

Indifference and Accountability

The United Nations and the Politics
of International Justice in East Timor

David Cohen



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Cover photographs, from left: flags of participating countries hang from the ceiling of the Serious Crimes Unit (SCU) canteen; the last day of the last trial held by the Special Panels for Serious Crimes; flags in the SCU canteen; the wall of the SCU canteen with handprints and messages left by participants in the Serious Crimes process as they departed from Dili.



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CHRONOLOGY

After 24 years of Indonesian rule following the precipitous departure of the Portuguese colonizers, in May 1999 the people of East Timor prepared to choose between maintaining a special autonomous status within the Indonesian Republic and becoming an independent nation. That month, the United Nations and the governments of Portugal and Indonesia had reached an agreement on a “popular consultation” on the issue. In June, the Security Council (Resolution 1246/1999) established UNAMET for the purpose of administering the vote, which was carried out on 30 August, with 98 percent of the registered voters participating. Of these, 78.5 percent voted against autonomy and in favor of independence. Although there had been very serious cases of atrocity in 1999 prior to the consultation, beginning on 1 September a deliberate and massive campaign of organized violence began in Dili and spread to the rest of the country. The violence, with few exceptions, was perpetrated by Timorese pro-autonomy militias. These militias had been organized, trained, financed, and equipped by the Indonesian armed forces (TNI). TNI troops participated in many of the major incidents of killings and in the massive destruction of buildings and dwellings across the country. There was also widespread rape, torture, looting, and approximately 1,400 cases of murder. On 15 September 1999, following an Indonesian request, the Security Council (Resolution 1264/1999) established a multinational force (INTERFET) to intervene and restore order. This was followed on 25 October by the creation of the United Nations Transitional Administration in East Timor (UNTAET, under Security Council Resolution 1272/1999), which administered the country until independence on 20 May 2002. At that time, the name of the mission was changed to the United Nations Mission of Support in East Timor (UNMISSET). The UN mission in East Timor finally ended on 20 May 2005 with the creation of a greatly downsized United Nations Office in Timor-Leste (UNOTIL).

UNTAET was endowed with wide authority, including the power to legislate and establish a judicial system for the country in the wake of the dissolution of Indonesian institutions. UNTAET’s mandate provided for “overall responsibility for the administration of East Timor ... including the administration of justice.” It also provided for a judicial mechanism to provide accountability for the violence. In June 2000, UNTAET created the Special Panels for Serious Crimes (SPSC) within the Dili District Court and the Serious Crimes Unit (SCU) within the office of the Prosecutor General of East Timor.* The Special Panels were the chambers of the Serious Crimes process and consisted of three judges per panel, two international and one Timorese. This structure was authorized by Article 163 of the Constitution of East Timor as a temporary institutional arrangement: “The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.” The Serious Crimes Unit was staffed by international prosecutors under the Deputy Prosecutor General for Serious Crimes. A defense function was not created within the UN mission until September 2002, with the formation of the Defense Lawyers Unit (DLU). Appeals from the Serious Crimes trials were to be heard by the Court of Appeal, created by UNTAET as the highest court in the Timorese justice system, pending the future establishment of the Supreme Court foreseen by the Constitution. The Court of Appeal was also created as a mixed tribunal, composed of two international judges and one Timorese judge.

* UNTAET Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.

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SUMMARY

David Cohen is director of the Berkeley War Crimes Studies Center and Sidney and Margaret Ancker Distinguished Professor of the Humanities at the University of California, Berkeley. Since 2001 he has also been an adjunct fellow at the East-West Center, where he directs the Asian International Justice Initiative. He has been observing and reporting on trials related to East Timor since 2001.

The goals of this report are fourfold: (1) to provide an overall assessment of the “hybrid” UN-sponsored Serious Crimes process in East Timor; (2) to analyze the performance of the various structural components of that process; (3) to examine the legacy of the Serious Crimes enterprise; and (4) to discuss the lessons to be learned from the five-year experience of the United Nations in seeking justice for the people of East Timor.

The report’s conclusions are based upon a comprehensive and detailed analysis of a number of key areas and a full assessment of the jurisprudence of the trials. It draws heavily upon hundreds of hours of interviews with key participants in every aspect of the Serious Crimes process. It is substantially more critical of the trials and of the UN’s role in managing the process than, for example, the Report of the UN Commission of Experts (July 2005). It demonstrates that, on the whole, the process was so deeply flawed from the beginning that, despite the important and successful efforts of key individuals to make structural improvements, egregious problems remained until the very end. These problems are serious enough to at least call into question whether important aspects of the process as a whole met international standards. Further, an analysis of the impact of these problems upon trial and appellate proceedings and Judgments provides substantive grounds for questioning the basic fairness of a significant number of the Serious Crimes trials, the adequacy of the appeals process, and, hence, the legitimacy of some of the ensuing convictions.

One of the questions this report addresses is why this state of affairs was allowed to persist for so long. This is a question that must be answered if the “lessons learned” from East Timor are to be a guide for future tribunals and for the UN in its ongoing role of administering international judicial institutions. While the report reveals what a small group of judges, lawyers, and staff managed to accomplish despite unnecessary challenges and difficulties, it also points to the massive institutional failure of the United Nations, and of the government of East Timor, to create a judicial enterprise worthy of the values and standards that the United Nations represents.

The report consists of an introduction and five parts. Part One provides an overview of the Serious Crimes process and the institutions that constituted it. It describes some of the systemic problems that were built into the institutional structure from its inception as well as the negative consequences they produced. Part Two focuses on the concrete impact of resource and personnel problems on the institutional components of the process (prosecution, defense, and chambers) and upon the trials themselves. It reviews in considerable detail both the failed and successful (or partially successful) reform efforts in regard to vital court functions such as translation and interpretation, transcription and court records, witness and victim protection and support, outreach, infrastructure and resources, court administration and case and trial management, and equality of arms. While most of these areas have been discussed in other reports, they are treated here in greater depth and with fuller documentation than elsewhere. In all of these areas the report documents significant failures that had a direct impact upon the capacity to meet international standards. In regard to the particularly vital issue of equality of arms, it shows how, despite significant improvements in the defense function, serious concerns persisted about adequate representation for the accused and the fairness of the convictions produced in many of the trials and appeals. These concerns were expressed not only by defense counsel, but also by prosecutors and judges.

Part Three provides an assessment of the jurisprudence, standards, and judicial practices of the trial chambers (Special Panels) and the Court of Appeal. This assessment is based upon an examination of all of the Judgments, Indictments, and Court of Appeal decisions from the beginning of the trials in 2000 to their premature end in May 2005. Twenty-six of the 55 Serious Crimes cases are analyzed, revealing a very wide range in the quality of the proceedings and Judgments of the Special Panels from beginning to end. The analysis demonstrates that a significant number of cases failed to meet the requirements of UNTAET Statutes and international norms and standards binding upon the tribunal. The analysis of the Judgments of the Special Panels identifies:

- Many Judgments that do not follow the statutory standards for Final Written Decisions and that do not provide a reasoned justification for their findings and conclusions.
- Widespread failure to adequately enumerate, define, interpret, and apply the elements of all of the offenses, or to state clearly the theory of liability and the requirements necessary to prove it.
- Lack of due consideration on the part of the judges in some cases for the interests of the accused, especially in cases where the defense was manifestly unprepared to represent those interests. This is particularly true in regard to advice pertaining to the right to remain silent and the consequences of admissions or partial admissions of guilt as well as to the production of potentially exculpatory witnesses or evidence.
- A significant number of cases where the rights of the accused appear to have been compromised. This is especially glaring in cases where individuals were convicted of crimes not charged in the Indictment and against which they had no opportunity to defend themselves, a violation of UNTAET Regulations and applicable international norms. This is also true in cases where the Court misunderstood or misapplied the basic legal doctrines on which the conviction was based.

An examination of the jurisprudence and practices of the Court of Appeal demonstrate it:

- Ignored the statutory grounds of review provided by UNTAET Regulations and failed to define or apply a standard of review.
- Failed to exercise an appropriate appellate function as defined by the Court's Statute, and, instead, functioned as a second court of first instance and simply overruled decisions of the Special Panels solely on the basis that the Court had reached a different conclusion.
- Seemed to lack awareness of the concepts of burden of proof and the presumption of innocence, and how they function in regard to the weighing of evidence.
- Made Judgments that display an apparent lack of basic knowledge of fundamental doctrines of international criminal law which the Court of Appeal was applying and reviewing. As a result, many of these doctrines were incorrectly applied, often to the detriment of the accused.
- Convicted defendants of crimes that had not been charged in the Indictment nor considered at trial and did so without notice or opportunity to defend.

- Made, in some cases, legally incoherent decisions as well as other Judgments that call into question the basic competence of some of the international judges of the Court of Appeal.

Part Four of the report examines the legacy of the Serious Crimes trials. It focuses upon the outcome of UN efforts at capacity building as well as the likely future of Serious Crimes prosecutions and of the Timorese judicial system of which they are now a part and on which their future depends. It examines the deeply flawed process by which all of the Timorese judges who served in the Special Panels and Court of Appeal, as well as every other Timorese judge in the country, failed what was called a “minimum competency” examination. It considers evidence that indicates basic incompetence in the preparation of the examination and that also suggests that the results may have been unfairly predetermined. Finally, it points up fundamental failings in the capacity-building efforts of the Judicial Training Center and in the United Nations Development Programme (UNDP) policies related to its staffing and programs. The Conclusion, Part Five, draws together the overarching themes of the report and presents recommendations based upon the “lessons” that may be learned from the complex and difficult history of the attempt to provide accountability for the 1999 violence in East Timor.

The general conclusions of the report may be summarized as follows:

- At the root of all the problems of the Serious Crimes process was the failure by the UN to ensure proper leadership, a clear mandate, political will, and clear “ownership” of the process from the very beginning. This included failing from the outset to appoint to key positions of responsibility individuals who understood the needs of a court and had the experience to build one from the ground up in a post-conflict environment. This included failure to appoint a Registrar with appropriate authority and experience to manage infrastructure, resources, personnel, and budget. In regard to the Special Panels, it involved failing to create a position of President (or the like), empowered to speak on their behalf, with sufficient stature and experience (as eventually happened in 2004) to know what the Court required and how to fight effectively to get it. Four years was too long to wait for this to happen.
- Underlying this first problem are the serious flaws in the UN recruitment process. If the UN is to be in the tribunal business it should develop a mechanism that ensures vigorous recruitment of the best persons available and a selection process advised or staffed by internationals of sufficient experience as judges and prosecutors to know how to select such individuals.
- The UN should have in place a standard process for creating tribunals and ensuring they have the resources they need to function properly and to meet the judicial standards that the United Nations aims to promulgate. There is no excuse for a UN court not to have, at the very least: competent translators and an appropriate translation system; accurate and professional transcription facilities; competent defense counsel to represent the accused; basic tools for legal research for all three branches; competent and experienced judges; legal officers and clerical staff to enable those judges to do their job; a functioning witness protection program that ensures that the interests of witnesses and victims are given their due; adequate and functioning case management, evidence management,

and file management systems with personnel trained to run them; and adequate security for the court. All of these were lacking for at least a substantial part of the time in East Timor. The lack of accountability for the failure to provide these is itself a systemic failing of the UN system.

- The lack of equality of arms for, at the very least, the first two and a half years of the Serious Crimes trials points to the lack of attention given to establishing a viable defense function. Failure to meet acceptable international standards in providing an adequate defense undermines the legitimacy of many of the trials and calls into question the convictions handed down in such cases.
- UNTAET and UNMISSET failed to make provision for adequate and effective training for court actors.
- Capacity building in the Serious Crimes process was an almost complete failure, from the collapse of the use of Timorese public defenders in 2002 to the debacle of the failure of all the judges in their competency examination in 2005. In regard to the latter, effective training should have been in place from the very beginning and should have been integrated into the judges' workload so as to enable them to do both.
- The UN failed to ensure the recruitment of experienced and professional qualified trainers and teachers for the capacity-building programs of the Judicial Training Center financed by the UNDP. If the UN is going to hire and pay trainers, they should not allow incompetence, language policies, or cronyism to dictate hiring, as was done in East Timor.

To be even more abbreviated, one might summarize the four core problem areas as: *lack of commitment, resources, management, and accountability.*

INTRODUCTION: AIMS AND PERSPECTIVES

The goals of this report are fourfold: (1) to provide an overall assessment of the “hybrid” UN-sponsored Serious Crimes process in East Timor; (2) to analyze the performance of the various structural components of that process; (3) to examine the legacy of the Serious Crimes enterprise; and (4) to discuss the lessons to be learned from the five-year experience of the United Nations in seeking justice for the people of East Timor.¹

Numerous reports have described the trials before the Special Panel for Serious Crimes (SPSC).² While they have made valuable contributions to our understanding of the justice process in East Timor, this report focuses on certain aspects of the trials that have sometimes been neglected and provides a more comprehensive and detailed analysis of a number of key areas. It will also offer the first full assessment of the jurisprudence of the trials. It presents a substantially more critical assessment of the trials and of the UN’s role in managing the process than, for example, the Report of the UN Commission of Experts (July 2005),³ which confined most of its criticisms to the trials that were held in Indonesia, and limited itself to an extremely careful, understated, and abbreviated critique of the Serious Crimes process. If we take international justice seriously we must be prepared to apply the same criteria whether dealing with Indonesian national trials or with those conducted by the UN in East Timor. In fact, there are serious grounds for questioning the basic fairness of a significant number of the Serious Crimes trials, the adequacy of the appeals process, and, hence, the legitimacy of some of the ensuing convictions.

All interviews were conducted by the author, and, unless otherwise noted, were conducted in Dili.

¹ “Hybrid” refers to the mixed composition of tribunals that are composed of both international judges appointed by the UN or other international agency organizing the process and judges from the local jurisdiction where the crimes have taken place (or at least appointed by that local government). Such tribunals now exist in Sierra Leone, Kosovo, Bosnia, and, in the advanced planning stages, Cambodia.

² Some of the more recent include the July 2005 *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999* (United Nations, 26 May 2005); Suzannah Linton, *Putting Things into Perspective: The Realities of Accountability in Timor Leste, Indonesia and Cambodia*, Maryland Series in Contemporary Asian Studies, no. 3-2005 (Baltimore: University of Maryland School of Law); Caitlin Reiger, *Hybrid Tribunals Case Study: The Serious Crimes Process in East Timor* (New York: International Center for Transitional Justice, 2006); and several reports in 2005 by the Judicial System Monitoring Program (JSMP), including *The Paulino de Jesus Decisions* (April 2005), *Torture and Transitional Justice in Timor Leste* (April 2005), *Submission to the United Nations Commission of Experts* (6 April 2005), and *Overview of the Justice Sector March 2005* (March 2005). JSMP is a Timorese NGO that has been effectively monitoring and reporting on the trials on an ongoing basis almost since their inception. These and other JSMP reports that will often be cited below were all published in Dili and are also available at www.jsmp.minihub.org/ (accessed 22 April 2006). See also the earlier assessments in Suzannah Linton, “Cambodia, East Timor and Sierra Leone: Experiments in International Justice,” *Criminal Law Forum* (2001): 185–246; Suzannah Linton, “Prosecuting Atrocities at the District Court in Dili,” *Melbourne Journal of International Law* 2 (2001): 415–458; Amnesty International, *East Timor: Justice Past, Present, and Future* (2001); and Open Society Institute and Coalition for International Justice, *Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor* (November 2004).

³ United Nations, *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999* (26 May 2005). Submission of report, including the summary of the report (annex I) and the full report in English (annex II), is dated 15 July 2005 (UN Doc. S/2005/458). This report will be referred to as the UN *Commission of Experts Report* in subsequent citations and page numbers refer to the original printed version of the report.

Why did the UN fail in East Timor to meet standards established by other UN tribunals?

Further, it is reasonable to hold trials conducted by the UN to even higher standards than those conducted by a national jurisdiction like Indonesia, which in general has a notoriously weak judicial system. In regard to the East Timor trials, on the whole, the process was so deeply flawed from the beginning that despite the important and successful efforts of key individuals to make structural improvements, egregious problems remained until the very end. These problems were serious enough at least to call into question whether the process as a whole met international standards, and it is clear that in some cases it did not.

It is not disputed that the Serious Crimes process from the very outset faced enormous obstacles and challenges. As one of the key participants, who did more than any other individual to reform the Special Panels for Serious Crimes, summarized the experience in a public UN International Symposium held in Dili to commemorate the end of the East Timor mission, “As the DLU [Defense Lawyers Unit] has become more robust, one can finally say that international standards of due process are being met. The Serious Crimes Process has now reached a point where it can do its job in a proper manner.”⁴

The implication is clear that only in April 2005, when the trial process was about to be closed down by the UN, had it reached a point where it could meet appropriate standards. Applied to the larger institutional context of the trials even this assessment is optimistic, because to the very end central components of the process, like the Court of Appeal, remained unreformed. One of the questions this report will address is why this state of affairs was allowed to persist for so long. This is a question that must be answered if the “lessons learned” from East Timor are to be a guide for future tribunals and for the UN in its ongoing role of administering international judicial institutions.

Observers have noted the way in which in the face of enormous challenges, such as lack of resources, the Serious Crimes process was able to accomplish as much as it did. While these challenges were very real, the more important question is why the task was made so unnecessarily difficult in the first place. Those dedicated individuals who worked hard to improve the process deserve enormous respect. The real issue, however, is why the United Nations failed so utterly to provide the resources (human, technical, and financial), cooperation, oversight, and political backing necessary to meet the standards that have been set by other UN tribunals in Arusha, The Hague, and Freetown.⁵ If it had done so, heroic efforts would not have been required to make the process work at all. We must distinguish on the one hand between what a small group of judges, lawyers, and staff managed to accomplish despite these hurdles and, on the other hand, the massive institutional failure of the United Nations and of the government of East Timor to create a judicial enterprise worthy of the values and standards that the United Nations represents. We must also ask why the key countries that supported this enterprise financially, and who were well aware of many, if not all, of the problems, did not do more to insist that they be corrected.

⁴ Speech of Judge Phillip Rapoza, 28 April 2005.

⁵ I am referring, of course, to the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone.

The previous paragraphs have made some sweeping claims, and it will be the task of the rest of this report to support them with evidence and objective analysis. It is important, however, to make this critical perspective clear from the beginning. These paragraphs have foreshadowed some of the key themes of the report already, but for the sake of clarity they are enumerated here:

- Lack of political will on the part of the UN to give the Serious Crimes institutions the resources and support necessary to make the process work effectively and to carry its work through to the end.
- Failure to establish clear “ownership” of the process between the UN and East Timor.
- Failure of key components of the process, and of individual trials, to meet appropriate, and sometimes even the most basic, international standards. This includes the retention of key court personnel, including international judges, even after serious issues of competence had been raised.
- Failure of the UN to provide effective oversight, management, and accountability.
- Failure to sufficiently address the needs of victims, witnesses, and communities through effective victim/witness-protection and community-outreach programs.
- Failure of the international community and the Timorese government to insist upon the correction of these failings and to stop the early closure of the Special Panels.
- Failure to develop a coherent completion strategy for the Serious Crimes Unit (SCU) at an early date so as to anticipate the myriad problems that premature closure of the Unit would bring.
- Failure of the Timorese government, the United Nations, and the international community to support the attempt to end the impunity of high-level perpetrators located in Indonesia.
- Failure to provide a clear mandate for the Serious Crimes Unit at the very beginning of its operations and to define and allocate its structure and resources, and that of the Special Panels, commensurately with this mandate.
- Failure to provide training in international humanitarian law for the judges of the Special Panels and the Court of Appeal or to provide legal officers with such expertise.
- Failure of capacity-building efforts to the degree that East Timor was left without a judiciary at the end of the UN mission.

After this Introduction the report will be presented in five parts. Part One will provide “An Overview” of the Serious Crimes process and the institutions that constituted it. Part Two, “Policies, Resources, Problems, and Responses,” will examine the challenges that the

different component institutions faced and the ways in which they responded. It will deal with what happened in the courtroom of the Special Panels for Serious Crimes, but also with the many processes outside the courtroom that shaped the possibilities and limitations of the trial process. Part Three, “Judgments and Jurisprudence,” will provide a fairly comprehensive assessment of the jurisprudence, standards, and judicial practices of the trial chambers (Special Panels) and the Court of Appeal. Stepping back from the detailed analyses of Parts Two and Three, Part Four, “The Future of the Serious Crimes Process,” will discuss the legacy of the trials. This will necessarily involve considering the outcome of UN efforts at capacity building as well as the likely future of Serious Crimes prosecutions and of the Timorese judicial system of which they are now a part and on which their future depends. Part Five, “Conclusions and ‘Lessons Learned,’” will draw together the overarching themes of the report and present recommendations based upon the “lessons” that may be learned from the complex and difficult history of the attempt to provide accountability for the 1999 violence in East Timor.

PART ONE.

THE SERIOUS CRIMES TRIALS IN EAST TIMOR: AN OVERVIEW

The creation of a hybrid judicial mechanism in East Timor to prosecute serious crimes, including genocide, war crimes, crimes against humanity, murder, torture, and sexual crimes, represented a response by the international community to the violence and massive human rights violations perpetrated by Indonesian military and security forces, and by the Timorese militias under their direction, in 1999. The history of this violence associated with the preparations for, and aftermath of, the vote for independence by 78 percent of the population of this former Portuguese colony has been well-documented and need not be rehearsed here.⁶ Massive and widespread destruction of property and forced deportations, as well as large numbers of cases of sexual crimes, torture, and murder, formed the basis of the demand for accountability in the form of criminal prosecutions rather than some other transitional justice mechanism. These demands, however, focused far less on the pre-1999 violence associated with the 25 years of Indonesian occupation. In response to international pressure, and in order to avoid the creation of an international tribunal on the model of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively), the government of Indonesia created a new court, the Ad Hoc Human Rights Court, of the Central Judicial District in Jakarta, to try Indonesian perpetrators who had played a leading role in the violence. The well-known failure of these courts to provide the desired accountability has been the subject of intense scrutiny and commentary and need not detain us further.⁷

⁶ See Chronology.

⁷ See, for example, David Cohen, *Intended to Fail: Trials before the Ad Hoc Human Rights Court in Jakarta* (New York: International Center for Transitional Justice, 2003); Suzannah Linton, “Unravelling the First Three Trials at the Ad Hoc Court for Human Rights Violations in East Timor,” *Leiden Journal of International Law* (2004): 303–361; and the UN *Commission of Experts Report*.

JUDGES: THE SPECIAL PANELS FOR SERIOUS CRIMES

In East Timor itself, the United Nations Transitional Administration in East Timor (UNTAET) was created by Security Council Resolution 1272 (1999) to govern the country until independence. The mandate of UNTAET was extended to 20 May 2002, when East Timor became formally independent (at which time UNTAET was replaced by the United Nations Mission of Support in East Timor, or UNMISET).⁸ A decisive, and innovative, feature of the justice mechanism established by UNTAET under Security Council mandate was that it was located within the incipient justice system of East Timor. Thus, when UNTAET created four District Courts and a Court of Appeal for East Timor, it assigned to the Dili District Court alone exclusive jurisdiction over the “serious crimes” enumerated above. Within that structure it then established, in June 2000, a court which would exclusively deal with such cases: the Special Panels for Serious Crimes (SPSC). These panels were to be composed of one Timorese and two international judges.⁹ No president was ever appointed for the SPSC. This, unfortunately, had as a consequence that no one ever had the official task of representing the interests of the tribunal and commensurate management authority. Moreover, the position of “Judge Coordinator” was created only in October 2003, apparently with a deliberate choice of title that left unclear the scope of its holder’s power to administer the Court and to represent its interests.¹⁰ The choice for that first Coordinating Judge did little to utilize the potential of this position. The second Coordinating Judge, however, Judge Phillip Rapoza, used it after his appointment in 2004 to implement a program of reform which succeeded in greatly improving the management, efficiency, and effectiveness of the SPSC.¹¹ His success in this reorganization, like that of Deputy Prosecutor General for Serious Crimes (DPGSC) Siri Frigaard earlier in the SCU, points up the very significant difference that good appointments in key positions can make, as well as the damage that can be done by a weak appointments process. The failure to provide strong leadership and management at the very beginning plagued the process to the very end. These problems in chambers and with the prosecution were exacerbated by the failure to create a position of Registrar with overall administrative and management authority and responsibility, as is the practice at other international tribunals.

The failure to provide strong leadership at the beginning plagued the process to the very end

Initially, serious crimes cases were heard by one, and later two, of these mixed panels of Timorese and international judges. In the second half of 2004, however, a third panel was added and trials were conducted simultaneously in a second courtroom. This measure was part of the effort to speed up the process in order to comply with the completion date of 20 May 2005 that the Security Council had mandated in Resolution 1543 (2004). More will be said later about the consequences of this deadline and the nature of the completion strategy which it provoked. It is ironic, however, that resources like a third panel of judges and a second courtroom only became available at the time when the premature closure of the Court was being implemented.

⁸ United Nations Mission of Support in East Timor (UNMISET), under Security Council Resolution 1410 (2002).

⁹ See UNTAET Regulations 2000/15 and 2000/11 as amended by 2001/25. All further citations will be to the amended version of the Regulations.

¹⁰ Interview with Judge Rapoza, 1 September 2004.

¹¹ Judge Rapoza thus held dual positions in the Special Panels for Serious Crimes (SPSC) after his appointment as Judge Coordinator in March 2004. When referring to his statements or actions in this administrative capacity, this title will be used.

A similarly constituted panel of two international and one Timorese judge (Judge Jacinta Correia da Costa) was established in the Court of Appeal to hear appeals from the Special Panels for Serious Crimes.¹² The Court of Appeal operates in Portuguese, though for a considerable period of time there were difficulties of communication in this language for the non-Portuguese speaking judges on the Court.¹³ There was also a period of 19 months in 2002–2003 when the Court of Appeal did not function at all because of prolonged, unexplained, and unjustifiable difficulties in filling a vacant position.¹⁴

The decision to resort to the unique structure of a hybrid tribunal embedded in the District Court of Dili but staffed, financed, and administered by the UN had a number of consequences, many of which will occupy us later in this report. Three of them deserve mention here.

First, this structure served to diffuse responsibility for the Special Panels, *and* for the resources it would receive. To give a minor example of this, in sharp contrast to the Serious Crimes Unit and the UNTAET/UNMISSET headquarters in the Obrigado Barracks, both of which were located in heavily guarded walled compounds with guard booths and barriers manned 24 hours per day, there was virtually no security at the Special Panels. This lack of security extended to the courtrooms as well. When trials were in session one could enter at will and there were no guards, metal detectors, searches of briefcases, etc. The reason for this discrepancy, Judge Rapoza stated, was that the Timorese government did not want UN personnel guarding its buildings, but that they themselves failed to provide adequate security. As he explained, there was “one unarmed, untrained, and unequipped security guard during court hours. As a result, the courthouse was virtually an open building and it was not uncommon, for those who arrived early at work, to encounter people from off the streets sleeping on the floor of the court vestibule while others used the outdoor faucets to wash.” This guard also proved to be unreliable when needed.¹⁵ UNMISSET did nothing to remedy this situation, despite repeated requests by the Judge Coordinator to obtain security assistance.¹⁶ One could multiply such examples, and they extended even to disputes over who was responsible for providing fuel and repairs for the generator at the Special Panels, which for this reason did not have regular electricity until July 2004, four years into its

¹² Established by UNTAET 2000/11. The President, Judge Claudio de Jesus Ximenes, has dual Portuguese/Timorese citizenship and has sometimes sat as the national judge with two other Portuguese judges.

¹³ Until 2002 the Court of Appeal worked in English, Bahasa Indonesia, and Portuguese. At that time the judges had no effective common language and there was a lack of interpreters to aid them in communicating. When hearings before the Court of Appeal began to be held exclusively in Portuguese in 2003, Judge da Costa did not speak Portuguese well enough to communicate with her fellow judges or to read their written decisions. In 2003, Judge da Costa wrote her decisions in Indonesian, a language not understood by Judge Jose Maria Calvario Antunes and Judge Ximenes. Beginning in 2004 she wrote her decisions in Tetum (to establish the use of that language in the legal system), which was not understood by Judge Antunes and Judge Jose Luis da Goia. The Court of Appeal did not translate these decisions.

¹⁴ During this period one case was heard by a specially appointed interim panel. See also JSMP, *The Right to Appeal in East Timor* (October 2002).

¹⁵ Interview of 30 August 2004. The quotation is taken from “Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?” Speech delivered at American University School of Law, 30 September 2005, manuscript supplied by Judge Rapoza to the author, pp. 9–10. To appear in *American University International Law Review* 21 (forthcoming).

¹⁶ In the speech referenced in the note above, Judge Rapoza comments, “... no security assistance was ever supplied by the UN mission for the premises. This was the case even when the court was besieged by a large group of protesters and the court gates had to be closed to prevent an incident” (p. 10).

operation and 10 months before it was closed down.¹⁷ That this dual nature had other, even more serious, consequences became apparent at the time of the controversy over the SCU indictment of Indonesian General Wiranto, when the UN (in New York and Dili) and the East Timorese Prosecutor General and his government found it both possible and convenient to disavow “ownership” of the process and, hence, responsibility for the indictment.¹⁸

The second consequence of the decision to create this hybrid structure involved the staffing of the Special Panels. Since there were no trained judges left in the country after the Indonesian departure, the statutory requirement of Timorese membership on the Special Panels had to be met somehow. Young Timorese lawyers, all of whom had received their legal education in Indonesia, were selected to be judges. Three of them served on the Special Panels and one on the Court of Appeal. They received no systematic training as judges, but the international judges were supposed to serve as mentors. In the initial phase of the trials this proved problematic because of the failure to provide interpreters, but eventually it did play a significant role. The decision to employ Timorese judges who had little previous legal experience led to disputes that are still ongoing over the capacity and qualifications of these judges (see Part Four).

The third result has to do with the fact that embedding the Special Panels in the Dili District Court enabled various Timorese state institutions to exert influence, in ways that were often detrimental, over appointments and other policies. This included requiring judges to come from a civil law jurisdiction.¹⁹ A decision was also made to have one Panel of the SPSC and the Court of Appeal function *only* in Portuguese, despite the directive which provided that the existing four working languages could be used for the duration of the Serious Crimes process. Because of the lack of Portuguese-speaking international prosecutors and defense counsel in the Defense Lawyers Unit, it lengthened the duration of proceedings and added considerable strain to an already deficient and overburdened interpretation, transcription, and translation process.

A relatively high conviction rate has proved common among international and hybrid criminal tribunals, and East Timor proves no exception. The Special Panels for Serious Crimes tried 87 defendants. According to UN statistics, of these, 83 were convicted at trial of crimes against humanity or other charges.²⁰ One of these acquittals was reversed by the Court of Appeal, and in the end only three defendants were thus acquitted of all charges.²¹

¹⁷ Interview with Judge Rapoza, 30 August 2004.

¹⁸ The UN *Commission of Experts Report* treats this issue in some detail on pp. 17–21.

¹⁹ An American judge, Justice Phillip Rapoza of the Massachusetts Appeals Court, could be appointed because of his Portuguese ancestry, his ability to speak Portuguese, and his connections with the Portuguese judiciary. These factors served as a cosmetic excuse to violate the policy of appointing judges only from civil law countries. Judge Samith de Silva of Sri Lanka could also be appointed because the Sri Lankan legal tradition has a small civil law component.

²⁰ The ICTY has convicted 42 accused and 8 have been acquitted (in regard to 3 of whom, appeals are currently pending).

²¹ United Nations, *End of Mandate Report of the Secretary-General on the United Nations Mission of Support in East Timor S/2005/310* (12 May 2005), p. 6. In a number of cases, however, the defendants were convicted on some charges but acquitted on others. Further, some of the defendants were acquitted on the offense charged but convicted on a lesser included offense. In many cases the accused made some kind of partial admission of guilt, which, though often not accepted by the Court, made the outcome of the trial predictable. Under UNTAET 2000/30, Section 29A, if the plea is accepted by the Court, there is nonetheless a presentation of evidence by the prosecution in support of its case. The Court considers the evidence and plea, and, if it is satisfied that the plea is adequately supported, it enters a conviction.

This represents a 97.7 percent conviction rate, a matter for some concern, as will be discussed in a later section.²² In 13 other cases the Indictments were either withdrawn by the prosecution (SCU) or dismissed by the Special Panels. The reasons for some of these dispositions are interesting for an evaluation of the work of the Serious Crimes Unit, and will be discussed below. In one case the defendant was declared unfit to stand trial.²³

PROSECUTION FUNCTION: THE SERIOUS CRIMES UNIT

The Serious Crimes Unit (SCU) was established in June 2000 as an international unit within the Public Prosecution Service of East Timor, under which there was to be a Deputy Prosecutor General for Serious Crimes (DPGSC) and another for Ordinary Crimes. The head of the Public Prosecution Service is the Prosecutor General of East Timor, who, since October 2001, has been Longuinhos Monteiro. Because of the dual responsibility for the Serious Crimes process, the question of to what extent the Deputy Prosecutor General for Serious Crimes is functionally independent of the Prosecutor General has often been a troubled one. At times, the working relationship between Monteiro and the DPGSC has been extremely strained, though with noted improvement at the end, in 2005, under DPGSC Carl DeFaria.

The Serious Crimes Unit was charged with the investigation and prosecution of crimes falling within the jurisdiction of the Special Panels. Like the Special Panels it existed for five years and underwent a number of changes. The history of the Special Panels and the Serious Crimes Unit is thus a complex one and cannot be treated in detail here. Under the Deputy Prosecutor General for Serious Crimes were teams of international prosecutors, Timorese trainee prosecutors, case managers and legal officers, UN police, international investigators, and technical staff in the areas of forensics, logistics, public affairs, translation and interpretation, information technology, and evidence. In 2002 the Serious Crimes Unit had a staff of 106.²⁴ Downsizing began in mid-2003, undoubtedly compromising the ability of the SCU to complete its mission. By November 2004 all but one international investigator (David Savage) was gone, pursuant to the UN mandate to close all investigations and to cease filing new Indictments by the end of that month. By early 2005, the Serious Crimes staff numbered 74, about half of whom were national staff. This was down from a high of 124 in April 2003.²⁵ Key SCU prosecution staff, including the head of the unit, Nicholas Koumjian (DPGSC) and a number of senior prosecutors, were leaving UNMISSET all through mid-2004 and the first half of 2005 as a result of the announcement of the closure of the unit in May 2005. There was no plan or effort by the UNMISSET administration to

²² Further, in the Aparicio Guterres Case (No. 18a/2003, discussed in Part Three: Section 4) the prosecution attempted to withdraw the Indictment at the beginning of the trial because of the weakness of its case. Prevented from doing so, it basically did not attempt to make a case, which led to an immediate acquittal. In terms of the Special Panels, not taking into account appeals, the conviction rate was 95.4 percent.

²³ Josep Nahak Case, No. 1a/2004, "Findings and Order on Defendant Nahak's Competence to Stand Trial," 1 March 2005, discussed in Part Three, Section 5. All of the Indictments and Judgments of the Special Panels are available online at warcrimescenter.berkeley.edu.

²⁴ Carl DeFaria, Deputy Prosecutor General for Serious Crimes, "ET's Quest for Justice: The Serious Crimes Files," text circulated at the International Symposium on UN Peacekeeping Operations In Post-Conflict Timor-Leste: Accomplishments and Lessons Learned, Dili, 28 April 2005, p. 1. Symposium is referred to in subsequent citations as the UN Symposium.

²⁵ Serious Crimes Unit (SCU), *Serious Crimes Unit Update*, 21 April 2003.

Rapid turnover in staff and ensuing lack of continuity and institutional memory were an ongoing problem

try to ensure retention of key personnel or continuity in cases at a time when the unit was functioning under pressure to complete all pending trials and prepare for the handover.

Rapid turnover in staff and ensuing lack of continuity and institutional memory were an ongoing problem in the SCU (and in the SPSC and defense) from the outset. A major cause of this was the UN's practice of typically giving short-term contracts (two to six months, with uncertain prospects for renewal) and ongoing doubts about how long the SCU would remain in existence. This was an issue that persistently impeded its effective functioning.

The Serious Crimes Unit filed 95 Indictments against 391 persons.²⁶ Of these, 309 were presumed to be outside of the jurisdiction of East Timor as of the end of April 2005. As noted above, pursuant to Security Council Resolution 1543, no new Indictments were issued after November 2005. The Special Panels received 290 requests for arrest warrants to be issued. Two hundred and eighty-five warrants were issued and five denied.²⁷ The reason for the discrepancy between the large number of indictees and the modest number of accused is the fact that the vast majority of those indicted are residing in Indonesia. These include Indonesians who are members of the Indonesian armed forces (TNI) or other governmental agencies, as well as Timorese who were either TNI members or leaders or members of militia groups opposed to independence. The refusal of the government of Indonesia, and particularly the Office of the Attorney General, to cooperate has meant that the SCU was able neither to interview TNI or militia witnesses or indictees located in Indonesia, nor to obtain custody of the accused. While international arrest warrants have been issued against a number of accused, after the warrant issued against TNI Colonel Yayat Sudrajat in 2003, no arrest warrants were forwarded to INTERPOL by the Prosecutor General of East Timor. The almost complete breakdown of cooperation between the SCU and the Prosecutor General over the issuance of the arrest warrant against Indonesian TNI General Wiranto sealed the fate of the attempt to exert international pressure against indictees through this mechanism.

The issuance of Indictments against so many persons known to be residing outside of the jurisdiction of East Timor was the result of a choice, a deliberate prosecutorial strategy first developed in 2002. Lacking a clear mandate from the Security Council or UNTAET, as well as effective leadership in its first year of existence, over time the Serious Crimes Unit developed a two-pronged strategy. At an early stage, apparently following the model of the investigation conducted by Indonesian National Human Rights Commission Committee of Inquiry (KPP HAM), it decided to pursue 10 "priority cases" which involved crimes against humanity and massacres or the murder of multiple victims. It brought two of these cases to trial fairly early on (Los Palos Case and Lolotoe Case), but a number of the others, particularly because of limited resources and lack of organization and focus, languished in the pipeline. As of December 2002, no Indictments had yet been filed in 4 of the 10 cases.²⁸

²⁶ DeFaria, "ET's Quest for Justice," p. 6. DeFaria notes that the figure given by the Special Panels for the number of persons indicted is 443. The discrepancy is due to the fact that "some accused appear in multiple Indictments."

²⁷ UN *Commission of Experts Report*, p. 27.

²⁸ Those cases were Kailako, Maliana, Suai Church, and "Attack on Bishop Belo's Compound and the Dili Diocese." SCU, *Serious Crimes Unit Update*, December 2002. By late May 2003, Indictments had been filed in 9 of the 10 cases. SCU, *Serious Crimes Unit Update*, 28 May 2003. The final Indictment, Maliana, was filed on 10 July 2003.

It was also not clear on what basis these cases deserved to be identified as having priority over all others. As Julia Alinho, the head of Public Affairs for the SCU put it, the creation of the label of 10 “priority cases” had as much to do with politics and public relations as it did with the substance of the cases. This included the labeling of certain events as “massacres” (where that term did not necessarily fit). More importantly, this gave an SCU lacking real focus or leadership a “seeming coherence in its prosecution policy,” but it also had high costs. Among these were that investigations and facts “were made to fit the pattern” indicated by the policy, and that other kinds of cases were neglected.²⁹

In early 2002 under the leadership of newly appointed DPGSC Siri Frigaard, the Serious Crimes Unit attempted to refocus its strategy and use a great deal of its limited resources to investigate high-level Indonesian suspects who had played a leadership role in organizing or perpetrating the widespread and systematic crimes against humanity that occurred in 1999. The SCU was, of course, well aware that it was unlikely that they would ever appear before the Special Panels. They also continued to indict and prosecute low-ranking Timorese, many, but by no means all of whom, were connected to the 10 priority cases. This multipronged strategy inevitably meant that already limited resources (especially with downsizing having been ordered by the UN in 2003) were stretched even thinner. After all, at the peak of its staffing, the SCU only had 12 international investigators to cover the 13 districts of East Timor and investigate some 1,400 murders, not to mention other crimes.

An additional factor played an important role in 2004 in concentrating on defendants located outside of the country. Once the completion date of 20 May 2005 was announced and the responsible units were mandated to complete all pending trials by this date, it was inevitable that more new cases could not be fed into the pipeline. As a result, a policy decision was made in the SCU in mid-2004 not to indict any more accused who *could* be brought to trial. To do so would make it impossible to achieve the UN’s bureaucratically defined goal of completing the pending cases. DPGSC Nicholas Koumjian stated in September 2004 that it would require all existing resources just to complete the 11 cases then pending.³⁰ No more could be added. That this was the result of a deliberate decision not to indict more individuals who *were* in the country and could be brought to trial was confirmed for me in interviews with prosecutors in the SCU and judges in the SPSC.³¹ As one prosecutor put it, “We had to think about not indicting people because of the time constraints. We had no choice.” He explained that the SCU was aware that there were serious crimes suspects in the jurisdiction, but “when time was really missing we selected cases we thought could be finished by 20 May.” Since in order to achieve the goal of the completion strategy they depended upon the ability of the Special Panels to complete pending cases, they made a decision not to indict so as not to create more work for the Court and slow up the completion process. He concluded, “We could have indicted so many more.”³²

These kinds of decisions have faced every war crimes tribunal from Nuremberg to Sierra Leone. Prosecutors operate with limited resources and must establish priorities. A wide range of factors, inevitably including political ones, go into shaping that choice. In the case

²⁹ Interview with Julia Alinho, 28 March 2005.

³⁰ Interview with DPGSC Nicholas Koumjian, 4 September 2004, Dubrovnik, Croatia.

³¹ Interview with Judge Rapoza, 19 February 2005.

³² Interview with Charles Nsabimana, 18 February 2005.

of the Serious Crimes Unit those choices were particularly difficult. This had to do with the fact that on the one hand its resources were extremely limited. On the other hand, literally all of the mid-level and high-ranking suspects were in Indonesia, outside of the jurisdiction of the Special Panels. The most obvious strategy option, to concentrate resources on those who, to use two current formulas, “bear the greatest responsibility” or were “most responsible” for the violence, was scarcely viable, for it might have meant having no trials at all. In the case of the Serious Crimes Unit, it was a serious failing of UNTAET not to have clearly defined their mandate, as was done for most of the other “hybrid” tribunals. Under Security Council Resolutions 1543 and 1573 (2004) the SCU and SPSC were mandated to complete their 10 “priority cases,” but this was very late in the day for the Security Council to concern itself with the SCU’s mandate and strategy.

The SCU could, of course, have concentrated its resources on investigating and prosecuting cases where the defendants were likely to be obtainable. Moreover, the 95 Indictments represent only 572 of the at least 1,400 murders thought to have been committed in East Timor as part of the 1999 violence. Many other cases of serious crimes, and, in particular, crimes against humanity such as rape, torture, forced deportation, and destruction of property were not investigated at all, because of the prioritizing of murder cases in general and of indicting high-ranking Indonesian alleged perpetrators. Further, at the closure of the SCU, 514 investigative files remained open and had not been brought to indictment, and another 50 cases that had been brought to the SCU had not yet been investigated.³³ None of the cases referred to the Serious Crimes Unit by the Commission for Reception, Truth, and Reconciliation (CAVR) were prosecuted and a number were in fact sent back because of lack of capacity.³⁴

The justification for the decision by DPGSC Siri Frigaard in 2002 to pursue indictments for a group of key high-ranking Indonesian officers is clear. To have done otherwise would have meant that those most responsible for the violence in East Timor in 1999 would have not only enjoyed total impunity but would not even have had a record of their crimes provided for the international community and the people of East Timor. If international arrest warrants could have been issued against all of them, the force of this accusation would have been amplified even if the results might have been the same. Responsibility for the failure to do so must be laid jointly at the doorstep of the UN and of the government of East Timor.

Further, not to indict those Indonesians and Timorese who played leadership roles in planning, organizing, orchestrating, or perpetrating the violence would have meant that only very low- or relatively low-level Timorese militia members were accused. As it is, one of the most frequent criticisms of the Serious Crimes process is that it only succeeded in convicting a relatively small number of low-level followers, nearly all illiterate farmers and fishermen caught up in the conflict at the local community level. The work of the Serious Crimes Unit, however incomplete, is widely praised for having helped to document a part of the historical record and provided the basis for future prosecutions against the high-ranking indictees before a future international or other tribunal. One need only imagine how marred the legacy of the Serious Crimes Unit would have been if these high-ranking suspects had remained unindicted.

³³ UN *Commission of Experts Report*, p. 16.

³⁴ Linton, *Putting Things into Perspective*. Linton aptly concludes that “... it was always predictable that none of the cases of Serious Crimes that were extracted from the CAVR process would be indicted, let alone tried. So, accountability for Serious Crimes has boiled down to a question of luck.”

*UNTAET
originally made
no provision for
defense*

DEFENSE FUNCTION: THE DEFENSE LAWYERS UNIT (DLU)

The third leg of the Serious Crimes process was the defense function. UNTAET originally made no provision for defense. When I interviewed UNTAET senior staff in early 2002 I was told that there was no UNTAET budget for the defense function. At the same time, Timorese public defenders and their international advisor stated that they had no funds for investigation, to bring witnesses to Dili, or for interpreters, office supplies, or virtually anything else. Indeed, at this time the lack of capacity in the defense component was one of the most serious and troubling shortcomings of the trials and made itself vividly felt in the courtroom to the obvious disadvantage and detriment of the accused.³⁵ This was exacerbated by the fact that the Timorese defense counsel lacked courtroom experience and had no training or experience in international criminal law. It was originally envisaged that the utilization of Timorese defense counsel with international mentors serving as defense lawyers would assist in capacity building. This effort failed because of lack of funding, resources, and commitment. In early 2002 there were no funds for interpreters, so that the international mentors and the Timorese lawyers could effectively communicate with one another. Library and research resources were also not made available for those young Timorese lawyers who were somehow supposed to prepare defenses in murder cases while “learning on the job.” It was only in mid-2002 that these problems began to be addressed, eventually by phasing out Timorese participation altogether.

The glaring deficits of the defense arrangement were well-known to all of the Serious Crimes Unit and UNTAET staff that I interviewed in 2002. Stuart Alford, a prosecutor in the SCU, recounted numerous times when he had coached defense counsel in the courtroom while the trial was underway out of his dismay for the consequences of their inexperience for their clients.³⁶ At this time the Serious Crimes Unit also began to fund the transportation costs for bringing defense witnesses to Dili out of the prosecution funds for its own witnesses. No witnesses had been called by the defense in the first 14 trials. Two of the international advisers to the Special Representative of the Secretary-General stated at this time that discussions were underway to deal with this issue because it was recognized that they now had “a Rolls Royce” of a prosecution unit and “an old heap” for the defense.³⁷ These “concerns” finally bore fruit in September 2002 with the creation of the Defense Lawyers Unit as a component of UNMISSET, where it was also housed. By April 2003 only international defense counsel in the DLU were representing defendants before the Special Panels. Why the development of a viable defense function took so long, however, has never been adequately explained.

The creation of the Defense Lawyers Unit was a welcome development, especially for the accused, but its effectiveness has also been questioned. There was certainly a wide range of qualifications, experience, and capabilities among DLU staff. As Judge Rapoza has noted, “Although the creation of the Defense Lawyers Unit was a significant step forward, the fact that it was staffed primarily by inexperienced trial lawyers was always a serious concern. It

³⁵ Interview with international defense counsel Sylvia de Bertadano, January 2002. See also David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?* AsiaPacific Issues, no. 61 (Honolulu: East-West Center, August 2002).

³⁶ Interviews, 14 and 16 January. Interview with Prosecutor Brenda Sue Thornton, 14 January 2002.

³⁷ Interviews, 16 and 18 January 2002.

was hard to accept that many of the defense lawyers who appeared before us were trying *their first case ever* in front of the Special Panels” (emphasis added).³⁸

The DLU was clearly not adequately resourced in terms of investigators, research tools, and staff. From September 2002 to closure in May 2005 it grew from three to seven defense lawyers. The inadequacy of defense representation before the creation of the Defense Lawyers Unit is beyond doubt. The “Equality of Arms” Section of Part Two will assess the critical question of to what extent this situation improved under the DLU. As DPGSC Siri Frigaard put it, “What I am afraid of is that afterwards, some years ahead, people will say that it’s not justice because they didn’t have a good enough defense or they didn’t have proper interpreters.”³⁹

It is understandable that the failure to provide accountability by trying high-ranking Indonesian indictees has occupied center stage in concerns about the East Timor trials. From an international justice and human rights perspective, however, the issue of whether or not accused were afforded fair trials that met the highest international standards and provided them with an adequate opportunity to defend themselves is at least an equally serious concern, especially when the trials are being conducted by the United Nations.

PART TWO. POLICIES, RESOURCES, PROBLEMS, AND RESPONSES

Part Two will deal with some of the challenges and problems that the different components of the Serious Crimes regime confronted. These include the issues of resources, translation and interpretation, transcription, case management, witness protection, community outreach, and equality of arms. There are other important issues that could have been included as well. Some of these, such as the failure to bring high-ranking Indonesian accused before the Special Panels, have been dealt with so extensively by others that I will concentrate on other issues that have not received as much detailed attention. Others will be dealt with in Part Three, on trials and jurisprudence.

Although some of the issues addressed here may appear mundane, adequate resources, case management, and technical support are essential for the proper operation of a tribunal, especially one dealing with as many complex cases as the Special Panels. Serious failings of capacity in any of these areas can operate to the severe detriment of the accused. In any modern judicial system these functions may be taken for granted. One would also assume that they would be provided for in a justice process created, financed, staffed, and administered by the United Nations. This was not the case in East Timor. Apart from a general unwillingness to invest adequate resources, one of the principal reasons for these shortcomings was the failure to appoint individuals with the authority, experience, and commitment necessary to build a court from the ground up in a post-conflict context. Some of the other issues more immediately involve the rights of the accused and are fundamental to our notions of due process and a fair trial. Many of these issues will appear again and again in the review of specific cases in Part Three.

³⁸ Written communication to the author, 5 December 2005.

³⁹ Quoted in Megan Hirst and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (New York: International Center for Transitional Justice, June 2005), p. 21, n. 142.

PRELIMINARY REMARKS ON INTERNATIONAL STANDARDS

The deficiencies that plagued the Special Panels were identified early on as subjects of concern by the Judicial System Monitoring Programme (JSMP), Amnesty International, and other organizations. One of the most troubling aspects of the Serious Crimes trials is how long it took UNTAET/UNMISSET to respond to these shortcomings even after they had been acknowledged. It is imperative to remember that what was at stake was not bureaucratic efficiency or some administrative ideal of a court system, but rather the lives and liberty of individuals. One of the international judges of the Special Panels regularly supplied me with statistics that favorably compared the SPSC's number of convictions per year and per dollar spent with those of the ICTR. He took this to indicate the effective and successful functioning of the tribunal, and there is no question that such quantifications were well viewed by the UN administrators. Large numbers of convictions in a short time span and on a very limited budget, do not, however, necessarily mean that a tribunal is performing successfully. It may indicate exactly the opposite. The objective of international justice is to provide accountability for very serious violations of international law, while at the same time meeting the highest international standards of fairness, due process, and respect for the rights of the accused. This is especially the case when the trials it conducts are supposed to be a model for the establishment of the rule of law in a post-conflict society. One of the Timorese judges on the Special Panels, Judge Maria Natércia Gusmao Pereira, expressed her deep concerns about this issue at a public forum. To ensure its legacy, she said, the Special Panels can rely neither on the "mass production of Judgments" to enhance the statistics of the Court, nor on the brilliance of a few exceptional opinions.⁴⁰

Large numbers of convictions in a short time on a limited budget do not necessarily mean that a tribunal is successful. It may mean the opposite.

The Report of the UN Commission of Experts concluded that in the Serious Crimes process the "investigations, indictments, prosecutions, defence, and judicial proceedings" were "generally satisfactory" and met "international standards." In reaching this assessment, the Commission of Experts stated that they gave "due consideration to the national legal infrastructure of ... Timor Leste ..."⁴¹ This position seems misguided. First of all, there was, quite literally, no "national legal infrastructure" in East Timor when the United Nations took over administration of the country through the establishment of UNTAET. The infrastructure for the Serious Crimes process was created by the United Nations. Whatever might be the achievements or deficiencies of the Serious Crimes process they are to be credited to UNTAET, UNMISSET, and the UN management of the process. To the extent that the East Timorese government made some problems even more difficult to resolve, this is also the result of the way in which the United Nations chose to structure the tribunal. It is also a reflection of its lack of political will to directly confront certain policies of the Timorese side that had a negative impact upon the effectiveness of the system, and, ultimately, upon the way in which individual accused were tried and convicted.

Secondly, one cannot allow the United Nations to pass off problems with the excuse that the Special Panels were, after all, part of the Dili District Court and the national legal system of East Timor. This is simply a strategy to shift responsibility from the body that created, funded, managed, and, ultimately, completely controlled the process. The SCU/SPSC regime was created by the UN and its existence ended, prematurely, when the Security Council

⁴⁰ Judge Maria Pereira in the "Future of Serious Crimes" panel at the UN Symposium in Dili, 28 April 2005.

⁴¹ UN *Commission of Experts Report*, pp. 8, 87.

decided to stop funding it. Accordingly, there is no plausible argument why its trials should not be expected to meet the same standards of fairness and justice as other UN international and hybrid international tribunals. If the UN is not able to meet such standards in a particular judicial process in which it is involved, then as an organization committed to the establishment of human rights norms and international law, it should refrain from proceeding until it can do so.

The very different attitude of some UNTAET administrators towards this issue is indicated in an interview on 14 January 2002 with Mohammed Othman, an international appointee who, as the first Prosecutor General of East Timor, played a leading role in shaping the early prosecutorial process. Asked if the Special Panels for Serious Crimes was an international tribunal and whether the prosecution and tribunal had to meet international standards, his answer was “no,” on both counts. He said that the Special Panels were merely part of the Dili District Court and that international standards would be “inappropriate” in East Timor. This was a strange reply in that UNTAET regulations then in force made international law binding for the Serious Crimes process.⁴²

When asked what standards were to be applied, Othman gestured with a sweep of his arm to the surroundings and said, “local standards.” When asked further what the local standards were, given that there was no functioning legal system in East Timor apart from what had been created by UNTAET, he changed the subject and did not answer. At the time of this interview, he was wearing a UN identification badge, sitting at a desk covered with letters and documents on UN letterhead, and doing his job in a building that flew the UN flag. Unfortunately, what many of my informants referred to as the “This is not the ICTY” attitude persisted among some UNTAET and UNMISSET staff. His answer also helps to explain why DPGSC Frigaard had to undertake a complete reorganization and revitalization of the SCU.⁴³

It also may underlie one of the most perplexing questions raised by the history of the Serious Crimes process, a question central to the concerns of this report: How was it that on the first day of the first hearing before the Special Panels, confronted with no accurate or competent system for translation, no system for recording or transcribing the proceedings, and with manifestly unprepared and inexperienced defense counsel (to name only the most basic shortcomings), the Presiding Judge, an international recruited and employed by the United Nations, could have allowed his court to proceed?

A justice operation conducted by the United Nations must be held to the same standards of fair trials as the other UN-sponsored tribunals, without reference to the “national legal infrastructure.” National infrastructure is no more relevant in East Timor than it is for the ICTR, which also operates in a developing country, or in the other “hybrid” tribunals in Sierra Leone, Bosnia, or Cambodia. In the case of Sierra Leone, the United Nations has demonstrated that for far less money than has been lavished upon the ICTY and the ICTR, it can create an efficient, competent, and modern court administration and trial process in one of the very poorest countries on earth, a country that had been totally shattered by a brutal 10-year civil war. Why did it not do the same in East Timor?

⁴² E.g., UNTAET 1999/1, Sections 2–3; 2000/11, Section 5; 2000/15, Section 3.1; and 2000/30, Section 3.

⁴³ The extent of the reorganization is noted in an SCU overview of DPGSC Frigaard’s term of office, though it diplomatically avoids mentioning why such a drastic restructuring was necessary: “During the first weeks of her tenure ... [she] oversaw the restructuring of the entire organization of the Serious Crimes Unit teams improving internal relations and increasing staff efficiency.” SCU, *Serious Crimes Unit Update*, 28 May 2003.

RESOURCES AND INFRASTRUCTURE

The serious lack of resources that confronted all components of the Serious Crimes process has been noted in a general way by numerous reports.⁴⁴ These shortcomings had a direct impact on the quality of the judicial process and the ability to meet international standards. While some resource issues may have more to do with convenience and efficiency, others are absolutely necessary for credible, fair, and legitimate trials.

As an anecdotal example, in its Media Briefing Note of 27 April 2004, “Bringing New Voice to East Timor’s Justice System,” UNMISSET proudly announced the introduction of a simultaneous translation system for the Court of Appeal. The way the system was described is telling: “The system enables courtroom parties—the judges, defense, and prosecution—to talk to each other *for the first time* in languages that all of the participants can understand” (emphasis added). The date of the Briefing Note indicates that the installation occurred four years after the creation of the Court of Appeal and only one year before the completion of the Serious Crimes trials. Lest there be any confusion about the literal import of the phrase “for the first time,” interviews with Court of Appeal judges included in the Briefing Note make clear that this was indeed the case. Judge Jose Maria Calvario Antunes is quoted as saying, “This is a very important step for us It permits all of the parties in the courtroom *to understand what’s occurring*” (emphasis added). The consequences of the parties not being able to “understand what’s occurring” in the courtroom were spelled out by the Timorese judge on the Court of Appeal: “The parties, defense, the accused, the prosecution, they all speak various languages, even the audience speaks a variety of languages *With no interpretation, there were often misunderstandings as to what had transpired*” (emphasis added).

The language problems of the Court of Appeal were well known within the UNTAET/UNMISSET community. They were caused by the fact that after 2003, two of the three judges operated in Portuguese, one in Tetum and Bahasa Indonesia (none fluently in English); the prosecution in English; the defense potentially in various languages including English, Bahasa Indonesia, and Tetum; and the accused in Tetum or other local languages, and possibly Bahasa Indonesia. English was not a shared working language of the judges, who were thus unable to understand each other *during proceedings* or to deliberate as a body about their decisions. Judge Jacinta Correia da Costa, for example, wrote some decisions in Tetum which could not be read by Judge Antunes, though he signed them. Likewise, the Portuguese decisions of Judge Antunes and Judge Claudio de Jesus Ximenes could not be read by Judge da Costa until, later in the process, she had learned Portuguese sufficiently well. More significantly, there was, as Judge da Costa and Judge Antunes indicated, an inability of the parties to understand what other parties were saying in the hearings.⁴⁵ The situation prior to 2003 was equally difficult because one of the judges spoke English, another only Portuguese and Tetum, and the third only Indonesian and Tetum, without adequate provision for translation of deliberations or written documents and decisions.

This would all make for a good comedy movie scenario, but in this case the consequences were all too real for the rights of those appealing convictions from lengthy prison terms, whose liberty and livelihood hung in the balance. When this “Tower of Babel” approach to courtroom proceedings is taken with the level of practice and jurisprudence of the Court of Appeal

⁴⁴ See footnote 2 on page 5.

⁴⁵ See JSMP, *The Impact of the Language Directive on the Courts of East Timor* (August 2004), pp. 8–11.

(as will be seen in Section Three), there is a very strong case to be made that the Court of Appeal component of the Serious Crimes process, in important respects, failed to meet basic international standards. This failure calls into question the legitimacy of many of the decisions confirming the convictions and prison sentences handed down by the Special Panels.

The tragedy of this story is that so little was required to ameliorate the problem. As the UNMISSET Briefing Note indicates, the cost of the new system was US\$80,000. The UNMISSET budget for 2003–2005 was US\$296,557,000. The SPSC and SCU budgets for the same period totaled US\$14,358,600.⁴⁶ Yet despite the tiny expenditure required, UNMISSET could never see its way to allocate a mere US\$80,000 to ensure that the Court of Appeal, in hearing Serious Crimes appeals, could function as a court should so that the parties could “understand what’s occurring.” The US\$80,000 for the translation system was supplied by the government of Denmark.⁴⁷

One might well ask both how it was possible that it would take four years to supply a multi-lingual court with the equipment it needed to function in a competent manner and how internationally appointed judges could not have demanded an immediate remedy to this problem.

The problems of translation resources for the Court of Appeal (to say nothing of other components), however, did not end here. Simultaneous translation systems required translators trained to use them. At the time the system was installed there were no translators trained in simultaneous translation. According to the UNMISSET Briefing Note the Court did have a “small staff” of translators for Portuguese, English, and Bahasa Indonesia. None of these, however, were professionally trained as translators. It did not, moreover, have translators for Tetum, the language of nearly all of the accused. The Briefing Note goes on to explain that in order to remedy this situation, the National University of Timor-Leste would, at the “end of June” 2004, begin “an eight-month pilot project ... training Timorese interpreters and translators.” Due to delays the project was not concluded until July 2005.⁴⁸ Why did UNTAET at the very outset make no provisions for professional training of Timorese interpreters and translators for a function that is absolutely vital for effective investigation, prosecution, defense, and adjudication, and where accuracy is of the utmost importance?

The Special Panels for Serious Crimes

When I first interviewed Judge Sylver Ntukamazina of Burundi in January 2002, I found him moving his office furniture from one floor of the building to another. He explained that the judges had been told to move, and that as they had no staff, they had to do the moving themselves. The judges shared cramped, small offices. They had no research tools in the form of basic books or a library and no legal advisors or research assistants—all of which are commonly supplied at the Special Court for Sierra Leone and the other UN tribunals. They had no professional court clerk, no judge’s clerks, no secretarial support, no file and calendar management system, and so on.

⁴⁶ UN *Commission of Experts Report*, p. 23.

⁴⁷ UNMISSET Briefing Note, 27 April 2004, p. 1.

⁴⁸ Despite the purport of the Briefing Note, according to UNMISSET Human Rights Officer Barbara Oliveira (email communication to the author, January 2006), this project was not aimed at solving the issues faced by the SPSC but designed to lay the foundation for the arrival of Portuguese-speaking judges and other court actors (who would take over the functions of Timorese who failed their examinations for permanent appointment).

For almost the first two years of trials, lacking staff and transcribers, the judges relied on their own notes as a trial record

Judge Maria Pereira emphasized the difficulties produced by the fact that for the first two years of trials, lacking staff and transcribers, the judges had to rely on their own notes as a trial record.⁴⁹ This meant that there was no accurate court record of proceedings.

It was well known that the resource situation at the Special Panels was catastrophic in the first two years or so. But what of the improvements made later? To what extent and for how long did resource issues continue to impinge on the ability of the SPSC to function properly?

Resource issues continued to affect the basic functioning of the Court until very late in the process. They were ameliorated after the appointment of Judge Rapoza as Judge Coordinator in March 2004 (he had arrived in Dili in December 2003). For example, it was only in July 2004 that Judge Rapoza succeeded in getting reliable electricity for the Special Panels when, thanks to the cooperation of Special Representative of the Secretary-General (SRSG) Sukehiro Hasegawa, the generator providing power for the SPSC was fixed.⁵⁰ This meant that because of the erratic electrical power service in Dili (even smaller hotels have their own generators), it was not until 10 months before the closing of the Special Panels that judges could be sure of being able to use their computers, fax machines, photocopiers, and so on, or work with lighting in their small dark offices.

As for research resources, there was some improvement because of the hiring of legal researchers. According to Judge Rapoza, when he arrived in December 2003, there were two legal researchers, shared by eight judges on an “availability basis.” He succeeded in increasing this to three legal researchers for nine judges during the last year of the trials.⁵¹ There was never a library of basic reference books in international criminal law and the practice of the international tribunals. Other problems were also never addressed. As had been done earlier for the Court of Appeal, a simultaneous translation system was finally provided for the Special Panels’ courtroom in late 2004. Because of mechanical problems and lack of trained staff, however, it proved impracticable to use.⁵² As Judge Rapoza summarized the situation, “The basic resources that the Special Panels should have had when they opened were not made available until the very end of the serious crimes process.”⁵³ It is significant that apart from the head of the Court Registry appointed by Judge Rapoza, no member of the Special Panels staff “had ever worked for a court before. Accordingly, it was necessary for me to instruct staff in matters that might otherwise be taken for granted, such as the need for confidentiality with respect to court records and communications.”⁵⁴

Judge Francesco Florit explained that “[i]f the UN had seen the process as important, these things would have been done from the beginning.” He pointed to the fact that there were no clerks, no real court interpreters or translators, no structure or court management until mid-2003. This, he concluded, “reflects the lack of importance that the UN attached to the process.”⁵⁵

⁴⁹ Interview, 28 March 2005. I also interviewed Judge Pereira on these issues in January 2002.

⁵⁰ For details, see Judge Rapoza, “Hybrid Criminal Tribunals,” pp. 8–9.

⁵¹ Interview with Judge Rapoza, 1 September 2004.

⁵² Interview with Judge Pereira, 28 March 2005; author’s observations of trials from January–May 2005; and written communication from Judge Rapoza to the author, 5 December 2005.

⁵³ Interview with Judge Rapoza, 29 March 2005.

⁵⁴ Written communication from Judge Rapoza to the author, 5 December 2005.

⁵⁵ Interview with Judge Francesco Florit, 28 March 2005.

Judge Antonio Helder Viana do Carmo provided a similar assessment and emphasized the serious consequences of this lack of resources, giving the example of interpreters. Because he cannot speak English, in 2001–2002 *he was not able to follow his trials properly* because of the lack of competent legal translators.⁵⁶ When one of the judges who signs the Judgments convicting defendants of serious crimes cannot understand the testimony or arguments on which the Court’s decision must be based, it calls into question the legitimacy of the proceedings.

The Serious Crimes Unit

Lack of resources affected the work of the Serious Crimes Unit, particularly in the initial phases of its work. This was particularly the case in regard to resources necessary to develop adequate investigative capacity, such as vehicles, competent interpreters, and numbers of investigative staff. As DPGSC Siri Frigaard explained at the UN Symposium in Dili, at the end of April 2005, the Serious Crimes process “got off on the wrong foot.” In January 2002, she had taken over a unit where the people wanted to do their job but did not have the resources to do so. She explained these difficulties in terms of a UN system where administrators who control budget “do not understand anything about a court process.” This was a theme that emerged frequently in my discussions with SCU, SPSC, and DLU senior staff. As SPSC Judge Francesco Florit put it, “This system was created without knowing what a court is and how it functions.”⁵⁷ DPGSC Carl DeFaria also pointed out that lack of adequate investigative resources at the beginning of the process had particularly serious consequences that may still be felt years afterwards when trials are underway.⁵⁸

DPGSC Frigaard provided many examples of such difficulties. When she arrived to take over the SCU in January 2002 the investigators had not been given vehicles. But, she added, trying to explain to the UN that investigators absolutely require vehicles for field investigations “was like trying to talk to a wall.” Eventually, after much struggle, she prevailed. Not all of her attempts to get basic resources succeeded. For example, despite all of her efforts she could not get UNTAET to provide cameras for investigators. She also had to go to the United States Agency for International Development (USAID) to get translators for her prosecutors. When DPGSC Frigaard began to reorganize the Serious Crimes Unit in January 2002 to improve its capacity and effectiveness, she expanded the scope of the prosecutorial strategy to encompass high-level Indonesian suspects. In March 2002, however, only three months after her appointment, she was told that the UN in New York had decided to begin downsizing.⁵⁹ Decisions about budget and resource allocation were thus made independently of the needs of mandated tasks of the Serious Crimes Unit.

None of this was helped, of course, by what a number of prosecutors referred to as the “complete lack of management” and direction in the SCU prior to 2002.⁶⁰ One of the lessons to be learned here is that the initial appointments made in a new tribunal largely determine the course that the tribunal will take. Once an institution gets “off on the wrong foot,” it

⁵⁶ Interview with Judge Antonio Helder, 28 March 2005.

⁵⁷ Interview with Judge Florit, 28 March 2005.

⁵⁸ Interviews with Carl DeFaria, 16 February and 28 April 2005.

⁵⁹ Speech by Siri Frigaard at the “Future of Serious Crimes” panel of the UN Symposium in Dili, 28 April 2005, and interview on 29 April 2005.

⁶⁰ Interview with Prosecutor Wambui Ngunya, 31 March 2005.

may take years to make up for it and establish the standards and practices which should have been put in place at the very beginning. In the case of the Serious Crimes Unit it took three years; in the case of the Special Panels, which suffered from no, or very weak, leadership until March 2004, more than four years. This is not to fault the individuals involved here. The blame is rather to be laid squarely on the doorstep of the UN for its notoriously weak recruitment and appointment practices and, even more so, for UNTAET's failure to provide effective management structures and meaningful oversight and performance evaluations.

The lack of resources in the SCU extended beyond investigation and prosecution to the technical support services necessary to ensure effective functioning of the unit. Two examples of these service functions within the SCU will illustrate the problem.

Kylie Taloo, SCU Coordinator for Translation, spoke of the challenges her unit faced when she joined the SCU in March 2002 as part of the reorganization then underway. Her impression of the resources situation when she joined the SCU was "no equipment, no cars, no computers, no paper." It took her two months to get a computer, even though the use of a computer was essential for her work. The situation dramatically improved as DPGSC Frigaard increased her staff from 3 translators to 42. Taloo emphasized, however, that the Serious Crimes Unit "never had professional translators." For the inexperienced national translation staff, there was no training program, but rather "on the job" training.⁶¹ Many questions subsequently arose at the trial stage over the accuracy of the translation of pre-trial statements given by witnesses to SCU investigators.

Despite three years of efforts, Taloo never succeeded in convincing UNMISSET to buy TRADOS, which is a standard translation database. She had requested this, or any other translation database software, repeatedly since 2002. Ironically, in the flurry of frantic activity to ready SCU files for the handover to the Timorese Prosecutor General's Office, she finally, in March 2005, received TRADOS to assist in the massive translation effort for the handover. But because it came so late it was never installed due to lack of time. She emphasized that TRADOS was not a frill, but a software system that provides the consistency in translation they could never have had without such a database. She was also never given a place to keep translation files despite frequent requests (her office was literally the size of a broom closet).⁶²

The lack of SCU investment in software systems extended to file management and evidence. Until the handover process was underway in 2005, there was no proper database and document management system for investigative files, case files, and translations of documents.⁶³ Different prosecutors managed their documents as they saw fit. Because the case files were in a state of total disarray, the preparation for the handover was a Herculean task.⁶⁴

Frequent turnover of staff on short-term contracts added to these problems as, for example, in the Evidence Unit where new staff kept changing the evidence management system. This resulted in three different archiving systems being used "and they were never harmonized and each erased some previous data." The SCU head of Public Affairs

⁶¹ Interview with Kylie Taloo, 31 March 2005.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

concluded, “The way the SCU was set up makes it seem like they expected to close it quickly. There was no long term planning.”⁶⁵ Again, only at the end of the process was an effective electronic file management system introduced because without it there could not have been a proper handover of documents. It is to the credit of DPGSC Carl DeFaria and his staff that, in a few months, they were able to remedy years of neglect and put the files in order.

It was also the case that the database construction for the handover revealed previously unsuspected patterns in indictments and cases. These showed how important it would have been to have proper case management and database systems from the beginning. For example, the 2005 database showed that some accused had actually been indicted multiple times, and sometimes for the same event. It also showed that in some cases there were multiple arrest warrants for the same accused. In the case of one individual, there turned out to be six arrest warrants which had been issued because of minor differences in spelling. Having a proper database and case management system would have prevented all of this superfluous effort.⁶⁶ According to the SCU lead investigator, who was with the Unit since the very beginning in 2001, Australia offered to send a case management expert to set up a database but the offer was refused.⁶⁷

The Defense Lawyers Unit

We have already noted above the complete lack of resources for the Timorese and internationals who served as defense counsel before the Defense Lawyers Unit began to operate in late 2002. This included a lack of funds for even the most basic needs, including investigators, transportation for them to go into the field to identify potential witnesses, transportation and accommodation for witnesses (should there be any) in Dili, computers, research aids, internet access, books, translators, and so on. The inexperienced Timorese defense counsel were operating in conjunction with international defenders, but they too suffered from the same lack of resources and also varied widely in terms of experience and ability. In the period up to April 2003, 7 SPSC trials were defended by Timorese counsel working alone, 11 by Timorese and international counsel together (often with multiple defendants), and 7 by international counsel alone. After that date, Timorese counsel appeared in only one trial. In the first 14 Serious Crimes trials (almost one-third of the total number of trials) not a single defense witness was called. In a substantial number of later trials this continued to be the case.

The Defense Lawyers Unit was supposed to remedy this situation and it certainly enjoyed greater resources than its predecessors. Even so, serious problems with funding remained, particularly for investigators, translators, and the like. Alan Gutman of the Defense Lawyers Unit made the same point as did SCU staff about the consequences of allowing UN administrators with no experience in court administration to make decisions about resources. In addition to never being given professional investigators, the Defense Lawyers Unit had no research staff, no law books, no access to the Lexis-Nexis online legal research database, and other deficiencies.⁶⁸

*The DLU had
no professional
investigators,
no research staff,
no law books, no
access to an online
legal database*

⁶⁵ Interview with Julia Alhinho, 18 February 2005.

⁶⁶ Interview with Julia Alhinho, 28 March 2005. Alhinho was heavily involved in the database project.

⁶⁷ Interview with David Savage, 17 February 2005.

⁶⁸ Interview with Alan Gutman, 30 August 2004.

TRANSLATION

Previous sections have highlighted translation issues in the Court of Appeal and in the Serious Crimes Unit. Translation problems affecting the performance of the Special Panels for Serious Crimes were even more serious. It is in the courtroom, in the trial process, that translation capacity most directly affects the interests of the accused and has the greatest impact upon the fairness of the proceedings.⁶⁹

In late 2001 and early 2002 the principal issues regarding translation in court revolved around the lack of sufficient numbers of translators; the lack of translators to deal with specific languages of East Timor or who could translate directly from, for example, Tetum to English; the experience, qualifications, training, and competence of translators; and the accuracy of translations, particularly those involving technical legal terms or concepts.

The standard practice in international tribunals is for translators to trade off at frequent intervals because of the strain of maintaining concentration for prolonged periods of time and the errors that occur when this practice is not followed. The lack of sufficient numbers of translators at the SPSC meant that translators often had to translate for hours without interruption and to continue to do so over a full trial day. This led to a number of serious problems, as well as to the lack of translators for certain languages when one became ill. There were no translators at the SPSC who could translate from local languages other than Tetum. Lack of translators with specific linguistic competencies meant that “chain translation” was typically resorted to. For example, one translator would translate from Tetum into Bahasa Indonesia, another from Bahasa Indonesia into English, and yet another into Portuguese.⁷⁰ As all participants frequently complained, this not only enormously lengthened the time required for trials but, more significantly for the accused, greatly multiplied the opportunities for errors or inaccuracies. JSMP has documented such specific instances.⁷¹ It was hoped that the introduction of simultaneous translation equipment in one of the two courtrooms would ameliorate this situation.

The JSMP trial report on the Lolotoe Case, which ran through 2002 and into 2003 reveals, however, that such difficulties persisted. The report notes that towards the end of the trial, an increase in the number of translators did help to ease the workload strains. It also notes, however, that long exchanges between the judges and some of the parties were often not translated at all, even when the rulings that resulted from the exchanges had a vital impact on the case of the accused.

The most pertinent example of this occurred when Jose Cardoso made an admission that all of a particular witness’ testimony was true. A lengthy debate ensued between the Panel, prosecution and defence to determine whether this admission could be considered an admission of guilt of the charge in question. The majority of this discussion was not translated even though it had a massive impact on the accused’s case.

⁶⁹ Very serious deficiencies involving translation were noted early on by observers and have been reliably and persuasively reported on in some detail. See JSMP, *Justice in Practice* (2001), pp. 24–28, and JSMP, “Special Panel for East Timor Ignores the Importance of Public Participation in Court Proceedings,” news release, 19 November 2003.

⁷⁰ See JSMP, *Trial Report on the Los Palos Case* (March 2003), pp. 26–27.

⁷¹ JSMP, *Trial Report on the Los Palos Case* (March 2002), pp. 25–27.

The accused was repeatedly questioned to clarify his admission, however his responses indicate that he failed to appreciate the legal ramifications of his admission. The lack of interpretation of exchanges between counsel and judges undoubtedly contributed to his confusion.⁷²

According to Judge Rapoza, in September 2004 significant translation problems remained. He attributed this to the fact that all of the translators at the SPSC were appointed at the United Nations Volunteer (UNV) level; thus there were no professional translators among them. This resulted in what he referred to as “significant variations in quality” among the translators. Under his leadership the SPSC was finally authorized to advertise for professional translators with legal experience. Asked why this had not been done earlier, he replied, “It was nobody’s job to fix it.”⁷³ Other Special Panels judges agreed that despite improvements, translation problems persisted until the end of the Serious Crimes process. When interviewed on 28 March 2005, Judge Antonio Helder said that of the challenges facing the Special Panels, “the biggest is communication, language problems in hearings.”

Judge Samith de Silva, while agreeing that translation in court was “not very competent,” pointed out that the issues of translation in SCU investigations also had a significant impact upon the accused. He explained, “Were the statements given to investigators properly transcribed and translated? There are cases where they were clearly not and the parties take advantage of it.” This phenomenon, he said, arose from two problems. The first is the translators were not good, and second, the investigators may have influenced answers or tried to make them “look nicer.” He added that it was disturbing and revealing that in these cases there were usually not originals of witness statements against which to check translations. He gave as an example one case where the witness said that what she was saying in Court was the same as what she had said in her statement. The problem was that the statement said something entirely different. The judges found her explanation credible and summoned the translator. It turned out that he was still, long after the time of his translation of the statement, in what Judge de Silva called the “very early stages of learning English.”⁷⁴

Some of these difficulties were put in perspective in an interview with the SPSC staff member in charge of translation and transcription.⁷⁵ Like Rapoza, she pointed out that all of the interpreters and translators were appointed at UNV level (United Nations Volunteer), and hence lacked professional qualifications and experience. None of them had had courtroom experience prior to being hired at the Special Panels. It was only in the second half of 2004 that pressure from Judge Rapoza led to the appointment of two interpreters with some legal background.⁷⁶ They were not, however, trained as legal translators and had no courtroom experience. As to resources, she said that they could not afford to hire people trained to use the simultaneous translation equipment they had. The problem, she stated, was that

⁷² JSMP, *The Lolotoe Case: A Small Step Forward* (July 2004), p. 23.

⁷³ As SPSC Judge Siegfried Blunk put it, one of the greatest failings he observed during his years at the SPSC was the failure of effective management and the lack of adequate performance assessments. What was needed, he stated, were heads of units who had to write substantive appraisals of their staff and evaluate their performance. Interview, 27 March 2005.

⁷⁴ Interview with Judge de Silva, 1 April 2005.

⁷⁵ Interview with Shanti Karuppiyah, 29 March 2005.

⁷⁶ Judge Rapoza, written communication to the author, 5 December 2005.

the budget did not allow for hiring people at the UN professional salary level. The net result of all the difficulties she detailed was frequently incomplete translations in the courtroom, with the result that some of the parties and transcribers could not follow what had been said. For example, “[w]hen the judges speak too fast for them to keep up, the interpreters will not be able to translate and will just say, ‘The Judges and the Defense Counsel had an exchange.’” In cases where interpreters were required for Timorese languages other than Tetum, because the Special Panels did not have such resources, they had to borrow translators from the SCU or police, or find local court staff or United Nations Development Programme (UNDP) or UNMISSET staff who spoke the language. None of these, of course, were professional legal translators and some of them may have had no experience in translation at all. She stated that in these circumstances “you just look around and see who you can find.” Unfortunately, the liberty of the accused may depend upon the success of such efforts. JSMP has provided vivid examples of how the accuracy of the translation of testimony of witnesses who only speak languages other than Tetum can be vital to the case.⁷⁷

TRANSCRIPTION

An accurate and complete transcript of proceedings is essential for the parties in the case, for the judges in writing their opinions and ruling on motions, and, of course, for the appeals process. Indeed, it is hard to see how an appeals court can fulfill its responsibilities to review proceedings if there is no complete and accurate record of the trial.⁷⁸ Nonetheless, for more than two years little was done to address this problem at the Special Panels.

The problem of the lack of transcripts was one focus of considerable criticism in 2001–2002.⁷⁹ Until the introduction of audio/video recordings in the Los Palos Case in late 2001, there were no records of the proceedings in the first 13 trials other than the notes of one of the judges designated for this role in each case. The fact that some of the judges did not have English as their native language was only one of the problems that this practice raised. Reliance on the notes of the judges against whom an appeal is lodged is hardly a good starting point for a viable appeals process. Even apart from this, such notes, especially given linguistic difficulties, are simply not a complete and accurate record of what was said at trial. When recording equipment was introduced it did not solve the problem, because no transcriptions were made from the recordings.

Steps were taken later in the process to remedy this situation. Transcribing began in late 2002, but there was no one supervising the transcription process until the job of Coordinator was filled on 23 May 2003. In 2005, the Translation and Transcription Unit comprised five transcribers, all of them appointed at the UNV level. They included no professional court reporters.⁸⁰ The Transcription Unit, its Coordinator explained, possessed no transcription equipment, only laptop computers. Two members of the staff knew stenography, but they had no steno machines. When asked why there were no machines for

How can an appeals court review proceedings if there is no complete and accurate record of the trial?

⁷⁷ For one such example, see JSMP, *The Lolotoe Case*, pp. 23–24.

⁷⁸ Linton has documented the serious consequences that the lack of an accurate court record caused in early cases at the SPSC and Court of Appeal in “Prosecuting Atrocities,” p. 431.

⁷⁹ Cohen, *Seeking Justice on the Cheap*.

⁸⁰ Interview with Shanti Karuppiah, 29 March 2005.

the staff who could use them, and why there were no professional court reporters, she cited the problem of funding, concluding, “You just compromise and do the best job you can.”⁸¹ This remark aptly encapsulates much of the experience of the Serious Crimes trials.

Some of the Judgments indicate that the transcripts are incomplete. For example, in the Jose da Costa Case, the Judgment, written in 2004, notes that “it has not been recorded in the transcript, but several witnesses, questioned on very basic details, confessed to ignore the months of the year”⁸² Judge Coordinator Rapoza explained that none of the transcription staff were trained as court reporters. Several of them were also non-native speakers and because of their lack of training and experience did not know legal terminology. As a result, he explained, the transcripts vary greatly in quality according to the ability of the transcriber, supervision, and review by judges. In some cases there are gaps, of 5 or 10 minutes, when the transcribers could not keep up with an exchange.⁸³

The resources necessary to ensure accurate transcription were not *ever* made available to the Special Panels. Thus, the official record of the proceedings must be considered potentially unreliable in any given case. One judge described the state of the transcripts as an “embarrassment” for the Court.⁸⁴ That “5 or 10 minute gap” in the transcript as a result of the transcribers being unable to keep up, or inaccuracies due to their lack of linguistic or professional competence, may operate to the prejudice of the case of the defendant on appeal. The whole point of professional transcription is to prevent that eventuality from occurring.

COURT ADMINISTRATION, CASE AND TRIAL MANAGEMENT AT THE SPECIAL PANELS

The first professional Court Clerk, or head of court registry, to serve at the Special Panels, Katia Galindo Malaquias Romijn, was hired by Judge Coordinator Rapoza in September 2004 as part of his program to reform the Court. She was the first to serve in this position who had actual experience in managing a court registry.⁸⁵ Efficient functioning of a court over time depends upon proper management of the court’s calendar and files, and an effective case management system. All of these were lacking at the Special Panels before the advent of Galindo.

In January 2002 there was no functioning calendar at the Special Panels. As a result, much time was lost because sometimes not all of the parties would appear for a hearing, or sometimes the parties were there but the defendant had not been brought from jail. Such events were routine and resulted in the repeated rescheduling of hearings and delay in finishing cases. On the morning of a hearing, telephone calls would often be exchanged between judges and the parties to find out if the hearing would, in fact, occur. The record of trials in 2001–2003 makes clear that repeated postponements for a variety of reasons could have been avoided by effective case management and a functioning calendar. Given the very limited resources of the Special Panels, such delays represented a significant obstacle in the

⁸¹ Ibid.

⁸² Case No. 12/2002, Judgment of 23 February 2004. See also p. 12, which also indicates the incompleteness of the transcript.

⁸³ Interviews with Judge Rapoza, 1 September 2004 and 28 March 2005.

⁸⁴ Interview, 27 April 2005; the interviewee preferred to remain anonymous.

⁸⁵ Interview with Judge Rapoza, 28 March 2005.

timely processing of cases through the various stages and created the potential for the infringement of the right to be brought to trial within a reasonable time.

Numerous instances demonstrate how even modest attention to case management could have expedited matters significantly. Judge Rapoza, for example, introduced the practice of holding pre-trial conferences at the Special Panels. This “innovation” was widely acknowledged as having made a significant contribution to more efficient scheduling and to more expeditious completion of cases. It was also not until the appointment of Judge Rapoza as Judge Coordinator, in March 2004, that judges began to coordinate their vacations so that trials would not be repeatedly interrupted by their absences. One can only wonder why it took almost four years to adopt such basic administrative measures.

A few examples of the chronology of some of the earlier cases may give a clearer idea of the chaotic situation and its consequences. In some cases delays and scheduling problems occurred at the pre-trial stage, in others once the trial had begun, and in others both. For example, the Lino de Carvalho Case (No. 10/2001) was tried on 16–18 February 2004, before Judges Rapoza, Pereira, and Siegfried Blunk. As the early case number indicates, however, it began much earlier.

The accused was initially detained on 28 October 2000 (and was held in a Timorese jail for almost two years until pre-trial release in October 2002). He was only indicted almost six months later (25 April 2001) for murder. The Indictment was amended on 18 May 2001 so as to charge him with murder as a crime against humanity. The preliminary hearing was held on 19 and 30 November 2001, and the trial scheduled for 10 February 2002. The trial actually began on 19 February 2002, and hearings were held on three days in mid-March, when the trial was continued until 16 April. On that date, one judge was sick and the trial was postponed until 6 May. On that date it was postponed until 4 June, and again on 4 June to 4 July. On 5 June the defense filed a motion for release of the accused from detention, but that motion was not heard. On 4 July the trial was again postponed to 9 September, and on that date again to 4 November. The Judgment gives no reason for any of these postponements, though when they are at the request of the defense or because of illness this is usually noted. In this case the delays over May–August 2002 had to do with, among other things, problems scheduling the Lolotoe Case and with the vacations of the judges. After the postponement of the hearing that had been scheduled for 9 September, the defense again made a motion for release of the accused from custody. This motion was finally heard on 25 October, and on 28 October 2002 the accused was ordered to be released from custody. Presumably, if the first motion of 5 June had been heard in a timely manner, the accused could have been spared several months of pre-trial detention. On 29 October 2002, however, the trial was rescheduled for 24 March 2003. On that date it was postponed again until 2 June. Before that hearing could occur, however, the trial was, on 30 May, continued *sine die* because one of the international judges had completed his contract and left East Timor. This surely could have been anticipated. On 11 July the trial was rescheduled to 13 October, then to 28 October, and on 26 October to 5 December 2003. Before that hearing could occur, the case was reassigned to Judge Rapoza, who had recently arrived in East Timor. He presided over the trial on 16–18 February 2004, and it was completed without further continuance.

What was the result of all of these delays and the waste of the several days actually spent in trial before the first panel of judges? On 16 February 2004 the defendant appeared in Court and pled guilty to one count of the Indictment. As part of a plea-bargain, the

*Eventually case
management
within the Special
Panels vastly
improved and
succeeded in
genuine capacity
building for the
Timorese staff*

prosecution withdrew the other charges and on 17 February the Panel sentenced him to seven years imprisonment, with credit for the two years served in pre-trial detention.⁸⁶ The Serious Crimes process, it should be remembered, was intended to serve as a model, and help build capacity, for the Timorese justice system.

There is no question that the trials of two major priority cases (Los Palos and Lolotoe) in 2001–2003 placed great strains on the Special Panels. There is also no question, however, that more effective court administration and case management could have greatly enhanced the efficiency of proceedings. While these priority cases were the cause of numerous delays, they themselves were repeatedly delayed and took far longer than anticipated. This was, on the whole, due to poor case management. JSMP reported repeatedly on the delays in these two cases.⁸⁷ The titles of some of the JSMP reports on the Lolotoe Case give a flavor of the problems: “Lolotoe Trial Faces Further Delays” (28 November 2001); “More Delays Hamper Lolotoe Trial” (28 October 2002). The trial was finally completed on 5 April 2003.⁸⁸

As noted, the reforms initiated by Judge Rapoza, as well as the recruitment of other new judges to the Special Panels in 2003–2004, greatly enhanced the efficiency of the Panels. Case management proved to be one area of the operation of the Special Panels where conditions not only vastly improved but also succeeded in genuine capacity building of Timorese staff. The success of the reorganization of this vital court function provides a number of lessons. First is the importance of effective management and leadership in recognizing problems and fighting on behalf of the Special Panels for the resources to address them. Second is the importance of the successful recruitment of qualified and motivated personnel with the appropriate professional experience. It is not the fault of previous SPSC court clerks, who were hired at the UNV level, that the system was so disorganized. It is rather the responsibility of the UN administrators who refused to hire professionals with the experience to organize a proper case and document management system.

WITNESS AND VICTIM PROTECTION AND SERVICES

The Statute of the Special Panels provides: “The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”⁸⁹ Offering adequate protective measures to witnesses before, during, and after trial is essential in the setting of any tribunal operating in a post-conflict context. It is

⁸⁶ All of the dates and facts in regard to this trial are taken from the Judgment. I did not have access to the full case file.

⁸⁷ See, e.g., JSMP, “Los Palos Trial Adjourned for 2½ Weeks,” news release, 24 August 2001: “The trial against the ten accused in the Los Palos case was yesterday adjourned for two and a half weeks as two of the judges hearing the case are taking their holiday leave... . The length of the trial has left the new East Timorese judicial system with substantial problems, not least of which is the suspension of all other serious crimes hearings... . The imminent expiration of the contracts of international staff involved in the Los Palos case, including a public defender and one of the judges, has created additional procedural problems for the court.”

⁸⁸ JSMP, *The Lolotoe Case*, pp. 18–20. In the high-priority Lolotoe Case the Special Panels wound up adjourning for six months (May–October 2002) because of the inability to schedule sessions that all of the judges could attend. Reasons included consecutive vacations. In one three-month period the Special Panel sat for only two days.

⁸⁹ UNTAET 2000/15, Section 24.1. Section 24.2 provides that “procedures regarding the protection of witnesses shall be elaborated in an UNTAET directive.” This latter requirement was apparently never carried out.

important not only to protect the victims and witnesses from threat, coercion, or reprisal, but also to make sure that the tribunal can hear all of the available evidence, provide a forum for victims to recount their experiences, and assist in the quest for accountability. The acquittal of the accused on account of a dramatic change of pre-trial testimony by all six eyewitnesses in the Victor Manuel Alves Case provides a vivid example of the potential consequences of the failure to make protective measures available.⁹⁰ A complementary function involves counseling and related services for traumatized witnesses, who may have been the victims of severe sexual violence and/or torture and other inhumane treatment. At the Special Court for Sierra Leone, for example, the Witness and Victim Unit, headed by Saleem Vahidy, encompasses a large number of staff, housed in a separately secured compound within the secure compound of the Special Court itself. The Unit disposes over unmarked vehicles for the pickup and transportation of witnesses, safe houses located in Freetown, well-trained and armed security staff, separate entrances for witnesses into the courtroom with appropriate waiting rooms and so on. It can provide post-trial protective measures, counseling, ongoing financial assistance, and, if justified, permanent relocation to other countries. At trial, all witnesses at the Special Court testify anonymously unless they request otherwise, and other measures to protect anonymity are available upon request. A witness protection officer is in the courtroom at all times and is trained to intervene and provide support and counseling whenever he or she feels that the emotional strain on a witness is too great. The Special Court has also employed a full-time professional psychiatrist whose clinical specialization includes research on child witnesses traumatized through the violence associated with conflicts. Such functions are essential to protect the rights and well being of those who testify in the aftermath of conflicts such as those that occurred in East Timor or Sierra Leone. Not one of these resources was available to the witnesses at the Special Panels. It is also not clear to what extent witnesses were even adequately informed that they could request protective measures before, during, or after their testimony.

*‘Witness protection
and security were
not taken seriously’*

Sharon Lowery served as the head of the SCU Witness Protection Office from its inception in June 2001 through 2004. When she took up her duties, she had “no car, no staff, no interpreter.”⁹¹ For the duration of her three-year tenure, she was, essentially, the entire witness protection program. She finally received one minibus as her total vehicle resources and then only in late 2002, one and a half years after assuming her position. Because she needed to use this vehicle for her work in Dili, she had no transportation resources available for witnesses to be brought in from the districts. After six requests to UNMISSET for three assistants, she finally received one local staff driver as her assistant to help coordinate witnesses. She still had to rely on UN police in the districts to get messages to villages when she was looking for witnesses, which “compromised confidentiality.” It was only in 2004 that she received access to another vehicle. As a result, during most of her tenure witnesses came to Dili on public transportation, or in SCU transportation. Witnesses traveling to Dili were not accompanied by witness protection staff, because there were none. While in Dili, she stated, witnesses were lodged in hotels, and later in the recreation house at the SCU. They *never* had any safe houses. The conclusion that the head of this unit for almost four years drew from her experience was that “[w]itness protection and security were

⁹⁰ This case is discussed at length below in Part Three, Section 3.

⁹¹ Interview with Sharon Lowery, Freetown, Sierra Leone, 13 April 2005.

not taken seriously.” “Witnesses were exposed,” she stated, adding that adequate witness security was never put in place.⁹²

When asked if she knew of specific cases where witnesses had been given reason to fear reprisals, she stated that she had had five cases where the witnesses expressed their fear of reprisals to her on the basis of threats from accused perpetrators or their relatives about their upcoming testimony. Because of the lack of effective protective measures in the communities, accused often contacted witnesses and talked to them about the case. In 2004 she had to deal with two such cases. Accused who had been released also often came to Court and could have access to witnesses there. Moreover, she explained, the witness waiting room at the Special Panels was next to the cell where the accused were held before and after the hearings. Because of the close proximity, accused were able to talk with the witnesses. She stated that she complained about this problem but never received a response.⁹³ Lowery’s account of witness protection problems at the Special Panels is consistent with information conveyed to me by the Judge Coordinator in an earlier interview.⁹⁴

Two prosecutors who served from 2001–2005 stated that there were often problems associated with this practice of using public transportation or the lack of anonymity and protection provided with UN transportation. Because the witnesses were coming in from their communities for the trial, they often rode in the same minibus as other witnesses or with the accused, who had returned to his community on conditional release. This occurred even in the case of a sexual violence victim who, unescorted, rode to Dili in the same small bus as the man accused of having raped her.⁹⁵ Both prosecutors expressed the opinion that there was no witness protection program worthy of the name. They explained how witnesses were picked up in their communities by the SCU, in vehicles marked as “UN,” and then brought to Dili. There was no anonymity whatsoever about the pickup. Their view was that “it was widely felt in the SCU that there was ongoing intimidation of witnesses.”⁹⁶ SPSC Judge Brigitte Schmid also explained how in one of her cases it came out that the only eyewitness changed his testimony after he was visited by the accused.⁹⁷

According to Sharon Lowery, there was no professional counselor or psychologist for witnesses. There was also no program to provide such services to traumatized witnesses or victims of sexual violence who testified. Lowery repeatedly asked for such resources but her requests were always denied.⁹⁸ The failure of UNTAET/UNMISSET to provide vehicles, adequate staff, adequate security and isolation of witnesses at court, or professional

⁹² Ibid.

⁹³ The UN *Commission of Experts Report* deals at length with inadequate protective measures at the Ad Hoc Human Rights Court in Jakarta but fails to address similar problems in the Dili trials.

⁹⁴ Interview, 30 August 2004.

⁹⁵ UNTAET 2000/15, Section 24.1 also provides that in implementing protective measures, “the panels shall have regard to all relevant factors, including age, gender, health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”

⁹⁶ Interviews with Prosecutors Shyamala Alagendra and Wambui Ngunya, Freetown, Sierra Leone, 12–13 May 2005.

⁹⁷ Interview with Judge Brigitte Schmid, 17 February 2005. Prosecutors Alagendra and Ngunya also cited evidence that a key witness had been intimidated by the accused in the Francisco Pereira Case. The Florencio Tacaqui Case (No. 20/2000) discusses various kinds of interference with witnesses at a number of points in the Judgment of 12 September 2004.

⁹⁸ Interview with Sharon Lowery, 13 May 2005, Freetown, Sierra Leone.

counseling in the case of traumatized witnesses finds no other explanation than indifference towards the needs of victims and witnesses who may have risked reprisal or intimidation in coming to the Special Panels to testify. Further, no program existed to provide protective measures after trial should there be such need. In this area there is little doubt that the Serious Crimes process failed to meet the international standards defined by the practices of other UN administered tribunals.

COMMUNITY OUTREACH

This section will only briefly consider the function of outreach, the process by which a hybrid or international tribunal seeks to make its trials accessible and meaningful to the victims and to the population of the country in whose name it seeks justice. The hope is to use outreach programs to contribute to community demands for justice and to processes of reconciliation and reconstruction in the aftermath of conflict. Longuinhos Monteiro, the Prosecutor General of East Timor, expressed this idea for the Timorese context in 2003 in a speech where he claimed that the prospect of more trials “will help those families of victims and their communities come to terms with their losses knowing that perpetrators have been brought to justice.”⁹⁹

The Public Affairs and outreach functions rested entirely upon the shoulders of one SCU staff person, employed at the UNV level despite the enormous workload and responsibility attached to this job. This person was responsible for all press and public relations for the SCU. On top of this job, which basically required them to be in Dili, they were responsible for all outreach efforts. Naturally, it is the latter which inevitably suffered due to the daily demands of the former. Both the first occupant of this position, Mark Harris, and his successor, Julia Alinho, made significant efforts to implement outreach initiatives. The lack of resources at their disposal for this purpose necessarily limited the scope of their efforts and, consequently, their effectiveness.¹⁰⁰

Alinho occupied a dingy, cramped office at the SCU. When asked about her support staff and resources she gestured to her office and said, “This is all there is.” She explained that though she attempted to undertake community initiatives whenever possible, given her lack of staff, funding, and resources her efforts were necessarily constrained. Outreach had been recognized as within the SCU’s purview from early on in the process. For example, it is mentioned in an SCU Fact Sheet of July 2002, which notes that outreach programs have been put on in seven communities across East Timor.¹⁰¹ Mark Harris was committed to such efforts during his two-year tenure as the Public Affairs Officer for the SCU, but like his successor, he had to juggle outreach with the many other duties of his job. Sporadic community initiatives were undertaken, but without the staff and support necessary for even a very modest sustained effort. When convenient, UNMISSET was also able to shift responsibility by stating that outreach was the responsibility of Timorese institutions.¹⁰²

⁹⁹ Prosecutor General Longuinhos Monteiro, speaking at the inauguration of new SCU prosecutors. Quoted in an SCU news release of 7 July 2003.

¹⁰⁰ Interview with Julia Alinho, 18 February 2005.

¹⁰¹ SCU Fact Sheet, July 2002.

¹⁰² Interview with Carl DeFaria, 18 February 2005.

The occasion of the close of the Serious Crimes Unit gave rise to its most ambitious and sustained outreach effort. DPGSC DeFaria recognized the importance of explaining the reasons for the closure of the unit and its consequences, and put a great deal of his time into this effort. The SCU held town meetings in 12 communities from 15 March to 9 May 2005.¹⁰³ The stated purpose of these meetings was “[t]o inform the communities about the end of the Serious Crimes Unit mandate.”¹⁰⁴ The meetings were supposed to be a joint effort of the Serious Crimes Unit and the Office of the Prosecutor General, but Monteiro attended only the first one.¹⁰⁵ It is paradoxical that the only major outreach effort was aimed at explaining the premature closure of the SCU to the communities of East Timor. “Too little, too late,” it nonetheless showed the capacity of the UN operation to engage in outreach when it deemed it necessary.¹⁰⁶

EQUALITY OF ARMS AND RIGHT TO AN ADEQUATE DEFENSE

“Equality of arms” is a concept linked to the broader right to a fair trial. It refers to a rough parity in the resources available to defense and prosecution. The core idea is that the rights of the accused to mount an effective defense and to a fair trial may be compromised if the resources available to the two parties are grossly disproportionate or if the defense simply lacks the resources to counter the case of the prosecution. Equality of arms has been raised by the defense as a concern at all of the international and hybrid tribunals.¹⁰⁷ Quoting the language of the International Covenant on Civil and Political Rights (ICCPR), the Appeals Chamber of the ICTY has ruled that “[a]t a minimum, ‘a fair trial must entitle the accused to adequate time and facilities for his defence’ under conditions which do not place him at a substantial disadvantage as regards his opponent.”¹⁰⁸ The entitlement to “adequate time and facilities for the preparation of his or her defence” is also a right guaranteed to every accused in trials before the Special Panels.¹⁰⁹ Equality of arms does not necessarily mean exact parity in all resources, as the prosecution typically faces a more extensive investigative task and bears the burden of proof, whereas the defense need only raise reasonable doubt about the prosecution’s case.¹¹⁰ The defense must, however, have the means necessary to accomplish this task.

In the case of the Serious Crimes process, *all* units involved in the process suffered from severe resource constraints that negatively affected their performance. It is against this backdrop of relative dearth that equality of arms in the Serious Crimes trials must be understood.

¹⁰³ Community meetings had sometimes been held earlier, when the SCU informed a community of the filing of an Indictment. See, e.g., SCU, *Serious Crimes Unit Update*, 21 April 2003. These were initiatives undertaken by DPGSC Siri Frigaard.

¹⁰⁴ Undated SCU memo by Julia Alhinho, provided by the memo’s author.

¹⁰⁵ Interview with Carl DeFaria, 29 April 2005. See also DeFaria, “ET’s Quest for Justice.”

¹⁰⁶ On the “too little, too late” phenomenon in international justice, see Linton, *Putting Things into Perspective*.

¹⁰⁷ See, e.g., the ICTR Rutaganda and Kayishema Appeals Judgment, paras. 63–74.

¹⁰⁸ Kordic and Cerkez Appeals Judgment, para. 175. The language quoted within this passage comes from the International Covenant on Civil and Political Rights, Section 14.3b.

¹⁰⁹ UNTAET 2000/30, Section 6d. This provision is based upon ICCPR Section 14.3b, which was binding upon the Special Panels.

¹¹⁰ This is the standard of proof at the international tribunals and at other hybrid tribunals, and at the Special Panels since Case No. 2/2000. The Special Panels made a specific ruling on the applicability of this standard as the required burden of proof in the Joni Marques Case, 9/2000, p. 349.

The improvements made by the creation of the DLU did not make up for previous failings

As a preliminary touchstone one might take the reports of the UNMISSET Transition Working Groups on the Serious Crimes Process. Drafted in early 2005 it offers a sober assessment of the situation in regard to equality of arms. It states that the performance of the Defense Lawyers Unit had “improved to the point where ‘equality of arms’ between the prosecution and defense is *now attainable*” (emphasis added).¹¹¹ On the consequences of the implied inequality of arms over the previous years of trials the report is silent.

In assessing equality of arms it is appropriate to consider first the period before the creation of the DLU and then the period after the Unit was established. This is the case because the Unit was created in response to a recognition of the very severe shortcomings of the defense function. One point must be emphasized: The improvements made through the creation of the DLU did not make up for the previous failings. If accused prior to the creation of the DLU did not enjoy a competent and adequate defense then one of their most basic rights was violated. Such a failing demands a remedy *for those individuals convicted under such circumstances*, not merely an improvement in the system for future trials.

This report has already noted the lack of resources available to the Timorese and international defense counsel who represented accused in a large number of murder and crimes against humanities cases prior to the creation of the Defense Lawyers Unit. The fact that defense lawyers did not call a single witness in the first 14 cases strongly suggests that an adequate case was not made on behalf of those accused. All of those trials resulted in convictions. Some of them will be analyzed more closely in the next section, but a few generalizations are relevant here in also pointing to the inadequacy of the defense.

First, the trials were extremely short considering the gravity of the charges. For example, in Case No. 2/2000, Julio Fernandes was charged with murder in connection with the 1999 violence. At his preliminary hearing (leaving aside previous stages) he clearly had not been properly counseled by his defense attorney. He made a statement to the Court that both acknowledged his guilt and disagreed with the charges against him. The Court found that this was not a guilty plea because “it was clear that there had not been sufficient consultation with the defense.”¹¹² This is a recurring theme in the trials of 2000–2001 during which defendants repeatedly made ill-advised, incoherent, and damaging statements at their preliminary hearing or at the commencement of trial, while at the same time pleading “not guilty.” At the trial of Julio Fernandes this statement was used against him and was read out to the Court by one of the judges. The trial itself took only one day to complete. The Indictment was read, the accused was questioned by the judges, and the prosecution called three witnesses. The defense then consented to the prosecution introducing pre-trial statements by seven other witnesses, without requiring them to appear. The defense thus gave up the opportunity to cross-examine more than two-thirds of the prosecution’s witnesses. This may have been irrelevant because, from the Judgment’s description of the proceedings, it does not appear that the defense attempted to make any case at all. The prosecution and defense made their closing arguments and the trial was adjourned until announcement of the decision. All of this was completed in one day.

The Julio Fernandes Case is not an exception, but is, rather, representative of many trials from the first two years of the Special Panels. Case No. 3/2000, a prosecution brought

¹¹¹ UNMISSET, *Reports of the Transition Working Groups* (Dili: UNMISSET, 2005), p. 61.

¹¹² Case No. 2/2000, Judgment, p. 2.

against Carlos Soares Carmone, involved similar problems at the preliminary hearing. The trial was completed in one day, 13 February 2001. As to the defense case, the Judgment merely notes, “The Defense did not present any witnesses or evidence.”¹¹³ In the trial of Yoseph Leki (Case No. 5/2000), the trial lasted two days, the second of which was only a partial day devoted to the closing arguments of the parties. Again, “[t]he Defense did not present any witnesses or evidence.” During the trial the defense did appear to make what the Court characterized as a “request for evidence,” but it was rejected because it “came ill-timed and therefore was dismissed during the trial hearing.” This hardly indicates a defense counsel in control of his case. Subsequent cases mostly follow this pattern of taking two to three days, with testimony and evidence on the first (and sometimes a second day as well), followed by a shorter session for closing arguments.¹¹⁴ These are all homicide cases that typically produce lengthy prison sentences. The defense did not produce witnesses or evidence.

While the defense did not produce witnesses or evidence in these cases, in many of them they did make an argument on behalf of their clients. The argument was variously expressed as duress, coercion, or superior orders. The defense counsel, however, appear to have had little understanding of the requirements for these defenses (or, in the case of superior orders, whether it was in fact a defense as opposed to a grounds for mitigation). The jurisprudence of these cases dealing with duress and superior orders has been expertly examined in an important article by Caitlin Reiger and Suzannah Linton.¹¹⁵ What is important for our purposes is the way in which these issues were handled by defense counsel.

First, duress, superior orders, and the like are sophisticated, complex, and jurisprudentially fraught doctrines. There is wide variation in the approaches of national legal systems to them and their treatment in contemporary international humanitarian law can best be described as “emergent.”¹¹⁶ The defense counsel at the Special Panels do not appear to have had an understanding from the conceptual and doctrinal perspective of how to make such a case effectively for the accused. Second, in the World War II jurisprudence on these doctrines it is clear that they only have a chance of succeeding in very rare instances when there is overwhelming and compelling evidence independent of the testimony of the accused. Since the defense in these cases did not introduce any evidence or witnesses they were unlikely to succeed. Third, these “defenses” often came out as issues in an unplanned and ill-advised manner, sometimes blurted out by the accused in an incoherent way at the preliminary hearing or at trial. They were often embedded in equally confused and ill-advised partial or complete admissions of guilt. Allegations of duress or superior orders do not appear to have been strategically developed by counsel and they continued to be used even after they had

¹¹³ Case No. 3/2000, Judgment, p. 2.

¹¹⁴ See, e.g., Augustino de Costa Case, No. 7/2000; Mateus Tilman Case, No. 8/2000; Manuel Goncalves Bere Case, No. 10/2000. Each of these was held in two sessions (one only for closing arguments) and in all of them the defense presented no evidence or witnesses. The Carlos Soares Case, No. 12/2000, took three days (one for closing arguments), as did a number of others. Again, the defense brought forward no witnesses or evidence. The accused was sentenced to 15 years, 6 months imprisonment.

¹¹⁵ Suzannah Linton and Caitlin Reiger, “The Evolving Jurisprudence of East Timor’s Panel for Serious Crimes on Admissions of Guilt, Duress, and Superior Orders,” *Yearbook of International Humanitarian Law* (The Hague, T.M.C. Asser Institute, 2002) pp. 167–213.

¹¹⁶ The defenses of superior orders and duress were considered by the ICTY Appeals Chamber in the Erdemovic Appeals Judgment, evidencing a deep division in the Court over the interpretation of these defenses. See especially the dissenting opinion of Judge Antonio Cassese.

failed in case after case. One is often left with the impression that they represented a defense of desperation by a defense that had not prepared a case. Fourth, one can only wonder how defendants could have been so ill-counseled by their public defenders that they made ill-prepared and damaging statements that drastically reduced their chances of acquittal but which did not function as guilty pleas. The latter, strategically deployed and coupled with a strong argument of mitigating circumstances, might have served to substantially reduce the sentence of the accused, as such guilty pleas were regularly taken into account in this manner by the judges of the Special Panels in arriving at a sentence. Defense counsel seem to have failed utterly in explaining to their clients the difference between a plea of innocent and guilty, the consequences of this choice, and the way in which they should comport themselves, particularly in regard to the right to remain silent.

It is clear that up to the creation of the Defense Lawyers Unit by UNMISSET in September 2002, equality of arms did not obtain in the Serious Crimes process. To what extent did the creation of the Defense Lawyers Unit resolve these problems? According to DPGSC Carl DeFaria's account of investigative resources, while preparing its cases in 2002–2003, the SCU had regional offices in various districts and employed "approximately 12 International Investigators, 26 UNPOL [UN Police] Investigators, and 6–10 PNTL (National Police TL) Investigator trainees The UNPOLs had been brought in for their expertise in certain areas of investigation, which was lacking, such as crime scene, forensic pathology . . ." ¹¹⁷ Coupled to the investigative process, the Serious Crimes Unit employed eight international prosecutors, leading four prosecution teams, each comprising "[t]wo International Prosecutors, One [*sic*] UNV Legal Officer, two/three International Investigators, One [*sic*] East Timorese Trainee-Prosecutor and two/three PNTL officers . . ." ¹¹⁸ In this context the SCU represented an investigative "Goliath" in comparison with the paltry resources of the Defense Lawyers Unit, which, in April 2004, encompassed two UNV investigators and no other investigative support staff. It also lacked the kind of resources enjoyed by the prosecution in regard to "expert consultants on issues such as forensics, psychiatry, toxicology . . . and is thus limited in its ability to advance special defenses or rebut scientific evidence adduced by the prosecution." ¹¹⁹

While concentrating on resources, the Report of the UN Commission of Experts studiously avoids evaluating the effectiveness and performance of the Defense Lawyers Unit in the courtroom. Their conclusion refrains from any overall evaluation of equality of arms issues. ¹²⁰

Such an evaluation is far more difficult than for the pre-DLU period. Although the quantitative aspects of relative resources can be discussed, the impact of the discrepancy in the courtroom is harder to assess. Under the DLU regime defense witnesses are more frequently called, but there are still a disturbing number of cases where they are not. Further, there is no question that there was a substantial overall improvement in courtroom performance. The problem, as noted above, was that there was a very wide range of abilities and experience in the DLU. Some DLU lawyers were making their first court appearances at the Special Panels. While most accused may have received at least minimally competent

¹¹⁷ DeFaria, "ET's Quest for Justice," p. 2. Precise monthly statistics on staffing can be found in the SCU's monthly *Serious Crimes Unit Updates*.

¹¹⁸ DeFaria, "ET's Quest for Justice," p. 2.

¹¹⁹ UN *Commission of Experts Report*, p. 32.

¹²⁰ UN *Commission of Experts Report*, pp. 32–33.

counsel, their case may have been handicapped by lack of investigative resources. Two investigators for nine defense counsel means inevitably that the resource is spread very thin. The SCU had a ratio of more than three investigators for each prosecutor during the same period, and their prosecutors on the whole were far more experienced. According to its head, the DLU only began to function fully (“crawled to a start”) in April 2003.¹²¹ By this time, the appointment of new international judges and other incipient reform measures had begun to have an impact in the courtroom.

In order to address equality of arms issues beyond the question of resources, I asked all interviewees who had participated in or observed the trials about this problem. Their responses were both interesting and troubling, particularly because a number of them framed the equality of arms question in connection with the high conviction rate already noted. That is, they considered the equality of arms issue not just one of resources and performance, but also as reflecting a systemic problem of fairness. Let us consider their views, beginning, as is appropriate in this case, with the defense.

In his presentation to the session on the Future of the Serious Crimes Process at the UN Symposium in Dili at the end of April 2005, the head of the Defense Lawyers Unit expressed his frustration.

Clients often have no choice but to enter into a plea agreement. Plea agreements occur in the context of high conviction rates. A client is almost certain of being convicted once an Indictment is filed. If he agrees to plea bargain, he can get away with a very low sentence, but if he fights for his rights and innocence he can be sure of a very high sentence even if he proves his innocence by circumstantial evidence or proves that the prosecution case is riddled with inconsistencies. Furthermore if a client goes to trial and gets a low sentence the sentence will be increased on Appeal if the prosecutor disagrees with it. *It has become a highly coercive technique to elicit a plea of guilt* and avoid trial and get a lesser sentence (emphasis added).¹²²

There is no question about the increasing frequency of plea agreements in the period after the announcement of the completion strategy for 20 May 2005.¹²³ It is also apparent from a review of sentencing considerations in the Judgments that defendants who pled “guilty” typically received far lighter sentences than did those who pled “not guilty” and were convicted of the same offenses.¹²⁴ Alan Gutman of the Defense Lawyers Unit also opined that bargaining had become an increasingly serious problem because of the pressure to finish cases. He claimed that in 2004 about 75 percent of the cases were plea-bargained under the impact of a plea-bargaining schedule promulgated by the DPGSC which established a

¹²¹ Ramavarma Thamburan, “The Defense Lawyers Unit,” (text of speech circulated at the UN Symposium panel “Future of Serious Crimes,” 28 April 2005), p. 1.

¹²² Thamburan, “The Defense Lawyers Unit,” pp. 2–3.

¹²³ Plea agreements did, of course, occur before this date. See, e.g., the account of the plea agreement in the Joao Sarmiento Case in SCU, *Serious Crimes Unit Information Release*, 12 August 2003.

¹²⁴ Under UNTAET regulations, even where there has been a guilty plea the Court must proceed with a review of the evidence and decide whether or not to approve the plea. Plea agreement cases thus also produce Judgments, which evaluate the plea against the evidence and consider the mitigating and aggravating factors in arriving at the sentence (which is normally the sentence proposed by the prosecution under plea agreement). In such cases the guilty plea (as a supposed expression of remorse and contrition) is taken as a strong mitigating factor.

formula for sentences based upon plea agreements as opposed to those which were not.¹²⁵ Defense counsel, he stated, feared the consequences for their clients if they did not cooperate. In the Aparicio Guterres Case (discussed in Part Three, Section 4), he stated that he was admonished in court by one of the judges that Security Council Resolution 1543 (mandating completion of all trials by 20 May 2005) did not allow for such lengthy questioning.

One DLU lawyer complained about equality of arms in regard to resources and qualifications, but stated that the underlying problem was structural. He pointed to the affect of the UN policy of giving only three- to six-month contracts and the institutional culture of lack of independence that this practice tends to produce. In his opinion, this constrained some defense counsel to consider the interests of the institution in contexts where countervailing interests of their client might have been at stake.¹²⁶ As he put it, “The system as a whole is designed to produce convictions.” DLU lawyer Alan Gutman stated that when he, or others, raised questions about problems or low levels of practice in the Serious Crimes process, participants in a personnel review committee on which he sat would sometimes respond by saying, “We are not the ICTY.”¹²⁷

Two prosecutors and two legal officers in the SCU also expressed similar concerns.¹²⁸ One indicated that it was widely recognized that there were serious problems concerning whether or not defense counsel had fully informed and properly advised the accused in regard to guilty pleas or admissions. One of them said that when she expressed this concern to a DLU lawyer in the context of a particular guilty plea, he told her, “You don’t understand that with some of these people it is better that they don’t understand.” She concluded that there was “a pervasive sense in the system that here it is East Timor, we don’t have enough resources, so international standards are either not possible or don’t apply.” She also stated that although many of the Indictments were weak and many witnesses gave testimony that was not relevant, some prosecutors felt that they could nonetheless rely on convictions being handed down by the judges.

Such views are troubling, but even more disturbing is that some or all of these concerns were shared by some of the Special Panels judges.¹²⁹

Judge Siegfried Blunk and Judge Brigitte Schmid of Germany expressed concerns about the lack of cooperation by defense counsel in the effort to meet the 20 May 2005 deadline for completion of trials.¹³⁰ They both expressed specific frustration about extended cross-examinations and objections. One of them explicitly stated, “Defense counsel should realize that they are part of the UN effort.”¹³¹ This judge’s opinion was that they were all part of one team and that defense counsel must also work for the team to get the cases done on time.

¹²⁵ Interview with Alan Gutman, 30 September 2004.

¹²⁶ This Defense Lawyers Unit (DLU) lawyer preferred to remain anonymous. Interview, 18 February 2005.

¹²⁷ The official name of the personnel committee was: Panel for the Recruitment Review for Posts at the OSRSG, Review of Special Post Allowance (SPA), Review of Staff for Movement to Higher Level Posts and Comparative Review Committee for the Draw Down Plan.

¹²⁸ Interviews, 19 February 2005.

¹²⁹ Because of the sensitivity of some of the remarks made in these interviews with the judges, and because of the potential for reprisal in some cases, although all of the dates and quotations are accurate I give the gender of all of the informants who requested anonymity as masculine.

¹³⁰ Interview, 27 March 2005.

¹³¹ *Ibid.*

Judge Francesco Florit opined that creation of the DLU had made a big difference, but there nonetheless remained a “huge variety in the quality of defense counsel.” He also expressed very serious concerns about the trial process as a whole, explaining how, as of the date of the interview, there had been only three acquittals, one of which was reversed. “This indicates,” he stated, “something is wrong with the system.” He explained further that he was very troubled by both the lack of acquittals and the low level of the defendants, “the very lowest of the militia.” International justice, he said, “should be about getting the big fish,” but they (the Court) have betrayed this mission because they only get the little ones. Expressing his frustration increasingly frankly, he concluded, “We did not come here just to rubberstamp a machine that produces guilty verdicts!”¹³²

Another SPSC judge stated that despite considerable improvement, serious problems nonetheless remained in the trial process. He stated that some of the judges were not willing “to hear both sides.” He then added, “They do not have an open mind about the defense.” These judges, he continued, think that the “defendant is militia” and thus is guilty. “They ignore the presumption of innocence” and use their power in an arbitrary manner.¹³³

Judge Samith de Silva expressed his concerns differently, and focused on problems in the evaluation of evidence and credibility.¹³⁴ Apart from problems in the investigative process, he thought that there were more serious questions about the way in which evidence was evaluated in some SPSC decisions. In particular, he stated, there had too often not been a careful examination of the credibility of prosecution witnesses. Other issues, in his view, included the use of problematic pre-trial statements and forensic evidence, of which he stated, “The forensic process here has had its lapses.” He concluded his reflections by stating that there remained a serious issue of whether justice was rendered to the accused. He expressed his concern about a justice process in which “[t]he biggest organization in the world is trying the poorest people in the world.” He stated that he kept in his office a picture of the humble hut of one of the accused to remind himself of the human consequences of the SPSC verdicts.

In conclusion, as to equality of arms in the narrow sense, one must agree with Judge Rapoza’s assessment that only late in the process had the DLU evolved in such a way that it could perform in a credible enough manner to meet minimum international standards.¹³⁵ From a broader perspective, however, very serious questions remain. When so many of the judges express doubts about central aspects of the proceedings, ranging from their basic fairness to the competence of the defense, integrity of investigations, excessively high conviction rates, and lack of impartiality or possible predispositions to convict, there is cause for concern. The fact that some of the judges would express these concerns as openly as they did indicates the degree of frustration that so many of the participants in these trials clearly felt. When coupled with the documented shortcomings of the defense function in 2001–2002, concerns can only be heightened. For these reasons it is especially important to examine with care the Judgments by which the 84 convictions are justified and to inquire as to whether they support the concerns raised above. This will be the task of the next part of this report.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Interview, 1 April 2005.

¹³⁵ Speech at the UN Symposium in Dili, 28 April 2005. Judge Rapoza also stated that the DLU has evolved to an extent so that “it is *now* possible to speak of equality of arms” (emphasis added).

**PART THREE.
JUDGMENTS AND JURISPRUDENCE:
THE SERIOUS CRIMES TRIALS AND APPEALS**

Although there have been some excellent treatments of particular jurisprudential issues and analyses of particular cases, there have been to date no comprehensive assessments of the Judgments and jurisprudence of the trials before the Special Panels.¹³⁶ The UN Commission of Experts, for example, analyzed at great length the Judgments from trials before the Indonesian Ad Hoc Human Rights Court, but failed to discuss even a single one of the Judgments or trials of the Special Panels. To have done so might have called into question some of their conclusions.

Rather than relying upon summary or anecdotal accounts of the trials, a more comprehensive and systematic analysis is required. This report is based upon an analysis of all of the Judgments and Indictments from the 55 trials completed by 20 May 2005 and all of the Judgments of the Court of Appeal that were available in the Special Panels as of that date.¹³⁷ I discuss here a substantial number (28) of the cases for three reasons. First, to avoid any suggestion that I selected only a few problematic cases. Second, to give the reader a sense of the tremendous range of quality, structure, and style among these Judgments. Third, to rebut as overly simplistic the notion that there were some bad Judgments at the beginning but that the situation greatly improved with time. In fact, the quality of the Judgment depended much more on who wrote it than at what period in the Special Panels' evolution it was written. Certainly, because of changes in recruitment practices and development of expertise over time, there are more Judgments in 2004–2005 that reflect higher standards than in 2001–2002. On the other hand, there also continue to be a significant number of poorly conceived and problematic Judgments in the later period. In regard to the Court of Appeal, their decisions manifest serious problems from the beginning to the end of the process.

The quality of a Judgment depended more on who wrote it than at what point in the Special Panels' evolution it was written

APPLICABLE STANDARDS

This analysis of the Judgments of the Special Panels draws upon several standards. In the first instance, there are the requirements of the UNTAET (2000/30) Transitional Rules of Criminal Procedure (TRCP), which in Section 39.3 set out required elements for the Final Written Decisions of the court of first instance (trial court), including the Special Panels.¹³⁸ These include, to cite those most relevant for present purposes:

¹³⁶ The reference to the treatment of jurisprudential issues is to Linton and Reiger, "The Evolving Jurisprudence." For case analyses see the several excellent case reports of JSMP, such as those on the Lolotoe and Los Palos cases, cited above, and, more recently, *Overview of the Jurisprudence of the Court of Appeal in its First Year of Operation since East Timor's Independence* (August 2004) and *The Paulino de Jesus Decisions* (April 2005).

¹³⁷ I received official versions of all of these from the former Judge Coordinator in June 2005. They are now available to the public on the website of the UC Berkeley War Crimes Studies Center (warcrimescenter.berkeley.edu), as are the website and the public portions of the database of the SCU.

¹³⁸ UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25, 14 September 2001. I will refer to these regulations, for the sake of convenience, as UNTAET 2000/30.

- (b) an account of the events and circumstances of the case tried by the Court;
- (c) an account of the facts that the court considered proved and facts that were not proved;
- (d) an account of the factual and legal grounds of those considerations;
- (e) a finding in relation to the innocence or guilt of the accused identifying the section applied of the penal legislation.

Subsections 39.3b–d give no real guidance as to how extensive or detailed the required “account” must be. It must, however, be extensive enough to be meaningful in terms of the purpose of such rules: that is to inform the accused and the public of the facts relied upon in reaching the decision, the reasons why other alleged facts were not considered as proved, the grounds for the factual decisions, and the grounds for the legal findings that led the Court to its decision. These constitute the bare minimum required for a reasoned decision to inform the accused of the justification for the conviction and the process by which it was arrived at. A full, coherent, and reasoned account is also necessary so that the Court of Appeal can properly exercise its function. Indeed, the ICTY Appeals Chamber has held that a Trial Judgment must enable the Appeals Chamber to discharge its duty by making sufficient findings of exactly what evidence has been accepted as proof of each of the elements for each offense with which the accused has been charged (as well as dealing with the issues of credibility in regard to that evidence).¹³⁹ What underlies this requirement is the obligation of the ICTY Trial Chambers to produce a “reasoned opinion in writing.”¹⁴⁰ While Section 39 of the Transitional Rules does not use this same language in its requirements for the Final Written Decisions of the SPSC, the purport of Subsections b–e is certainly that the Final Written Decision must justify its conclusions through a logical and systematic account of its factual and legal basis and how the findings were arrived at. The description of the Final Written Decision prepared by the Coordinating Judge in 2004 and discussed in detail below interprets Section 39 as requiring a “reasoned opinion.”

At the ICTY and ICTR there has been considerable discussion of the proper structure of a trial chamber Judgment.¹⁴¹ The ICTY Appeals Chamber has held that a Judgment should provide a systematic account of its factual findings in regard to each incident underlying the crimes charged in the Indictment that it regards as having been established beyond a reasonable doubt. The principle underlying this ruling is as applicable to the Special Panels as it is to the ICTR: “An accused is entitled to know whether he has been found guilty of a crime in respect of the alleged incidents under the principle of a fair trial.”¹⁴²

The Special Panels over the course of time established and modified a kind of standard format for their Judgments. One focal point of the inquiry in individual cases will be to examine the adequacy of that format and to consider the cases in which the Judgments significantly deviate from the standard practices of the Court.

¹³⁹ ICTY Kordic and Cerkez Appeals Judgment, paras. 379–388.

¹⁴⁰ ICTY Statute, Article 25.

¹⁴¹ E.g., ICTY Kvočka Appeals Judgment, paras. 22–76; Kordic and Cerkez Appeals Judgment, paras. 379–388.

¹⁴² ICTY Kvočka Appeals Judgment, para. 73.

The analysis also uses two other points of reference in evaluating the Judgments: (1) International norms and practices as reflected in the Judgments of the ICTR and ICTY.¹⁴³ As these Judgments are the most authoritative and extensive source of interpretation on the doctrines and offenses defined by their Statute, one would expect the Special Panel judges to refer to the jurisprudence of these Judgments in their own deliberations. One would also expect that they would provide for the SPSC judges the most convenient and appropriate model for the structure of their own decisions. (2) The discussion of the elements of the Final Written Decision as expressed in the joint “Background Paper on the Serious Crimes Hand-Over Process,” co-authored in respect to the SPSC by its Judge Coordinator. This statement may be viewed as the Judge Coordinator’s understanding of what a decision should include under the requirements of Section 39.3 of the Transitional Rules of Criminal Procedure (UNTAET 2000/30).

The TRCP states that “the Final Written Decision ... will contain an extensive written description of the evidence contained in the transcripts. Consequently there is no need to translate thousands of pages of transcript in cases that are closed and where a translated document exists summarizing the evidence.”¹⁴⁴ In the next section, entitled “Final Written Decisions,” it is stated that “[t]he decision contains an extensive summary of the procedural facts, the evidence heard at trial and the legal reasoning used by the panel to reach its decision.” These guidelines for the Final Written Decision are not reflected in many, if not a significant majority, of the Judgments of the Special Panels.

Many, as will be seen, lack an “[e]xtensive summary of the procedural facts.” While all contain some reference to the procedural facts (i.e., the basic chronology of stages leading up to the trial), in many it is incomplete or abbreviated by significant omissions. In some, it is so sketchy as to be almost useless. In many, there is nothing approaching either “an extensive written description of the evidence contained in the transcripts” or “an extensive summary ... of the evidence heard at trial.” Only a very few Judgments mention all of the witnesses and offer even brief summaries of their testimony. In many cases, however, the judges either refer only very briefly to specific testimony and witnesses or mention only those witnesses whose testimony they rely on in reaching their decision, ignoring the others. In many Judgments, for example, it is impossible to ascertain from the section on the facts and factual findings whether the defense even called any witnesses.

The Judgments also do not follow the usual practice of the ICTY and ICTR of setting out the prosecution’s version of the facts and then the defense’s version, or of the arguments based upon them. This does not mean that the Judgments of the Special Panels needed to be as extraordinarily lengthy as those of the ICTY/ICTR, but rather that they needed to be organized so as to address these areas of concern. They needed in particular to indicate the factual basis and arguments of the defense and prosecution cases and by weighing these against one another to explain why they found what they did. SPSC Judgments typically just have a section for “Proved Facts” (as required by UNTAET 39.3). This means that in most cases there is no systematic analysis or weighing of the evidence presented by both sides as to the elements of the offense. Nor, consequently, is there an account of why the judges found in favor of one account rather than the other (violating one of the material

¹⁴³ See citations in the two previous footnotes.

¹⁴⁴ These quotations are interpretations of the TRCP’s content and are found in the “Background Paper” mentioned above.

elements of 39.3c–d). This serious problem is only exacerbated by the fact that defense arguments are often not referred to at all, or only in the sketchiest and most incomplete form. One is typically left to guess what the defense case was based upon. Thus, in many (if not most) SPSC Judgments it is difficult to ascertain, as UNTAET 39.3 requires, what are the grounds for particular factual and legal conclusions; instead there are brief, summary findings. As noted by the ICTY Appeals Chamber, “[A] catch-all phrase” cannot substitute for a “reasoned opinion.”¹⁴⁵

The underlying principle here is not simply the procedural requirements of a particular court’s statute, but rather the fundamental principle of the right to a fair trial. Under the Constitution of East Timor and applicable laws, this is as much guaranteed to each defendant that appears before the Special Panels as before the ICTY.¹⁴⁶ That these principles apply with equal force in East Timor under its Constitution and UNTAET Regulations has been affirmed in decisions of the Special Panels.¹⁴⁷ As will be seen in the analysis of specific cases in this section, “catch-all” phrases simply asserting that the elements have been met or that guilt has been established are employed in a large number of SPSC decisions.

One might well wonder how this typically abbreviated summary of the evidence might provide the kind of “extensive summary ... of the legal reasoning used by the panel in reaching its decision” necessary for a reasoned justification of the decision. The answer is that for the most part they do not. Typically the SPSC Statute is quoted or elements listed without interpretation or discussion of definitions of elements or of even the most basic jurisprudence bearing upon them. One or two cases are sometimes cited, but rarely discussed. This quotation of the Statute is typically followed by a very brief summary that describes the *conclusion* rather than the *process of analysis and reasoning* that produced it. This lack of an account of the reasoning that supports the legal conclusions and the way in which the law was applied to the facts is one of the most serious shortcomings of the Judgments as a whole and does not follow the material elements required by the applicable law. A reasoned Judgment that explains the basis of a conviction requires an analysis of the elements enumerated in the SPSC Statute (UNTAET 2000/15) and of the theory or responsibility found by the judges to have been proved through the prosecution’s case. In the case of the SPSC, these too often fail.

One would expect that an account of the legal reasoning, and especially of the interpretation of the legal doctrines in question, would be supported by references to international jurisprudence. The decisions of the ICTY and ICTR reflect careful consideration of the way in which the developing case law of the tribunals, and especially of the Appeals Chamber, has shaped our understanding of key doctrines of international criminal law.¹⁴⁸ Such exercises in definition, interpretation, and analysis are especially necessary in international criminal law because so

¹⁴⁵ ICTY Kordic and Cerkez Appeals Judgment, para. 385.

¹⁴⁶ Timorese Constitution, Sections 30–34; UNTAET 1999/1, Article 2; UNTAET 2000/30, Transitional Rules of Criminal Procedure, Sections 2–6; and ICCPR, Article 14, which was binding upon the Special Panels and Court of Appeal.

¹⁴⁷ See, e.g., the Findings and Order on Defendant Nahak’s Competence to Stand Trial (Case No. 1a/2004), pp. 8–10. Judge Rapoza in this decision notes that the body of applicable international law for these purposes includes the jurisprudence “of other international courts and tribunals” (p. 10).

¹⁴⁸ The nature and scope of the Judgments of the ICTY and ICTR have been shaped largely by the understanding of the civil law judges of those tribunals (and particularly the ICTY) and are thus in no way incompatible with the civil law orientation of the Special Panels.

many critical doctrines, such as the law of command responsibility, joint criminal enterprise, genocide, and crimes against humanity, have only been fleshed out and articulated by the decisions of the ICTY and ICTR. In many Judgments of the Special Panels there is no reference at all to this body of case law despite its immediate relevance to the case at hand. Some judges, on the other hand, regularly referred to ICTY and ICTR cases. Such references, while not strictly necessary in any sense of “precedent,” would have greatly assisted in arriving at a more systematic, coherent, and accurate interpretation and application of relevant doctrines. Even more importantly, using them as a model might have helped some of the Judgments avoid misapplying, or neglecting to apply, the elements of the offenses as defined by the SPSC’s own Statute. Instead, in many such Judgments the Panel seems to be, jurisprudentially speaking, groping in the dark.

In short, although the statement of the requirements for a Final Written Decision by the Coordinating Judge might lead one to expect some sort of uniformity in the Judgments, there is very little. The lack of uniformity in the Judgments may be seen as directly related to an even more serious lack of consistency in their quality and in the proper application of the law of the Special Panels’ Statute.

The cases that follow were selected both to represent particular issues and to reflect the way that the practices and jurisprudence of the Special Panels developed over time. The sections are organized around the different series of case numbers reflecting the years in which the Indictments were filed. Altogether, the analysis will encompass almost half of the cases that came before the Special Panels, which should alleviate any concerns about the representativeness of the selection.¹⁴⁹

SECTION 1: SELECTION FROM CASES FILED IN 2000¹⁵⁰

A. Trial of Joao Fernandes: Uncertain beginnings

As a sort of baseline, and because of some of the issues they raise, Section 1 will consider 6 of the 11 Judgments of the Special Panels in the earliest 12 Serious Crimes cases, for which Indictments were filed in 2000. In the first case decided by the Special Panels, involving the prosecution of Joao Fernandes on a single charge of murder,¹⁵¹ the accused pled guilty at his arraignment. At the pre-sentencing hearing where the Court must satisfy itself of the validity of the plea, the Special Panel asked the prosecution why the accused was not charged with murder as a crime against humanity, instead of ordinary homicide under the Indonesian Penal Code.¹⁵² The prosecutor, according to the Judgment, explained that although there

¹⁴⁹ All SPSC cases cited in this report are referred to by the name of the accused and the case number. This will enable easy reference to online resources where the Indictments and Judgments are available (warcrimescenter.berkeley.edu). Also, page citations to Judgments referred to in Part Three appear in text.

¹⁵⁰ There are 12 cases (1/2000 to 12/2000) and 11 Judgments. Two of these will be considered later, along with the Armando dos Santos Case, because they all involve similar issues and controversial rulings by the Court of Appeal. I do not consider the Los Palos Case because it has been the subject of extensive analysis and JSMP has devoted entire reports to it (cited above).

¹⁵¹ Case No. 1/2000, Judgment of 25 January 2000. On this case (and 2/2000) see the excellent treatment by Linton in “Prosecuting Atrocities at the District Court of Dili.”

¹⁵² The Special Panels were bound, according to their Statute, to apply both the law applied in East Timor prior to September 1999 (that is, Indonesian law) and the definitions of crimes against humanity, war crimes, and genocide, incorporated with modifications into their Statute from the Statute of the International Criminal Court (UNTAET 2001/25, Section 8).

were widespread and systematic attacks against the civilian population in East Timor in 1999 (these are required elements of crimes against humanity), in this particular case there was no evidence at hand of these elements, hence the charge of ordinary murder.

This key paragraph of the Judgment is, however, so poorly written that parts of it are unintelligible.¹⁵³ One example will suffice. The Court states that “[t]he prosecutor then explained that she charged one murder because there is no evidence of crimes against humanity, *the accused is detained and seek[s] a quick justice*” (p. 2, emphasis added). What do these last words mean and do they still refer to what the prosecutor said? Who, exactly, seeks “a quick justice” and what does this mean? Is the prosecutor (who was a native English speaker) here presented as purporting to speak for the accused? What is the meaning of “the accused is detained” in this context? None of this is clarified by the Judgment. The accused was sentenced to 12 years imprisonment.

The Timorese judge on the Panel wrote a strong dissenting opinion that is far more lucid than the opinion of the majority

The Timorese member of the Panel, Judge Maria Pereira, wrote a strong dissenting opinion that is far more lucid than the opinion of the majority. She argued that the accused should have been charged with crimes against humanity. Indeed, the facts of this case raise the issue of why the prosecution in the first 12 trials only charged the accused with ordinary murder instead of seeking to establish the broader context of crimes against humanity in which these murders took place. It has been suggested that the SCU refrained from indicting for crimes against humanity in these first cases so as to simplify and shorten the trials. The garbled remark about seeking “a quick justice” may perhaps reflect such a policy. It certainly seems, however, that the Indictment could have, under the facts recounted in the Judgment, been framed as a crimes against humanity charge.

Apart from these issues the majority opinion provides only the most minimal enumeration of the elements of murder. One would expect that in the first Judgment of the Court, a careful foundation would be laid for future decisions. There is no discussion of definitions and no citation of cases. In the majority opinion there also appear to be factual errors that reflect a lack of care and proofreading.¹⁵⁴ As will be seen, it is not without significance that the Timorese judge here, in her first case, writes a more careful, accurate, and sounder opinion than the international judge who authored the Judgment.

On appeal, Judge Fredrick Egonda-Ntende of the Court of Appeal wrote a separate opinion that challenged the validity of the conviction entered by the Special Panel. He raised an issue that was of continuing importance as the Serious Crimes trials proceeded. This involves the obligation of the judges under the Statute of their court to ascertain whether the accused “understands the consequences of the admission of guilt,” whether the admission is voluntary and was made “after sufficient consultation with defense counsel,”

¹⁵³ I am quoting the English original version of the Judgment.

¹⁵⁴ E.g., in the majority opinion the prosecutor is listed as Brenda Hollis, in the dissenting opinion as Brenda Sue Thornton (which must be correct, as in Case No. 2/2000). The majority opinion gives only the first name of the second prosecutor and misspells it, while the dissenting opinion gives the correct spelling of the full name. The majority opinion lists three defense counsel, the dissenting opinion, four. UNTAET Regulation 2000/30, Section 39.3, requires that the parties be specified in the Judgment. On the whole, many of the Judgments are rife with editorial and typographical errors. Sometimes these are on matters of importance. For example, the date of the murder in Case No. 5/2000 is given by the Court at one point as 26 September 2001, which is impossible given that the Judgment was delivered on 11 June 2001. The correct date is 26 September 1999.

and whether it is “supported by the facts of the case.”¹⁵⁵ He argues at some length that the process of ascertaining if these statutory requirements have been met cannot be a mere formality. The Court must question the accused sufficiently to determine if in reality he understood the nature and consequences of his plea and had been sufficiently counseled by his lawyer. Further, “[t]he record of the trial court ought to show that the accused understood these consequences” (p. 10). It must also reflect that the accused acknowledged the specific evidence against him. On numerous occasions the record leaves considerable doubt as to whether the accused had any real grasp of what he was doing in making inculpatory statements when asked how he would plead. The same is true in regard to the adequacy of consultation with counsel.

B. Trial of Julio Fernandes: Moving ‘in the dark’

Aspects of this trial were discussed in Part Two of this report under “Equality of Arms and Right to an Adequate Defense.” Again, the accused is charged with ordinary murder.¹⁵⁶ Parenthetically, it appears from the Judgment that the accused was unlawfully detained for three months on an expired detention order. The terse description of the proceedings implies that there was virtually no defense advanced against the charges and concentrates only on the evidence presented by the prosecution (though a later section indicates that a defense of duress was put forward). The difficulties with a partial admission of guilt without “sufficient consultation with the defense” have been discussed above, though it appears not to have been of any concern to the judges in this case. Of interest here is rather the treatment of substantive legal issues.

The Judgment enumerates the elements of murder as follows: “the perpetrator, the deliberate intent, the premeditation and take somebody’s life [*sic*]” (p. 7). There is *no* citation of where these elements come from. The Court’s discussion appears to consider premeditation and deliberate intent as synonymous, and as both required by the Indonesian Penal Code definition of murder. As authorities for its analysis, the Court vaguely refers to “Indonesian jurisprudence and the interpretation of murder in different countries.” There are no citations to or discussion of any Indonesian cases or jurisprudence or to doctrinal practices in “other countries.”

In regard to the defense of duress, which has a very complicated and uncertain basis in international law and varies widely among national jurisdictions, the Court cites Indonesian Penal Code Section 49, which deals with self-defense against “immediate threatening unlawful assault.” There is no discussion of how this provision on self-defense against assault might apply to the circumstances of the defendants, what the required elements of that defense might be, or of how they have been interpreted in Indonesian law. The accused was sentenced to seven years imprisonment. Judge Maria Pereira dissented. Although the international judges on the Panel were supposed to be her mentors, it is she who again set a higher standard here. She focuses clearly on the required elements, discusses their meaning, and argues that because the accused acted spontaneously the requirement of premeditation was not met.

This case was heard on appeal, and the decisions rendered by the Court of Appeal are instructive. The majority opinion, to summarize briefly, basically agreed with the position taken by Judge Pereira’s dissent, and substituted a conviction under Indonesian Penal Code Section 338, which does not require premeditation. They reduced the sentence to five years.

¹⁵⁵ UNTAET 2000/30, Section 29A.1a–c.

¹⁵⁶ Julio Fernandes Case, No. 2/2000, Judgment of 27 February 2001.

Judge Ntende of the Court of Appeal, however, delivered a blistering dissent which criticized both the Court of Appeal and the Special Panel on a number of grounds. His opinion analyzes the elements of duress, which the Special Panel entirely failed to do. He states that he could not find testimony in the trial record to support the factual findings made by the Court and also reproves the Special Panel for failing to provide any citation for its vague references to Indonesian law and to “other jurisdictions.” In regard to the Court of Appeal, he notes that *they have raised and decided issues on their own, without giving the parties an opportunity to be heard*. This, he says, is not “good practice.” Judge Ntende also points out that he could not read the majority opinion because it was in Portuguese and no one provided him with a translation (para. 36). It is clear from his dissent that the Court of Appeal was not functioning as a deliberative body. The Judgment was also read out in Portuguese, which the accused and his counsel could not understand, and no translation was provided.¹⁵⁷

Finally, Judge Ntende castigates the parties and the Panel for admitting seven pre-trial statements, with the consent of the defense, so that the witnesses did not need to be called to testify in Court. He states that neither the prosecution that made this request, nor the Panel that approved it, made an effort to specify the legal basis for it. Indeed, he argues that in allowing the evidence to be presented in this manner the Court violated the clear language of its Statute which provides that “[w]itnesses shall be heard directly by the Court, unless for good cause the Court determines that a different procedure may be used. Any procedure for the presentation of witness testimony must take account of the rights of all parties to a fair hearing.”¹⁵⁸ As he concludes, “The court and counsel *chose to move in the dark unaided by the light of the law* that applies to reception of evidence by the court” (para. 51, emphasis added). His analysis makes clear that defense counsel compromised the rights of the accused in summarily agreeing to the admission of these statements.

One further aspect of this case bears upon the analysis of subsequent decisions. As their standard of proof, the Special Panels placed the burden on the prosecution to prove their case beyond a reasonable doubt (pp. 7, 9). While the Transitional Rules of Criminal Procedure (UNTAET 2000/30, Section 6.1) provide that anyone accused of a crime must be assumed innocent “until proven guilty in accordance with law,” it does not specify what standard of proof the prosecution is required to meet. Reasonable doubt was explicitly held to be the appropriate requirement of proof in the Joni Marques Case (9/2000, p. 349) and remained the standard practice for the Special Panels. Judge Rapoza explicitly addressed this issue again in the Josep Nahak competency decision and affirmed that the applicable standard of proof was that “every element of an offense must be proved beyond a reasonable doubt.”¹⁵⁹ As will be seen, the Court of Appeal often ignored this standard in its decisions in Serious Crimes cases.

¹⁵⁷ See Suzannah Linton, “Prosecuting Atrocities.” See also the JSMP report of 29 October 2001: “The majority Judgment was rendered in Portuguese, a language neither Fernandes, his Public Defender, nor the Public Prosecutor can understand. Despite the fact that three court interpreters were present in the courtroom, the President of the Court of Appeal decided to give an improvised verbal summary of the decision in Tetum for the benefit of Fernandes, and a summary of the main legal points in English.” (“Court of Appeal Reduces FALANTIL Member’s Sentence to 5 Years,” news release, p. 1.)

¹⁵⁸ UNTAET 2000/30, Section 36.1.

¹⁵⁹ Case No. 1a/2004, Findings and Order on Defendant Nahak’s Competence to Stand Trial, p. 23. For a discussion of the applicability of this standard at the international tribunals, see ICTR Musema Appeals Judgment, paras. 63–74.

C. Trial of Carlos Soares Carmone: Weak Indictments, weaker jurisprudence

In the trial of Carlos Soares Carmone for murder¹⁶⁰ there was a confused and partial admission of guilt not sufficient to constitute a guilty plea,¹⁶¹ and a finding at the first preliminary hearing that the accused “didn’t understand the charges against him.” The Indictment is extremely abbreviated and charges premeditation but fails to support it with factual allegations. More seriously, there are manifest shortcomings in the factual findings and factual analysis of the Judgment.

Under “Factual Findings” the Court says that there is no dispute as to the allegations of the prosecution because the accused “acknowledged them.” In reviewing the testimony, however, it appears that there were major and vital discrepancies in the various witnesses’ accounts of the murder. These discrepancies were not analyzed, weighed, or explained by the Court to justify their findings. This also points to a serious failure by defense counsel. Although there is a better discussion of duress than in previous cases, the analysis of the definition of premeditation is weak. On appeal, the Court of Appeal advances a different definition of premeditation.¹⁶² Neither the Court of Appeal nor the Special Panel supports its definition with legal analysis or jurisprudence. They simply present, as given, two different definitions, with no reference to what jurisdiction’s law or jurisprudence might support them.

One further disturbing aspect of the Judgment of the Court of Appeal is its decision on one of the three grounds of appeal advanced by the accused: that the prosecution did not call two witnesses that it knew might exculpate the accused. The response of the Court of Appeal is, among other things, that “if Appellant considered that the depositions of the above individuals were important for his defence, he should have requested their hearing.” When the defense counsel was asked if he had any evidence to produce at trial he said no.

The Court of Appeal here misses the point. The issue is not whether the defense could or should have adduced this testimony, but whether the prosecution had an obligation to do so. UNTAET Regulation 2000/30, Section 7.2, provides that “the public prosecutor shall investigate incriminating and exonerating circumstances equally.” Further, the accused has the right to “request the Public prosecutor or Investigating Judge to order or conduct specific investigations in order to establish his or her innocence” (6.3e). It is not clear from the record whether the accused was ever informed of or understood this right.

Especially in light of the fact that it was known to all that the defense had no investigative resources and no capacity either to go into the field itself or to bring witnesses to Court, it seems callous and ungrounded to sidestep this issue by simply saying that the defense should have called these witnesses if they considered their testimony important. It also sidesteps the issue of the responsibility of the prosecution and the judges to ensure that exculpatory evidence is adduced. The seeming lack of concern on the part of the judges of both the Special Panels and the Court of Appeal that the defense called no witnesses in the first 14 trials underscores the seriousness of this point.

¹⁶⁰ Case No. 3/2000, Judgment of 25 April 2001.

¹⁶¹ Significantly, there were both international and Timorese defense counsel representing the accused.

¹⁶² Decision of 2 August 2001, written by Judge Ximenes.

D. Trial of Yoseph Leki: Facts which ‘do not call for any formal evidence’

The trial of Yoseph Leki is important because it reveals how a certain pattern developed at this very early stage in the Special Panels’ approach to crimes against humanity.¹⁶³ On the whole, however, the Judgment in this case is far more thorough than those previously discussed in considering the evidence introduced by both parties and applying it systematically to the enumerated elements of the crime. Although Leki was only charged and convicted for ordinary murder, in the “Factual Findings” section of its Judgment the Court makes findings on facts unrelated to the ordinary murder charge, but which could establish the “chapeau elements” that are a prerequisite for a charge of murder as a crime against humanity.¹⁶⁴

In addition to finding that there was a widespread attack against the civilian population, the Panel found that Yoseph Leki was aware that his conduct was part of the broader context of violence organized by the Indonesian military in the aftermath of the popular consultation of 1999: “the plan outlined and executed by Indonesian military forces and its supported local militia groups was the forced deportation of hundreds of thousands of East Timorese” (p. 7). The problem here is that no evidence was introduced at trial to support these findings because crimes against humanity were not charged by the prosecution. The Court deals with this by stating that “[t]hose facts do not call for *any formal evidence* in light of what even the humblest and the most candid man in the world can assess” (emphasis added).

What this statement seems clearly to indicate is that the Court had already made up its mind on a key issue that would confront it in various trials, without having heard any evidence at all. Indeed, it seems to justify its findings with reference to what it considers to be an irrebuttable preconception. The way it phrases its finding bears both on the guilt of the accused in this case and upon future prosecutions for crimes against humanity. This finding suggests a lack of impartiality on the part of the Court that goes against the presumption of innocence, the prosecution’s burden of proof beyond a reasonable doubt, and the right of the defendant to contest the evidence against him. In general, this Judgment also suffers from the same kind of defects in analysis, findings, reasoning, and jurisprudence evident in others from this period.

E. Trial of Mateus Tilman: Incoherent attempts

Mateus Tilman was tried and convicted for attempted murder for his participation in a militia attack on a house that was burned down, though with no loss of life.¹⁶⁵ Three aspects of the Judgment deserve attention here: (1) problems of language, (2) the confusion of factual findings and legal analysis, and (3) flawed jurisprudence and legal reasoning on the key issue of the requirements for attempt.

The English in which the Judgment is written is at times so questionable as to be unclear or incoherent, including on crucial points where precision is required.¹⁶⁶ For

It seems that the Court had already made up its mind on a key issue that would confront it in various trials

¹⁶³ Case No. 5/2000, Judgment of 11 June 2001.

¹⁶⁴ Such a showing requires the establishment of what are commonly referred to as the “chapeau elements” of crimes against humanity in addition to the specific elements of murder as a crime against humanity. Briefly, the chapeau elements include that the crime alleged was part of or connected to a widespread or systematic attack against a civilian population and that the accused was aware of this connection. (See ICTY Kordic and Cerkez Appeals Judgment, paras. 93–100.) This is typically done by introducing evidence on the broader context and organization of the violence of which the crime charged is a part.

¹⁶⁵ Case No. 8/2000, Judgment of 24 August 2001.

¹⁶⁶ The Judgment notes that the original was promulgated in both English and Bahasa Indonesia, with “the English text being authoritative” (p. 14).

example, the “Factual Findings” section of the Judgment includes the following two paragraphs, which I quote in their totality. Ensuing paragraphs continue the consideration of various facts and theories:

The victims’ attempt of death and the link between the conduct and the outcome proved ...

The court has to assess here two important controversial points raised by the defendant and the defense for the defendant: 1) the result aimed by the group in the attack of Laranjeira’s family whether or not it was the death of the victims of the attack. 2) The individual criminal responsibility of attempt [*sic*] murder and its exemption by the duress. The court shall point out its belief according to what it has been proved by both parties and pursuant the legal provisions on the matter. (paras. 36–38)

Neither of these paragraphs are factual findings. They, and the ensuing paragraphs, contain statements about what each party contended about factual and legal matters, weighing of these contending considerations, and analysis of legal issues, such as individual responsibility.

As to the requirements for attempt, the Court does not analyze the elements required to convict. They cite Indonesian Penal Code Section 153, which does not define the required mental element (the crucial core of the law of attempt) and they neglect to discuss the import for the liability of the accused of one of the two key requirements of that Section, “that the performance is not completed only because of circumstances independent of his will.” There is no discussion at all of this element despite the fact it could be seen as crucial in the case at hand. There is also no consideration of any case law or jurisprudence on attempt, which is a complex doctrine whose definition varies widely among national jurisdictions and which has been scarcely explored in international criminal jurisprudence.

Apart from further such doctrinal problems, the Panel appears to reach contradictory conclusions on the crucial issue of what the mental element of the offense (*mens rea*) in fact was: on the one hand that the accused shared the criminal intent of the group of which he was a member, on the other hand that he only had knowledge of their intent, but did not share it. Thus, paragraph 50 of the Judgment finds that:

By joining also the operation launched on 2 September, he previously and intentionally shared the aim of furthering the criminal activity of the group. ... Even though he did not share their criminal purposes, the Special Panel has no doubt that the accused gave his contribution “in knowledge of the intention of the group to commit the crime.”

F. Trial of Carlos Soares: Second guessing the Special Panels

Carlos Soares was accused of having murdered an old man by shooting him in the head at close range during the course of a militia raid that he was leading against a village.¹⁶⁷ The defense presented no witnesses or evidence. He was convicted and sentenced to 15 years and 6 months imprisonment. This sentence was reduced on appeal to 13 years, which is the reason for including this case in the present review. A preliminary point about the impact of inadequate resources on the trial and appeals process is worth noting. Confirming concerns about the transcription of the trial proceedings, the Judgment of the Court of Appeal states

¹⁶⁷ Case No. 12/2000, Judgment of 31 May 2001.

that the only trial record consisted of notes taken by one of the judges on a laptop. It states that this record, when printed out, comprised 25 pages. Considering that the trial took three days, it is hard to imagine that a complete record of all that transpired could be contained in 25 pages. This raises concerns about the completeness and accuracy of this official “record” of the trial.

In the decision of the Court of Appeal, the grounds of appeal are not specified, as required by Regulation 2000/30, Sections 40.5c and 40.1. The Judgment does not analyze why the sentence of the trial court was so deficient that it must be overturned on one of the specified grounds. A final decision by the Court of Appeal must meet the same requirements as for the Judgments of the Special Panels (UNTAET 2000/30, Section 41.5). They seldom do so in Serious Crimes appeals cases.

It is also typical of the Court of Appeal that the adjustment of the sentence is a relatively minor one, usually of one or two years.¹⁶⁸ In such cases it is hard to see how the sentence could be so egregious as to be overturned on one of the specified grounds if only such a minor adjustment is required. The reason given in this case is that this murder was not particularly serious compared with others that occurred in East Timor, because it was not accompanied by torture or mutilation. On the factual findings of the Special Panel, which were explicitly approved by the Court of Appeal, however, the accused shot in the head at close range with a military assault rifle an unarmed and defenseless old man, who was cowering in fear in a cluster of bamboo while attempting to hide. It is hard to see how this sentence, especially in relation to others handed down at the Special Panels, is so grossly disproportionate as to represent a miscarriage of justice or a violation of the rights of the accused such as to justify modification of the sentence. If it were, certainly a larger adjustment would be required.

The underlying problem here is a practice that runs through the appeals process in Serious Crimes cases from start to finish. That is, the lack of specification of a standard of review and the concomitant disposition of the Court of Appeal to “retry” the case on the basis of the record and arrive at its own assessment about the case as a whole. Such a conception of the function of this court of second instance is neither envisioned by the UNTAET Regulation 2000/30, Sections 40 and 41, nor consistent with the practice of the appeals chambers of any of the other international and hybrid tribunals. This is relevant for the Court of Appeal because under the Constitution of East Timor and applicable UNTAET regulations, “[i]nternational principles and norms *applicable in East Timor* can be discerned not only through the Rome Statute and the RPE [Rules of Procedure and Evidence of the International Criminal Court (ICC)], but *also in the jurisprudence of other international courts and tribunals*” (emphasis added).¹⁶⁹

In contrast to universal international practice (and the norms of most national systems), in case after case the Court of Appeal failed to understand the function and limitations of an appeals chamber. Their Statute defines only four specified grounds of appeal, none of which authorize the Court of Appeal to approach the case *de novo* and substitute its evaluation of the evidence and issues for that of the Special Panel. Perhaps this is the reason it almost never discusses issues of standard of review, adequacy of grounds of appeal, and so on.

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¹⁶⁸ See JSMP, *Overview of the Jurisprudence of the Court of Appeal*, pp. 13–18.

¹⁶⁹ Decision of Judge Rapoza in Case No. 1a/2004, Findings and Order, p. 10.

SECTION 2: SELECTION FROM CASES FILED IN 2001¹⁷⁰

A. Trial of Francisco Pedro: Rushing to judgment?

The Francisco Pedro Case, involving murder as a crime against humanity, is interesting for two reasons.¹⁷¹ First, although it was filed as Case No. 1/2001 on an Indictment from 13 January 2001, it did not come to trial until 31 March 2005, only weeks before the end of the last Serious Crimes trial. Second, the Judgment reflects the pressure exerted by Security Council Resolution 1543, mandating completion of all pending cases by May 2005.

In regard to the first point, the delay in bringing this case forward seems to reflect both case management problems at the SCU as well as difficulty in drafting satisfactory Indictments.¹⁷² The first Indictment was filed on 13 January 2001 and alleges both that the accused stabbed the victim and that he aided and abetted the stabbing. In a hearing of 4 May 2001, the Special Panel pointed out that the allegations did not make sense. The prosecution responded, curiously, by filing an amended Indictment on 10 May, which left these allegations unchanged, but added another defendant. The Court, accordingly, dismissed the case on 22 May and the prosecution appealed. It subsequently withdrew its appeal and filed a second amended Indictment on 31 January 2002. Third and fourth amended Indictments were also subsequently filed. Overlooked for almost two years, the case was finally assigned to Judge Blunk on 3 December 2004. This only occurred because the Judge Coordinator conducted an audit of all pending cases in late 2004 and discovered that they included that of Francisco Pedro.¹⁷³ On 14 December the prosecution asked and was granted leave to withdraw the third and fourth amended Indictments. After a preliminary hearing on 14 February 2005, on 30 March the trial began. The next day, however, the accused changed his plea to guilty on three counts and the prosecution, apparently under a plea agreement, withdrew the other counts.

That the plea agreement was made under institutionally imposed pressure to complete cases quickly is indicated by the Judgment itself. In considering mitigating circumstances in the Sentencing section of the Judgment, Judge Blunk writes, “Mitigating is ... that before the Court he pleaded guilty on the second day of the trial, *so that* the Court whose lifespan ends on 20 May 2005, can turn its resources to the remaining trials, which according to OP 8 Security Council Resolution 1543 should be concluded ‘*as soon as possible*’” (p. 8, emphasis added).¹⁷⁴ The accused was sentenced to eight years imprisonment.¹⁷⁵

¹⁷⁰ Cases 1/2001 to 21/2001. There are 23 Judgments from these 21 cases, because in cases involving multiple defendants, when one or more change their plea to guilty during the course of the trial, they are severed from the other defendants and a separate Judgment is issued, with the same case number but designated as, for example, 4a, 4b, 4c, etc.

¹⁷¹ Case No. 1/2001, Judgment of 14 April 2005.

¹⁷² JSMP has often noted the weakness of some SCU Indictments. See, e.g., JSMP, “Special Panel Dismisses Indictment Against Alleged Aitarak Militia Members,” news release, 15 July 2003.

¹⁷³ Written communication by Judge Rapoza to the author, 5 December 2005.

¹⁷⁴ The Judgment is 10 pages long, three of which are taken up with sentencing and disposition; one is a cover page, and two discuss procedural background. The four pages devoted to analysis of the allegations, factual findings, and legal findings analysis are competent, though abbreviated.

¹⁷⁵ Francisco Pedro had spent more than 18 months in pre-trial detention, which was deducted from his sentence.

B. Trial of Augusto Asameta Tavares: Reasonable doubts?

This case, like the next one to be discussed, raises serious questions about the adequacy of defense counsel and indicates how, given more competent counsel, the interests of the accused might have been advanced.¹⁷⁶ It involves an indictment for ordinary murder arising out of participation in a group militia attack.

The trial of Augusto Asameta Tavares was a brief affair. At the preliminary hearing (27 February 2001) the accused had pled not guilty but also made an ill-advised admission that he stabbed the victim under orders. The trial lasted one day, 12 June 2001. The prosecution called five witnesses. The defense presented no witnesses or evidence. He was convicted of murder and sentenced to 16 years imprisonment, but this was reduced to 9 years by the Court of Appeal on 24 November 2004, though it is not clear from the Judgment what the rationale or justification was for this reduction.

All of this seems straightforward enough. The problem is that, according to the Judgment, *none* of the five prosecution witnesses saw the attack on the victim. The prosecution witnesses were only able to testify about the attack on their village in general. The *only* evidence referred to in the Judgment about the attack on the victim came from the several pre-trial and trial statements of the accused himself. The Court convicted him on the basis of those statements alone (which had previously been held not to constitute a guilty plea), even though the Court itself finds these statements “*fraught with inconsistencies and contradictions*” (p. 9, emphasis added). The forensic evidence did not help the Court. There were multiple assailants and the accused testified that he struck only one glancing blow on the arm of the victim. Forensic examination of the skeletal remains, however, showed that there was no wound on either arm of the victim. The autopsy report concluded only that death was caused by blunt force injuries. The Court concluded in its findings that he stabbed the victim, but that it was unknown on what part of the body. What is important, the Court concluded, is that he participated in the attack and, with other assailants, caused wounds which resulted in death. This is reasonable enough, except for the lack of independent testimony that he participated in the assault at all.

Had the accused understood his right to remain silent and the consequences of electing not to do so?

An experienced defense counsel would have destroyed the prosecution’s case. The prosecution presented not a single witness that could testify as to the attack on the victim. The Court found that the *only* evidence of the accused’s participation lacked credibility and was full of contradictions. The critical question, though, is whether defense counsel and the Court had made sure that the accused understood what he was doing when he pled not guilty, but then made a statement that provided the only evidence against him. Had he understood his right to remain silent and the consequences of electing not to do so? Obviously, if an accused wants to admit his guilt, express remorse, and accept punishment that is his right. But Augusto Tavares pleaded “not guilty” and wanted a trial. If his defense counsel had all along made sure he understood the meaning and consequences of what he was doing and advised him to exercise his right to remain silent (of which he seemed wholly unaware despite a formal acknowledgement of it), there would have been no case to answer.

Equally serious is the Special Panel’s lack of clarity as to the theory of responsibility that grounds the conviction. On the one hand, the Court found him guilty of having stabbed

¹⁷⁶ Prosecution of Augusto Tavares, Case No. 2/2001, Judgment of 28 September 2001.

the victim and thereby contributed to the cause of his death. This seems to indicate direct perpetration and participation in the attack that caused the death of the victim. On the other hand, the Court also seems to find that his participation in the crime took the form of “one who aids, abets, or otherwise assists in its commission.” But the same paragraphs also suggest that his liability is predicated upon aiding and abetting or upon a joint criminal enterprise theory of sharing in a common criminal purpose: “From the time when he joined until the operation, he had many chances to refuse to share the purposes of the militia group.”¹⁷⁷ In the extremely brief section of the Judgment entitled “The Law,” the theory of responsibility is not made clear, though the UNTAET provisions cited do *not* include direct commission of the criminal act. No explanation is given as to why direct perpetration has been dropped. The only statement on the theory of responsibility in “The Law” section of the Judgment states, in its entirety, “Even if Augusto Asameta Tavares was not the main murder perpetrator his individual responsibility is met in Section 14.3(c and d) of UR 2000/15.” Those sections, however, include several distinct forms of liability. It is one of the most basic tasks of a Judgment to specify the theory of responsibility, enumerate the grounds necessary to establish it, and indicate the legal reasoning that led to the conclusion of guilt (as required by UNTAET 2000/30, Section 39.3d). This, the Judgment against Augusto Tavares fails to do.

The various theories of individual responsibility, and especially the doctrine of joint criminal enterprise, and its relation to co-perpetratorship, have received enormous attention from the ICTY and ICTR.¹⁷⁸ This jurisprudence might have assisted the Court in clarifying the grounds of its decision and in making its reasoning clearer. It is not referenced in the Judgment at all. The burden of this inadequacy is born by the accused.

Should there be any doubt about the applicability of international case law to proceedings at the Special Panels, the Decision of Judge Rapoza in the Josep Nahak Case states,

... Section 9.1 of the Constitution of East Timor states that ‘[t]he legal system of East Timor shall adopt the general or customary principles of international law.’ Similarly, any ‘[r]ules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor’ following their formal approval and publication. Section 9.2 of the Constitution. Accordingly, international law has official status in East Timor and is thus binding on this Court.

The constitutional provisions requiring the application of general or customary principles of international law are consistent with parallel UNTAET regulations that have not yet been repealed and which thus continue to serve as applicable law [ensuing citations omitted].¹⁷⁹

C. Trial of Jose Valente: What was he thinking?

In the Jose Valente Case the focus is upon the conduct of the defense.¹⁸⁰ The defendant was charged with ordinary murder for his participation in a militia attack. On the date of the

¹⁷⁷ Note also that in paragraph 49, the Judgment uses verbatim the two confusing sentences analyzing whether or not the accused shared the group’s criminal purpose that were quoted above in discussion of the Mateus Tilman Case (No. 8/2000). The Judgment just substitutes the date of the different attack.

¹⁷⁸ See, e.g., ICTY Vasiljevic Appeals Judgment, paras. 94–103. Paragraph 102 considers the differences “between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor.” The Special Panel finding covered both without any examination of the distinction of what is required to prove them.

¹⁷⁹ Case No. 1a/2004, Findings and Order, p. 8.

¹⁸⁰ Prosecution of Jose Valente, Case No. 3/2001, Judgment of 19 June 2001.

preliminary hearing, 7 March 2001, the defense counsel did not appear and the hearing was postponed until 26 April. On that date considerable confusion arose about how many counts there were in the Indictment, which the prosecution attributed to mistranslation. The defense made no objection to proceeding on this basis, although one can imagine that there might well have been good grounds to object under such circumstances. The accused pled not guilty but made a confusing, legally incoherent, and very damaging statement in which he stated that he was guilty as an individual but not guilty as a member of a group. One can only wonder whether the defense counsel had properly counseled his client and informed him adequately of the meaning and import of the plea, or of his right not to make any statement.

The preliminary hearing was then postponed until 2 May, to give the defense time to figure out what his client's plea actually should be. The interim period does not seem to have clarified his thinking, for on 2 May the defense counsel stated that his client pled guilty, but not to the crimes of murder as charged in the Indictment, but rather to manslaughter. The Court refused to accept this confused statement as a guilty plea because it did not address the crime with which the accused was charged. The prosecution requested an extension of detention pending trial and the defense counsel responded *that he had no objection to his client's continuing incarceration*. In this context the direct connection of the incompetence of defense counsel to serious harm to the interests of the accused could not be clearer.

When the trial began on 16 May, defense counsel submitted a document in which the defendant admitted some of the facts against him. The prosecution called five witnesses, the defense none. The prosecution also requested to have the pre-trial statement of one of its witnesses admitted into evidence without calling him to testify and *the defense agreed to this without objection*. As noted above in the discussion of the opinion of Judge Ntende in the Julio Fernandes Case, this practice violates the Statute of the Special Panels.¹⁸¹ Jose Valente was sentenced to 12 years imprisonment.

If one asks if Jose Valente had a fair trial, it seems clear enough that he had defense counsel who was unprepared, passive, and seemingly incompetent. He agreed without objection to every request made by the prosecution, including the continued incarceration of his client and the introduction of incriminating evidence without an opportunity to cross-examine. He called no witnesses and made a statement that conceded his client's connection to the crime but was inadequate to constitute a guilty plea. He seems initially not to have known if his client was pleading guilty or innocent. If he did intend to offer a guilty plea, he seems not to have known how to make one the Court would accept. His client seems to have had no comprehension whatsoever of what was transpiring when the judges asked him if he wanted to make a statement or what the consequences of a statement might be. He appears not to have understood his right to remain silent or how or why he might use it.¹⁸² The defense counsel seems to have had no coherent strategy and at virtually every stage to have made the situation worse rather than better for his client.

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¹⁸¹ UNTAET Regulation 2000/30, Section 36.1. There was no showing of good cause as required by the Statute. And, as Judge Ntende observed, agreement of the parties is not good cause to depart from the requirement that witnesses appear in court to testify.

¹⁸² Under UNTAET Regulation 2000/30, Sections 6.2a, 6.3h, and 30.4, an individual has the right to remain silent at every stage in the criminal process and has to be informed that his silence cannot be taken as an admission of guilt. At trial the judges must also confirm that the accused understands the nature of the charges (30.4).

D. Trial of Augusto dos Santos: A 'well-advised' defense?

The trial of Augusto dos Santos for murder displays many of the same kinds of problems.¹⁸³ It was, however, tried almost a year later and shows that such problems persisted well into 2002. The accused had initially made a confession of guilt to the Investigating Judge on 20 November 2000. As in so many cases, it is an open question as to what, if anything, he was advised about his rights before doing so.¹⁸⁴ At the preliminary hearing, on the other hand, he declined to make any statement and pled not guilty. The trial commenced on 19 March 2002 and the accused changed his plea to guilty of premeditated murder at the beginning of the trial. The grounds for this decision to change his plea appear, however, to be inconsistent with his account to the Court of his actions. Among other things, in his statement he told the Court that at the time of the attack:

- (1) He was afraid.
- (2) He was acting under orders.
- (3) There was no plan to kill the victim.
- (4) The orders were to beat or kill (i.e., not specifically to kill).
- (5) The act was "not planned, not on my own free will."
- (6) He only struck the defendant twice. The victim fell to the ground and was then beaten to death by three others. (pp. 6–7)

In discussing the adequacy of the guilty plea, the Court's reasoning and language is sometimes unintelligible. Here too it also displays total indifference to the issue of the adequacy of representation and of the advice given by defense counsel on the guilty plea. This is despite the fact that the Court acknowledges the right of the accused to competent counsel in the following account of the defense counsel's statement on the decision to plead guilty:

The defense underlined that the admission of guilty made by the accused is made as it has been discussed between him and his client. For him, the accused confessed and admitted having committed a murder and having wanted to kill a victim *because* he repeatedly said he did not have a plan. For the Defense, the question of a plan is an academic question. *A competent counsel represents the accused.* The definition of the charge is clear and the accused has admitted it. *He is represented and he is well advised.* (p. 7, emphasis added)

This paragraph certainly raises questions of competence, both of its author and of the defense counsel whose views it represents. It hardly constitutes a reasoned basis for accepting the validity of a guilty plea, especially under these circumstances. Because of the incoherence of the language it is also hard to tell whether the gaps in logic are intentional, for example in regard to the word "because," which suggests that the accused's insistence that he did not have a plan provided the basis for his statement that he "wanted to kill a victim."¹⁸⁵

It is also not clear what the Court meant in stating that the question of the plan is "academic" for the defense. It is true that a plan is not required as an element for conviction,

¹⁸³ Case No. 6/2001, Judgment of 14 May 2002.

¹⁸⁴ As required by UNTAET Regulation 2000/30, Section 6.2a–f.

¹⁸⁵ The language of the original Judgment is English.

but the accused was obviously not speaking with legal elements in mind. What a review of his testimony to the Court makes clear is that what he really meant is that he did not *intend* to kill the victim. The allegation that he only intended to hit him, and not to kill, would bear upon the elements of Penal Code Section 340 and could constitute a possible defense. His repeated insistence on this point, noted more than once by the Court, hardly seems like an adequate basis for a guilty plea.

The Court also goes on to say in the next paragraph that “[t]he Defense underlined that the part of the reason for the confession was so *that it is not necessary to call the witnesses in relation to the killings*” (emphasis added). It is not clear what this should be taken to mean, but it also raises questions about what the accused had been advised about the nature of the proceedings and his rights. The Court certainly does not make clear the connection between its acceptance of the guilty plea and avoiding the necessity of inconveniencing the witnesses and prolonging the proceedings.

In previous cases the Special Panels had refused to accept a guilty plea where the accused did not make a complete admission of guilt.¹⁸⁶ Here his statements enumerated above leave open the possibility of a number of defenses and must thus be taken as qualifying his statement as only a partial admission of guilt. The Panel, however, saw no difficulty in accepting this plea as the basis of its conviction for premeditated murder.

E. Trial of Francisco dos Santos Laku: ‘What even the humblest man in the world can assess’

Francisco dos Santos Laku was a Timorese Sergeant in the Indonesian Armed Forces and was charged with having ordered an “ordinary” murder during a militia attack in 1999.¹⁸⁷ The Judgment engages in a careful and well-organized analysis of the evidence, discussing the testimony of the various witnesses and of the accused, analyzing inconsistencies and credibility. While the factual analysis and findings are relatively thorough, the legal analysis is very abbreviated. The entire discussion of the law, the elements, and their application to the accused, takes up less than a page of the Judgment’s 14 total pages.¹⁸⁸

Although the accused was not indicted or convicted for crimes against humanity, the Court chose to make a finding on the connection of the attack in which the accused participated to the existence of a widespread and systematic attack against the civilian population. This finding, however, is not based upon evidence introduced at trial. The Court, without citation to a previous decision, simply employs verbatim the same language it had used in previous cases, concluding that “[t]hose facts do not call for formal evidence in the light of what even the humblest and the most candid man in the world can assess” (pp. 10–11, emphasis added).¹⁸⁹

The making of findings in the absence of what the Court calls “formal evidence,” without citation to any cases or other references, or formally taking judicial notice, suggests that the Court has a preformed disposition about the existence of certain facts and

¹⁸⁶ E.g., Case No. 3/2000 and Case No. 3/2001.

¹⁸⁷ Case No. 8/2001, Judgment of 25 July 2001.

¹⁸⁸ The accused was sentenced to eight years, but the Court of Appeal raised the sentence to nine years. It is hard to imagine how an error significant enough to qualify under the grounds of appeal (which are not even mentioned by the Court of Appeal, as required by UNTAET 2000/30, Sections 40 and 41.5) could then result in only such an insignificant adjustment in the sentence.

¹⁸⁹ This exact language was used, for example, in the Yoseph Leki Case discussed above (No. 5/2000, Judgment of 11 June 2001, p. 7).

conclusions of law which will arise in any crimes against humanity prosecution which it has heard or will hear. This does not suggest impartiality and could operate to relieve the prosecution of the burden of proof beyond reasonable doubt¹⁹⁰ on key elements of offenses charged in crimes against humanity cases.

F. Trial of Abilio Mendes Correia: Virtues of a vigorous defense

Abilio Mendes Correia was indicted for murder, torture, and inhumane acts as crimes against humanity.¹⁹¹ Although indicted on 24 September 2001, his preliminary hearing was repeatedly postponed and finally took place in February 2002. After repeated postponements, on 12 May 2003 the trial was continued *sine die* because of the departure of one of the international judges.¹⁹² Only subsequent to this, on 10 June 2003, was the accused, *who had been in prison for more than two years since May 2001*, granted conditional release. In mid-November 2003 the trial was postponed again on the grounds that the prosecution needed more time to transcribe cassettes containing statements of the accused. The prosecution had had two years, during which the trial had been scheduled to commence 13 times, to prepare the case file.

Finally, at the beginning of 2004 the case was assigned to new judges and scheduled for a March trial date. In February, defense counsel filed numerous motions, including one to dismiss on the basis of the insufficiency of the Indictment. On 26 February, the Court ordered the prosecution to file further specifications establishing the basis for Counts Two and Three of the Indictment. They did so two days before the trial began on 3 March. What then transpired was that the prosecution, confronted with a vigorous defense (and a weak Indictment), made a plea agreement whereby the accused pled guilty only to “inhumane acts,” the least serious charge against him. He received a light sentence for a crimes against humanity conviction at the Special Panels: three years. With a two-thirds release provision, Abilio spent only three days in custody after his conviction since he had already spent two years in pre-trial detention.

This case is also noteworthy because of the Judgment, written by Judge Rapoza. It is of the usual length of 15 pages, but in terms of the quality of organization, exposition, clear reasoning, and jurisprudence it marks a new era at the Special Panels. The Judgment is organized into the proper sections, meeting the requirements of Section 39.3. It succinctly sets out the contentions of the parties, the factual findings of the Court, and so on. Although there was a guilty plea, it lucidly sets out the elements of the offenses and considers key case law on a number of them. With its numerous and apt references to a wide range of ICTR and ICTY cases it operates at a completely different level of jurisprudence than any Judgment considered thus far. The quality and lucidity of this Judgment only serves to highlight the shortcomings of many of those that preceded it.

G. Trial of Florencio Tacaqui: ‘The paucity of their culture’

The trial of Florencio Tacaqui was unusual in the first instance because the accused had not spoken a word to anyone since his arrest.¹⁹³ The trial proceeded, though with much discussion of the expert diagnosis of “elective mutism.” Much could be said about this aspect of the

¹⁹⁰ See the discussion of the applicability of this standard in the treatment of the Julio Fernandes Case (No. 2/2000) above.

¹⁹¹ Case No. 19/2001, Judgment of 29 March 2004.

¹⁹² An SCU Fact Sheet, *Justice and Serious Crimes*, of November 2002 notes that “His trial also started in March this year and has been postponed every month since.”

¹⁹³ Case No. 20/2001, Judgment of 12 September 2004.

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case, but our focus lies elsewhere. The preceding discussion of the Judgment in the Abilio Correia Case suggested that it marked a new era at the Special Panels. This does not imply, however, that there was a uniform improvement in the quality of the Judgments.

Tacaqui and 10 other individuals were charged with multiple counts of crimes against humanity, including murder, forced deportation, inhumane acts, extermination, and persecution in connection with the militia attack on civilians at Passabe in 1999. Tacaqui's case was later severed and he was tried separately. The most basic procedural facts of the case do not appear in the Judgment. Apart from the lack of a pre-trial chronology, there is no information about the preliminary hearing, the plea of the accused, and so on. All the Judgment says is, "After the preliminary hearing, the trial started on the 14th July 2003." There is no information about the trial dates or how many sessions were held. As for the usual information about the course of the trial, we are informed only that "[i]n the course of the trial several witnesses were heard [no number is given] At the end of the trial closing statements were made" (p. 1).

All of this is a complete departure from the normal practice of the Special Panels. The lack of vital information makes it difficult to understand how the case developed the way that it did, for example involving the severance of Tacaqui's case or the unexplained delay from indictment in 27 September 2001 to the end of the trial in September 2004. The principal strength of this 53-page Judgment written by Judge Florit is that it spends a great deal of time analyzing the testimony of the various witnesses and assessing their credibility. This discussion also seems to vent some of the author's frustration at the Timorese witnesses, who, it is claimed, deliberately use "the paucity of their culture" as a way of avoiding responsibility when confronted with a contradiction in their testimony (p. 5). It gives an imaginary example of an accused disingenuously adopting this strategy in response to a question by a judge: "I don't know: we are simple people; we didn't go to school; we are illiterate; we are not like big people; we are son of God . . ." (p. 5). The disparaging tone in which the Timorese *as a group* are treated in regard to their veracity suggests predispositions that may influence the assessment of the credibility of individual witnesses.

The Judgment spends a substantial amount of time on difficulties that the Court experienced in dealing with problems of inconsistencies in testimony and issues of credibility. It imagines that these difficulties are "crucial and more troublesome in the Timorese cultural environment than in other jurisdictions" (p. 4). There is no question that there are legitimate concerns about what the ICTR has called "cultural factors," but great care must be used in this regard.¹⁹⁴ These problems have been confronted by the ICTR, the ICTY, and the Special Court for Sierra Leone, and are not, as the Judgment seems to imagine, a uniquely Timorese predicament. Dealing with the problems caused by witnesses whose cultural sense of time, of narration, or of communal knowledge may be very different than that of the judges, or who may have been traumatized by the events they experienced, is indeed a challenge. In its first case, the ICTR Trial Chamber explicitly addressed these issues in a manner that points up the crudeness and bias of the discussion in the Tacaqui case.¹⁹⁵ In some international and hybrid tribunals, unfortunately, prejudice and lack of knowledge have led a number of participants to simply conclude that lying is part of local

¹⁹⁴ ICTR Akayesu Trial Judgment, para. 155.

¹⁹⁵ *Ibid.*, paras. 140–144, 155–156.

culture. The discussion quoted above seems also to be veering dangerously in that direction. The Judgment complains that cross-examination often produced “contradictions and confusion” rather than “clarity,” because the witnesses were “unable to come out from the bundle of contradictions created from their own words.” But isn’t this exactly what cross-examination, testing of credibility, and the requirement of proof beyond a reasonable doubt are supposed to do?

After engaging the evidence, the Judgment’s analysis of credibility leads to some surprising conclusions that resulted in acquittal on a number of the Counts. For example, five eyewitnesses testified directly to the role of the defendant in the murder charged. The Judgment focuses on certain minor similarities in their stories, like mention of the “blood-soaked ground” (one may wonder about the role of the translators here, especially because they were translating from Baikenu to Tetum, and from Tetum to English or Portuguese). This led the Court to the conclusion, unsupported by *any* other evidence, that these witnesses must have been unduly influenced. (There is no explanation as to by whom or in what context this might have occurred.) For the Court, this, in turn, justified the conclusion that they were not eyewitnesses at all, and were not even present at the scene of the crime.

This is a remarkable chain of conclusions to be drawn solely from references to “blood-soaked ground” at the scene of a massacre of some 60 persons, where the ground probably was, literally, soaked in blood. The more natural explanation might have been that these inhabitants of the same small community had, naturally, spoken with each other of these events in the intervening years, and that this detail had stuck in the minds of the survivors. This might have prompted questions on this issue, but hardly seems a sufficient basis for completely rejecting the otherwise consistent testimony of five eyewitnesses and concluding that they are all completely fabricating their testimony and were not even at the scene. It is also telling that the Judgment acknowledges no material inconsistencies between their in-court testimony and their pre-trial statements. On this basis the accused is acquitted of murder despite this testimony by five eyewitnesses (the defendant remained silent and the defense called no witnesses).

While all of these evidentiary matters are considered in great detail over many turgid pages, the Judgment provides no enumeration of all of the elements of any of the offenses or discussion of how the key elements should be interpreted and applied. With the exception of the charge of persecution, there is no application of the factual findings to the elements. The Joint Criminal Enterprise (JCE) theory of liability is mentioned, but there is no discussion of what is required to establish this complex doctrine or how it was applied.¹⁹⁶ The same is true of co-perpetratorship. No international cases or jurisprudence are cited or discussed, the chapeau elements of crimes against humanity are not specified and considered, nor are the elements of the individual crimes against humanity, except for persecution and to some extent deprivation of liberty. An underlying problem is that the Judgment is poorly organized, hard to follow, and not broken up into clear sections distinguishing factual and legal issues and dealing systematically with the topics to be treated in a Final Written Decision.¹⁹⁷

¹⁹⁶ There are three “versions” of JCE recognized in the jurisprudence of the other international and hybrid tribunals, and considerable effort has gone into articulating the definition and requirements of each. See, e.g., ICTY Vasiljevic Appeals Judgment, paras. 94–101.

¹⁹⁷ All of the problems detailed here also occur in the Judgment written by the same judge in the Anastacio Martins Case (No. 11/2001, Judgment of 13 November 2003).

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What we see here is that the advent of new and often more professionally qualified and experienced judges to the Special Panels in 2003–2004 did not have univocal results. The Judgments of some of the new judges reflect the addition of new intellectual resources to the Special Panels in terms of jurisprudence, familiarity with international case law, models of how Judgments should be written, and so on. Yet these virtues are by no means uniformly distributed.

SECTION 3: SELECTION FROM CASES FILED IN 2002¹⁹⁸

A. Trial of Victor Manuel Alves: Reversal of fortune?

The trial of Victor Manuel Alves for murder involves the killing of a former militia leader by a pro-independence leader at a reconciliation meeting on 23 September 1999 on Atauro Island, off the coast from Dili.¹⁹⁹ This case was legendary in the Dili Serious Crimes community because of the strange turn that the trial took. It is worth examining both for an evaluation of the Judgment but also for other reasons connected to the politics of the case, and especially the fact that this prosecution involved charges against a pro-independence accused rather than the usual pro-Indonesian militia member.

What the Judgment finds as undisputed is that the accused went to a meeting with the victim on Atauro Island and that he took a military assault rifle (G-3) with him. In the first stage of the meeting he gave it to one of his followers to hold. Later he took the weapon back, fired two shots in the air, and then shot the victim, who was walking away with his back turned. The victim was hit in the back of the head at close range by this one shot and died instantly. It is also undisputed that all of this took place in the presence of a crowd of onlookers such that there were numerous eyewitnesses to these events. Although indicted in January 2002 for murder “with deliberate intent” under Indonesian Penal Code Section 340, in January 2004 the Indictment was later amended to a lesser degree of murder under Section 338. The procedural record does not reveal the reasons for the delay in bringing the case to trial, but it may well involve the political sensitivities noted above.²⁰⁰

At trial, all six of the eyewitnesses, including the son of the victim, changed their previous statements. They now testified either that they did not see the killing at all, or that the accused fired the rifle when he was walking away from the victim, and did not aim at all because he was looking in the opposite direction. The Panel accepted the preposterous story that the enraged accused, after being gravely insulted by the victim, grabbed his weapon from the man holding it and fired two warning shots at the victim, who had just turned his back on him. Then, they further find, the accused turned away in the opposite direction, with the heavy military assault rifle dangling over his shoulder pointing backwards. The gun then discharged and just happened to hit the victim squarely in the back of the head. The Judgment phrases its finding using a passive tense which omits any agency on the part of the accused: “a third shot [after the two warning shots] *was fired* from the gun ... unintentionally hitting the victim who was several metres away” (p. 5, emphasis added).

Relying on the change in testimony of the eyewitnesses, the Court acquitted Alves of murder but found the accused guilty of a negligent killing and sentenced him to one year

¹⁹⁸ Cases 1/2002–13/2002, of which eight resulted in Judgments.

¹⁹⁹ Case No. 1/2002, Judgment of 8 July 2004.

²⁰⁰ See Linton, “Prosecuting Atrocities,” for background information.

imprisonment and to pay compensation, but suspended the prison sentence.²⁰¹ The Judgment is lucid and well organized. It contains all of the appropriate sections, and discusses the evidence, the facts proved and not proved, and makes factual findings. The entire discussion of the law and its application to the charges, however, is three lines long. There is no discussion of elements, or any other legal issues, or any reasoning or analysis whatsoever. The entire “Legal Findings” section of the Judgment reads as follows, and it is the only place where the legal issues and findings that bear upon conviction are discussed:

As the intent to kill the victim was not proven the mental element of the crimes stipulated by Art. 340 IPC was not fulfilled. However, since the causing of death by negligence is proven, the accused was convicted of the crimes stipulated in Art. 359 IPC. (p. 6)²⁰²

In reaching this conclusion the Court was constrained by the fact that all of the eyewitnesses had reversed or modified their stories as to the crucial facts that could have established an intentional killing. No forensic testimony was adduced to challenge the plausibility of the story based upon trajectory analysis because this kind of expertise was not available in the SCU. Although obvious to all that witnesses had been subject to some kind of outside interference, under the circumstances there was little the Special Panel could do. According to a prosecutor close to the case, who asked not to be named, other factors were at work in shaping this outcome.²⁰³ The accused is wealthy and well-connected politically in Dili. He was regarded by many as a hero for having killed a militia leader. According to this informant, who was in a position to have direct knowledge, the prosecutor on the case was approached by one of the judges from the Panel to drop the prosecution because of security concerns involving the accused’s political connections.²⁰⁴ The prosecutor refused and the Judge asked the prosecutor to plea-bargain the case at two years. The prosecutor refused again. As the accused was only convicted of the lesser-included offense of negligent homicide and was given a suspended sentence, he went free. The communication between a judge and the prosecution about the disposition of the case was without question improper. It might not have occurred, however, if at least some provision had been made by the UN for the security of its judges. As noted above, however, there was none at all.²⁰⁵ Equally serious in the case is the apparent interference with the testimony of the eyewitnesses. This case also points up the potential consequences of the failure to inform witnesses that protective measures could be made available if they felt that testifying would put them at risk. As discussed above, no such protective program was in place though it was mandated by UNTAET 2000/15, Section 24.1.

²⁰¹ The Court of Appeal changed the sentence to two years.

²⁰² The reference to “not proving the mental element stipulated by Art. 340 IPC” is apparently an error, since as the Judgment noted, on 10 February 2004 the Court granted leave to amend the Indictment to charge the accused under IPC 338 rather than under 340.

²⁰³ Interview, 20 February 2005.

²⁰⁴ There is no indication that the other two judges on the panel were aware of their colleague’s action.

²⁰⁵ Security is vital in any post-conflict environment and should be automatic. That is, the UN should not wait until there is a problem to deploy security measures because it may then be too late. Although the security situation in Freetown is generally quite good (if not much better than in Dili in 2000–2002), judges of the Special Court for Sierra Leone always move about with two bodyguards. The courtroom itself is even more heavily protected. In Dili the judges had no security personnel either at court or outside.

B. Trial of Marculino Soares: Weak Indictments, weaker Judgments

Marculino Soares was indicted on 25 July 2002 for murder, persecution, and inhumane acts as crimes against humanity.²⁰⁶ These crimes were alleged to have occurred during the attack in Dili on the house of pro-independence leader Manuel Carrascalao, in which 12 persons were killed. This was one of the major incidents in the militia violence in Dili and one of the SCU priority cases. After a preliminary hearing on 10 September 2003, his trial commenced on 10 May 2004 after scheduling delays due to other cases. The trial was, judged by the standards prevalent earlier at the Special Panels, a long one for a case with only one defendant. It comprised 17 hearings, but these took over six months to complete because of what the Panel called “unavoidable delays.”

The Special Panel’s Judgment, delivered in late 2004, is problematic in a number of respects. In its specific findings on the attack and the murders, the Judgment nowhere discusses or evaluates specific testimony. There is no discussion of consistency of accounts or of credibility of witnesses, even though the events were chaotic, and seen from a variety of viewpoints by different witnesses, whose accounts differed accordingly. After enumerating the facts it considered proved, the Judgment simply states that the presence of the accused at the scene is “largely confirmed by the testimony of various witnesses” (*largamente confirmado por varias testemunhos presencias*). Given the presumption of innocence and the burden of proof beyond a reasonable doubt on the prosecution,²⁰⁷ one would expect a finding that this absolutely vital fact was not “largely” confirmed but rather was confirmed beyond a reasonable doubt.

There is no analysis of credibility, weighing of testimony, or any analysis of the defense case. The entire discussion of the facts involving the accused occupies 1 page of this 33-page Judgment. The discussion of the legal aspects of the case is equally inadequate. The chapeau elements (widespread or systematic attack against a civilian population, etc.) of crimes against humanity are listed but not discussed. The accused was convicted of murder and inhumane acts, but the elements of these offenses were not even enumerated let alone analyzed.

Beyond this, even though the Panel found the accused liable under a theory of command responsibility, there is no discussion of the definition of this theory or what the prosecution is required to prove to make its case on this basis. Command/superior responsibility is a complex doctrine that has been the subject of extensive jurisprudential discussion in many ICTY and ICTR cases, but these are nowhere referred to.²⁰⁸ The entire discussion of command responsibility takes up only five lines of text and merely paraphrases the Court’s Statute. Aiding and abetting and common purpose as alternative theories of liability are treated in an equally summary fashion as theories of liability, occupying together six lines. He is only found guilty of the latter but no explanation is given for this conclusion. The treatment of the law to be applied could thus not be more perfunctory and is completely missing any coherent analysis, systematic application of the law to the facts, or the legal reasoning justifying its conclusions. The accused was sentenced to 15 years imprisonment.

²⁰⁶ Case No. 2b/2002, Judgment of 25 July 2004. Soares is charged both under UNTAET 2000/15, Section 14 for his individual responsibility and under Section 16 for command responsibility.

²⁰⁷ UNTAET 2000/15, Section 6 establishes the presumption of innocence. On the burden of proof, see the discussion of the Julio Fernandes Case (No. 2/2000) above.

²⁰⁸ See, e.g., the extended discussion in the leading case on this issue, ICTY Delalic Appeals Judgment, paras. 182–268, and the ICTR Rutaganda and Kayishema Appeals Judgment, paras. 280–304.

There was a disposition from the beginning of the Special Panels to treat the existence of crimes against humanity as a 'given'

One further point deserves mention here. In this Judgment, as in others noted above, the Panel refers to what they call the standard practice on the issue of evidence to support the contextual, chapeau elements of crimes against humanity, i.e., placing the charges of the Indictment in the larger context of violence in East Timor in 1999 and showing that this context meets the requirements of the Statute in regard to the existence of a widespread or systematic attack against a civilian population. The Judgment simply refers to this as a practice of the Special Panels and makes no reference to specific cases that analyzed these reports. The “Factual Findings” on the widespread and systematic attacks make *not a single specific reference* to any particular portion of any report. The “facts” are simply asserted and there is a general reference to the admission into evidence of the reports.

While the Special Panel in the Marculino Soares Case agreed to take judicial notice of the finding of a “widespread and systematic attack” in other SPSC trials, this position was explicitly rejected in the Rudolfo Alves Correia Case.²⁰⁹ There, the Special Panel denied a request by the prosecution to take judicial notice of the adjudication of this issue in previous cases. Judge Rapoza filed a “Written Decision on the Prosecutor’s Motion for Judicial Notice and Admission into Evidence.” That decision explains the concept of judicial notice and why it cannot be applied as the prosecution had requested. Although the Special Panel in the Rudolfo Alves Correia Case could not overrule the decisions of the other Panels that had granted motions for judicial notice on this issue, its findings, and reasoned argument in support of them, suggest that these decisions were fundamentally erroneous. One may note here the striking difference in the seriousness with which these two Panels took the issue of judicial notice.

As noted above, there was a disposition from the very beginning of the Special Panels to treat the existence of crimes against humanity as a “given,” something that even the “humblest and the most candid man in the world” would know. This practice appears to have relieved the prosecution of the burden of proving essential elements of its case. The standard justification for this practice was the lack of resources to bring in experts to testify. But even if that had been true, surely the unwillingness of UNMISSET to provide funds necessary for an adequate trial should not have operated to the detriment of the accused, but rather of the prosecution, which bears the burden of proof beyond a reasonable doubt.²¹⁰ If the prosecution cannot find the resources to lay a proper foundation for its evidence then that evidence should not be admitted, rather than admitting it without question because they do not have the resources.

C. Trial of Umbertus Ena and Carlos Ena: Flawed investigations, appellate incompetence

Carlos Ena and Umbertus Ena were tried for crimes against humanity (murder and inhumane acts) in connection with the Passabe massacre perpetrated by pro-Indonesian militia in the Oecussi district in 1999.²¹¹ The trial began on 15 September 2003, and, because of numerous repeated delays, proceeded only intermittently until final statements on 22 March 2004. The overall quality of this Judgment is much higher than those just considered. There is a

²⁰⁹ Case No. 27/2003. Other instances where the Panel took judicial notice (directly or indirectly) on this issue include the cases of Damiao da Costa Nunes (Case No. 1/2003), Mateus Lao (Case No. 10/2003), and Aparicio Guterres (Case No. 18a/2003). All are considered below.

²¹⁰ As established for the Special Panels in Case No. 2/2000.

²¹¹ Case No. 5/2002, Judgment of 23 March 2004.

very careful analysis of the testimony and the level of jurisprudence is also considerably higher. Though the chapeau elements of crimes against humanity are treated perfunctorily and clearly taken for granted, there is considerable reference to international jurisprudence on inhumane acts as a crime against humanity.

Two aspects of this case are of immediate interest. The first has to do with the Panel's analysis of the very serious flaws, and possibly misconduct, in the investigation. Second, one aspect of the decision of the Court of Appeal calls into question its understanding of basic doctrines of international criminal law that were applied by the Special Panels.

Carlos Ena was ultimately acquitted by the Special Panel. The acquittal was based on the Panel's grave doubts about the integrity of the evidence against him. Despite the fact that there were four eyewitnesses who placed him at the scene of the crime, irregularities and inconsistencies in their testimony and pre-trial statements resulted in the Panel finding that the evidence could not prove beyond a reasonable doubt that he was there. The Judgment engages in a very thorough and detailed examination of the serious and objective shortcomings of the evidence and of the investigation.

The Court's analysis reveals that the investigator may have prepared statements to be signed by the witnesses. Of the four pre-trial statements by eyewitnesses, two are verbatim except for the name and age of the witness and the time of the interview. It appears that the blanks have just been filled in, for the Judgment notes that "even the spacing and the punctuation marks are replicated." In the case of the third witness the first five paragraphs are identical, and the remaining ones have "striking similarities." The statement of the fourth witness also has "striking similarities" (p. 12).

One questions how the prosecution could have used these statements. This case also shows the immense importance of competent defense counsel and of having investigators available to the defense. Ultimately, one of the accused is acquitted because his defense counsel produced several witnesses who all credibly testified that the accused was elsewhere when the attack took place, thus flatly contradicting the testimony of the four key prosecution witnesses. In addition, effective cross-examination and careful analysis by the Panel revealed the shortcomings of this testimony. Umbertus Ena, represented by different counsel, was convicted and appealed.

The appeal. In regard to the law of crimes against humanity, the Judgment of the Court of Appeal is so confused and confusing that it raises questions about their understanding of this most fundamental doctrine. The Court of Appeal held that whether or not there are multiple charges, an accused can only be convicted of "one crime against humanity." It is far from clear what this can mean. At the ICTR and the ICTY defendants are routinely convicted of multiple counts of one particular crime against humanity (murder, rape, torture, etc.), or of individual or multiple counts of several different crimes against humanity.²¹²

The Court of Appeal tries to explain its ruling in terms that are incomprehensible from a doctrinal standpoint. They state that there cannot be "as many crimes against humanity as the numbers of murders committed or the types of crime committed." (*Nao pode haver tantos crimes contra a humanidade ... ou quantos os tipos de crime cometidos.*) The Judgment

²¹² In the Kunarac Case, for example, the lead defendant was even convicted of multiple counts of rape as well as counts of torture as crimes against humanity arising from the same acts of rape. This application of the law was approved by the Appeals Chamber in the ICTY Kunarac Appeals Judgment, paras. 168–185.

The decision by the Court of Appeal in the Paulino de Jesus Case is one of the most controversial in the history of the Serious Crimes process

then asks, if because the conduct of the accused can only fulfill the elements of one crime, can the sentence that convicted him of multiple crimes stand as is? They conclude that it can, “[f]or one of the elements of the type of crime against humanity consists precisely of various crimes or forms of crime committed as part of a widespread or systematic attack” (*Pois um dos elementos do tipo do crime contra a humanidade consiste precisamente em serem os various crimes ou formas de crime praticados como parte*) The verdict and sentence against Umbertus Ena are then upheld, but with the alteration that the accused committed “only one crime against humanity.” This discussion is, in my opinion, conceptually incoherent and completely at odds with all universally accepted and uncontroversial understandings of the jurisprudence of crimes against humanity.²¹³ This decision was written by an international judge, recruited and appointed by the UN as the President of the Court of Appeal. From this Judgment it appears that the Court lacks even basic familiarity with this central doctrine of international criminal law embodied in their Statute (UNTAET 2000/15, Section 5) and with the body of international jurisprudence that has interpreted and applied it.

D. Trial and Appeal of Paulino de Jesus: A first acquittal and a manifest injustice

The decision by the Court of Appeal in the Paulino de Jesus Case is one of the most controversial in the history of the Serious Crimes process.²¹⁴ It is the subject of an excellent special report by JSMP, and for this reason we will only consider certain aspects of this case. Paulino de Jesus was initially charged with murder under the Indonesian Penal Code during a militia attack in Bobonaro district in 1999. The Indictment was amended to murder as a crime against humanity during the trial, and it was of this charge that the defendant was acquitted on 28 January 2004.²¹⁵ This was the first full acquittal by the Special Panels.

The acquittal was based upon a very careful analysis of the evidence by the Special Panel. There was a serious question as to whether the accused was present at the scene of the crime. The defense brought forward four witnesses to support the alibi of the accused. The Special Panel carefully weighed the many contradictions and inconsistencies in the testimony of several of the prosecution witnesses, and also considered at some length factors such as whether they could have seen what they testified to from the distance and position of their location, and so on. There is a detailed and careful analysis of credibility. In other words, the acquittal was well founded by a Judgment that justified its findings and reasoning in a coherent and cogent way.

The Court of Appeal basically ignored the grounds on which the prosecution appealed, although its Statute specifies that it “must address each issue raised by the appellant” (UNTAET 2000/20, Section 40.5). Rather than functioning as a court of second instance, the Court of Appeal considered the case de novo.²¹⁶ It simply substituted its evaluation of testimony for that of the Special Panel, ignoring the grounds of review specified in its

²¹³ The jurisprudence of crimes against humanity has been largely settled in the practice of the ICTY, ICTR, and other hybrid courts. See, e.g., ICTR Muhimana Trial Judgment, paras. 523–533, and ICTY Kordic and Cerkez Appeals Judgment, paras. 93–100.

²¹⁴ Case No. 6/2002, Judgment of 28 January 2004.

²¹⁵ Issues concerning the Indictment are fully explored in JSMP, *The Paulino de Jesus Decisions*.

²¹⁶ The other international criminal tribunals have consistently held that this is not the legitimate role of the Appeals Chamber: “The Appeals Chamber reiterates that an appeal is not a trial de novo.” ICTY Blaskic Appeals Judgment, para. 13; and see ICTY Valsilijevic Appeals Judgment, paras. 4–9 on the “corrective” nature of the appellate function.

Statute (UNTAET 2000/30, Section 40.1). The UNTAET Statute does not specify the standard of review, but it is widely accepted in international practice and at all the other hybrid tribunals that the appropriate standard of review is that a trial court finding must be manifestly and completely erroneous or that no reasonable court could make such a finding on the basis of the evidence.²¹⁷

Indeed, in this case the Court of Appeal seems completely unaware that a court of appeal needs to specify its standard of review in order to give a reasoned justification for its decision. It also seems unaware that under the Timorese Constitution and the Court's Statute an accused is presumed to be innocent and the burden of proof is on the prosecution. For example, the Judgment states that the Court does not understand how the Special Panel could find that the accused *might* have been at the scene and yet fail to convict him. The fact that he might have been there cannot constitute proof beyond a reasonable doubt. This was the Special Panel's point: although there is testimony that places him at the scene, there are problems with that testimony, and there is also a good deal of credible testimony that places him elsewhere. It is the task of the court of first instance to weigh this testimony and the credibility of those who gave it. It was on this basis that they decided that because the inconsistencies raised a reasonable doubt they had to acquit.

Such "subtleties," however, seem lost on the Court of Appeal. They decided that the parents of the victim testified "clearly and convincingly" that the accused was at the scene. Of course, they did not hear and see those witnesses as did the Special Panel, and were thus less able to assess credibility. They do not even mention, and indeed seem unaware, that the Special Panel dealt at length with the testimony of the parents of the victim and found that it was full of inconsistencies and contradictions.

The Special Panel's analysis of the key evidence of the parents casts even more doubt upon the unfounded conclusions of the Court of Appeal. The parents, for example, in their first pre-trial statements *did not even mention the accused*. They named a completely different person as the man who stabbed their daughter. *Two years later* they gave another statement and changed their story completely, naming the accused for the first time on the basis of a photograph they were shown. The Special Panel pointed out that it appears from the record of their depositions that the husband and wife coordinated these second statements after one of them had first been deposed.

The wife, in her first statement, said that she was shot in the leg and ran away before her daughter was murdered. She stated that she only learned later that she had been killed. At trial, she at first testified that she was shot only *after* her daughter was stabbed. Later in the trial she again changed her testimony and reconfirmed her first statement, that she was not even present and only found out later. Both parents also contradicted themselves on the murder weapon used. These kinds of inconsistencies and contradictions on absolutely vital facts convinced the Special Panel that the prosecution had not made its case beyond a reasonable doubt. This conclusion appears fully justified by the record, for the Court heard

²¹⁷ See, e.g., ICTY Kupreskic Appeals Judgment, para. 30: "Only when the evidence relied upon by the trial chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the trial chamber." The ICTY Vasiljevic Appeals Judgment also holds that an error of fact must have been serious enough to cause a "miscarriage of justice" in order to furnish a basis for the Appeals Chamber to overrule the Trial Chamber (para. 5).

four defense witnesses confirm the defendant's alibi in a manner they deemed credible. While this alibi evidence placed the accused at another village during the general timeframe of the attack, it could not completely preclude the possibility that the accused might have snuck away and been present at the scene of the crime. It nonetheless was taken by the Special Panel as providing substantial support for his alibi.

The testimony of the wife was completely discredited, while the Court concluded that it was unlikely that her husband could have seen what he claimed to see from the position he was in (hiding under a zinc sheet, at night, and 30 meters away). The fact that both witnesses named a completely different person as the perpetrator in their first statements, and never satisfactorily explained the change in their testimony, also weighed heavily against their credibility.

This, however, was the testimony that, without careful analysis, the Court of Appeal found unquestionably "clear and convincing." The Court of Appeal does not even mention a single one of these contradictions or inconsistencies in the parents' testimony or the reasoning of the Special Panel in weighing it as they did. They also completely ignore the testimony of the four witnesses who stated that the accused was elsewhere. They also ignore the fact that three of the five prosecution witnesses were not present when the victim was murdered and a fourth said that he knew nothing of the accused in relation to the crime.

In other words, it is not just that the Court of Appeal ignores the grounds of appeal, considers the evidence *de novo*, and reaches its own conclusions. The real point is that they do so with total disregard for the presumption of innocence, the standard of proof beyond a reasonable doubt, or the applicable standard of review. They substitute their hasty and incomplete consideration of the testimony of only a very few of the witnesses for the careful and detailed analysis of all of the evidence by the Special Panel. They seem completely unaware of the basic principle of justice that where there is contradiction and uncertainty on the most essential factual issue in a case, that uncertainty must be resolved in favor of the accused.²¹⁸ Indeed, they fail to even consider the evidence that would tend to exculpate the accused. Seemingly oblivious to the possibility that the accused might be innocent or that the evidence might be insufficient to establish his guilt, the Court of Appeal ignores the basic rights of the accused which are designed to ensure a fair trial.²¹⁹

This Judgment of the Court of Appeal was written by one of the Portuguese judges appointed by the United Nations. This judge is also a *trainer and mentor* at the Judicial Training Center for Timorese judges in a program organized by the UNDP. Apart from the problems discussed above, the Decision also fails to analyze the legal issues and the required elements of the offense. As JSMP has pointed out at length in its report, the Court of Appeal consistently confuses ordinary murder under the Indonesian Penal Code and murder as a crime against humanity.²²⁰ They refer to the requirement of premeditation for murder as a crime against humanity, but there is, in fact, no such required element for that offense in international law or in the UNTAET Regulations.

²¹⁸ A principle at least as deeply enshrined in the civil law tradition (*in dubio pro re*) as it is in the common law.

²¹⁹ Paulino de Jesus had no further recourse from the conviction entered by the Court of Appeal. The Constitution of East Timor provides for a Supreme Court, but that court has not yet been created and in all likelihood will not be for several years. The Court of Appeal has ruled that in the absence of a Supreme Court there is no right of appeal from its decisions.

²²⁰ JSMP, *The Paulino de Jesus Decisions*, pp. 16–17.

At his trial, Paulino de Jesus was acquitted of charges and restored to liberty because three judges of the Special Panel, in a well-reasoned and careful decision, unanimously concluded that the prosecution had not met its burden of proof beyond a reasonable doubt.²²¹ Paulino de Jesus was then convicted by a decision of the Court of Appeal which clearly fails to provide a reasoned justification for this result and displays an almost complete ignorance of the substantive and procedural standards which should govern its decision. Even more serious, given the role of the Court of Appeal as a foundational model for the rule of law in East Timor, this decision reveals a lack of awareness that an appeals process serves to protect the rights of the accused to a fair trial and to due process of law.²²²

SECTION 4: SELECTION FROM CASES FILED IN 2003²²³

A. Trial of Damiao da Costa Nunes: Where is the defense?

Damiao da Costa Nunes was charged with murder and persecution as crimes against humanity for his participation in an attack by the Laksaur militia in 1999.²²⁴ He pled not guilty. The defense counsel in this case was the head of the Defense Lawyers Unit. The question that will occupy us here is the conduct of the defense in this case and the way it is portrayed in the Judgment.

In the “Factual Findings” section of the Judgment, the Court notes that it was “undisputed between the parties that there was a systematic and widespread attack on the civilian population and that the accused acted in this context.” The defense thus conceded not only the chapeau elements of a widespread and systematic attack, but also the vital element that the acts of the accused were part of this context.²²⁵ As a result, the prosecution introduced no evidence on any of these issues. Considering that it was dealing with multiple counts of crimes against humanity the trial was very short, and was concluded in six sessions.

Essential parts of the Judgment are abbreviated in the extreme. In the section on the issue of individual responsibility (“The Responsibility of the Accused,” paras. 62–63), the Judgment finds that the accused committed the crimes as a co-perpetrator. There is no definition of the required elements of co-perpetratorship, no jurisprudence, no analysis, and no legal reasoning. The entire discussion takes up six lines.

A question left open in reading the Judgment is what the defense did or argued at the trial. Apart from mentioning that the defense conceded the chapeau elements of crimes against humanity, the Judgment does not refer to or discuss a single argument or contention of the defense. No defense witnesses are referred to. Either the defense made no arguments and failed to raise questions about credibility and consistency of witnesses, or the Court fails

²²¹ See the discussion of the applicability of this standard in the Julio Fernandes Case (No. 2/2000) above.

²²² These rights are guaranteed by the Timorese Constitution, Sections 30–34; the Transitional Rules of Criminal Procedure, Sections 2–6; and ICCPR Article 14, which is binding upon the Special Panels and Court of Appeal.

²²³ There were 35 Indictments filed in 2003, Cases 1/2003–35/2003. Eighteen of these went to trial. There are 21 Judgments (some cases had multiple parts that were severed and tried separately as, e.g., 4a/2003, 4b/2003, etc.).

²²⁴ Case No. 1/2003, Judgment of 10 December 2003.

²²⁵ See also the Marcelino Soares Case (No. 11/2003) where the Judgment comments on its acceptance of the same reports by saying that the “Defense made no objection to their use, and the contents seemed credible... ”

to mention them.²²⁶ The defense certainly did not succeed in contesting the facts to a degree that compelled the Court to deal with their arguments and allegations. As the standards for the Final Written Decision and UNTAET 2000/30, Section 39.3 indicate, however, the Judgment should describe and evaluate the factual and legal contentions of the defense and weigh them against those of the prosecution.

Judge Siegfried Blunk dissented as to the sentence. The dissent is noteworthy because it cites international jurisprudence²²⁷ to argue that international sentencing standards require that sentences be of sufficient length to deter future perpetrators and demonstrate that such serious crimes will not be tolerated by the international community.

B. Trial of Mateus Lao: Abbreviated justice

Mateus Lao was indicted for murder as a crime against humanity, committed during the Passabe massacre perpetrated by the Sakunar militia in 1999.²²⁸ There are a number of troubling aspects of this case, not the least of which is that the Judgment is only eight pages long, including cover sheet, sentencing, disposition, and signatures. Despite the fact that this is a crimes against humanity prosecution, the substantive sections of the Judgment that deal with factual findings, analysis of the facts and evidence, and the law and its application comprise only three and a third pages.

The key evidence on which the Court based its conviction is the testimony of the defendant given before an Investigating Judge in 2002. Neither the “Procedural Background” section of the Judgment, nor any other part, provides any information on the circumstances under which the accused made the admission that he struck a man, whose identity he did not know, twice with his machete. There is no information in the Judgment on whether this admission was made with advice of counsel or whether the accused understood what he was doing. Having pled not guilty, the defense called no witnesses and seems principally to have contested the identification of the remains as those of the man whom the accused admitted striking.

Identification of the victim was made by the location of garment scraps, identified by family members. They were not found on the skeletal remains, however but “near” them, rendering them highly problematic as the sole basis of identification. Sixty-two other individuals were murdered in the same area. The forensic report from 2000 appears not to have established a cause of death or the identity of the victim on the basis of any evidence other than garment scraps found at the scene (no DNA testing was performed). The Court made no finding as to the cause or time of death other than a conclusion that the victim died (at some unspecified time) as a result of “injuries inflicted by the accused.” There was no evidence to support this causal connection. The victim’s remains were only recovered later by his brother and buried at another location, which would have complicated any forensic identification. Further, none of the prosecution’s witnesses saw the accused strike anyone; they only testified as to the attack in general. This gap in testimony was critical, because the defendant had testified only that he struck a man whose identity was unknown to him. The Judgment analyzes none of these issues.

²²⁶ The Judgment also includes no discussion of the facts not proved, as required by UNTAET 2000/30, Section 39.3. Such a section or enumeration would help in revealing what the defense argued.

²²⁷ The short dissenting opinion cites the ICTY Erdemovic Sentencing Judgment and the ICTR Kambanda Judgment and Sentence.

²²⁸ Case No. 10/2003, Judgment of 3 December 2004.

The brevity of the decision provides no real basis for evaluating the reasoning by which the Panel reached its factual and legal conclusions

The brevity of the decision provides no real basis for evaluating the reasoning by which the Panel reached its factual and legal conclusions. The entire “Legal Grounds” section of the Judgment reads as follows. It is the only section of the Judgment that deals with legal issues and findings:

As mentioned above the Court is convinced that Yosef Maknaun died after the militia had left the crime scene of the inflicted injuries. The amount and the severity of injuries were a substantial cause for the victim’s death. The accused knew that the wounds were likely to cause the death of Yosef Maknaun. He also knew that these acts were part of a systematic attack on the civilian population.

The accused therefore committed the Crime against Humanity of Murder under customary International Criminal Law as recognized by [references to ICC, ICTY, Statutes and Nuremberg and Tokyo Charters omitted]. The accused committed the crime jointly with other persons (Sec. 14.3[a] Reg. 2000/15). (pp. 5–6)

These few lines contain no analysis of the elements, the theory of responsibility, or any of the central legal and evidentiary issues. An essential function of a Judgment is to specify, define, interpret, and analyze the grounds of liability on which the conviction is based and provide a reasoned account of the decision. All of this it fails to do. This Judgment was written by one of the recently recruited international judges only six months before the closure of the Special Panels. It demonstrates the great lack of uniformity in the Special Panels judges’ conception of the functions a Judgment must fulfill and the sharp divergence of some of those conceptions from the requirements of the Final Written Decision.²²⁹

One further point deserves mention here. The Judgment makes findings on the existence of widespread and systematic attacks. It supports these findings as follows: “The *evidence* for the systematic attack ... is based on historical facts which can be ascertained from history books (ct. for example James Dunn, East Timor 3rd edition 2003 page 352)” (p. 4, emphasis added). This reference to one page of one book is the only citation for the basis of this “evidence.” Beyond this, the Judgment only mentions its “supplementary use” of the executive summary of the Indonesian Investigative Committee’s Report and letters and notes of the UN Secretary-General. There are no specific references here at all. Defense Counsel Alan Gutman had objected at trial to the use of only the executive summary and asked for submission of the full report. Judge Schmid on 11 February 2004 denied the motion and rejected his request for access to the full report.

C. Trial and Appeal of Marcelino Soares: Abbreviated justice, abbreviated appeals
Marcelino Soares was a Timorese who held a low-level command position (*Babinsa*) in the Indonesian military (TNI) in East Timor. He pled not guilty and was tried for murder, torture, and persecution as crimes against humanity for his role in the 1999 violence.²³⁰ The focus on this case will be the treatment of command responsibility as a basis for his

²²⁹ The full report was never submitted into evidence at the SPSC, although it was readily available. Interview with Alan Gutman, 1 September 2004.

²³⁰ Case No. 11/2003, Judgment of 11 December 2003. The “Procedural Background” section of the Judgment is so abbreviated that even the most basic facts are missing, e.g., how the defendant pleaded or anything else that transpired at the preliminary hearing.

conviction in the 14-page Judgment of the Special Panel and in the Judgment of the Court of Appeal. He was sentenced to 11 years imprisonment.

On the whole, the factual analysis of the Judgment is thorough and careful. Although there is some reference to international criminal law jurisprudence, the treatment of the legal issues—for example, the definition of the elements of torture—is rather brief. This brevity poses more of a problem for the Court’s application of the doctrine of command responsibility, which defines the circumstances under which a commander may be held liable for acts committed by his subordinates. This is a complex doctrine and specific aspects of it have been the subject of a great deal of attention in the decisions of the ICTR and ICTY.²³¹ This is especially true of the mental element required and the circumstances under which knowledge of the crimes of his subordinates may be imputed to the commander.²³² It is also true of the key issue of how to determine when a superior-subordinate relationship exists, and how to define “de facto authority” and “effective control,” which are important indicia for this relationship. It is standard practice at the ICTR and ICTY to discuss in detail the required elements, to apply careful and systematic analysis to each of them, and to specify the evidence on which the finding for each element is based.²³³ Though these courts sometimes do so at excessive length, the necessity of specifying the elements, defining them adequately, and applying them systematically to the facts so as to justify the Court’s conclusions is fundamental to the function that a Judgment is to fulfill. It is also required by UNTAET 2000/30, Section 39.3a–e.

In the Marcelino Soares Case, although the defendant was convicted on both command and individual responsibility, there is no enumeration of the elements which the prosecution had to prove to establish liability under the definition provided in UNTAET 2000/15, Section 16. The standard of command responsibility is not defined, and the Court makes no specific findings on the elements of the superior-subordinate relationship, effective control, the power to prevent or punish, and so on, central to that doctrine. There is also no specification and definition of the theory of individual responsibility on which the accused is convicted. The total discussion of the theories and bases for findings of responsibility for the conviction on torture as a crime against humanity is as follows: “The accused bears both personal responsibility and command responsibility according to Sec. 16, Reg. 2000/15.” This is not a reasoned justification for the Panel’s finding of guilt on these grounds.

One of the grounds of appeal was that the elements of command responsibility were not proved at trial.²³⁴ The Court of Appeal, however, does not deal with the issue raised in a systematic way. Although the appellant argued that the elements were not proved, the Court of Appeal did not respond directly to this ground of appeal as required by UNTAET 2000/30, Section 41.5. Its decision does not define command responsibility or discuss its elements or how the Special Panel interpreted or applied them or how it should have done

²³¹ See, e.g., ICTY Kunarac Trial Judgment, paras. 394–399; ICTY Kvočka Appeals Judgment, paras. 136–177.

²³² The Delalic Trial Judgment and the Delalic Appeals Judgment (paras. 182–268) treat this issue at great length.

²³³ See, e.g., ICTY Krstić Trial Judgment, paras. 603–605 and 647–652, for a relatively abbreviated (by ICTY standards) account.

²³⁴ “[N]ao se provou que ... os elementos essenciais de responsabilidade de que o arguido era o commandante das operacoes” (Court of Appeal Judgment, p. 1).

so. The three scattered passages in the Court of Appeal decision that even mention the issue are in "Factual Findings" in regard to the attacks on the three victims. One states that the accused held the position of *Babinsa*. The second states that he never punished any of his subordinates for the specific acts described in the finding as to the particular victim. The third, also embedded in the findings in relation to specific victims, mentions that he did not prevent his subordinates from committing the specified acts of violence. These points are indeed relevant to command responsibility, but they are not dealt with by the Court of Appeal as part of a discussion of the definition or requirements of that doctrine. They also do not include all the required elements. Indeed, because the elements of command responsibility are not enumerated or dealt with systematically, it is impossible to be sure what definition the Court of Appeal was in fact applying. On these crucial issues the Judgment appears incomplete and confused.

In their conclusions, the Court of Appeal even seems to ignore that the accused had been convicted on a theory of command responsibility. Despite their earlier references to his role as a commander, in specifying the grounds on which they uphold the conviction, they speak *only* of his actual participation: "The accused knew he was participating in the acts and he wanted to participate" ²³⁵ This is, of course, the basis for individual responsibility and not command responsibility. Ultimately, this confusion was created by the failure of the Court to explicitly address the command responsibility issue as a ground of appeal and its concomitant failure to specify and analyze the theory of responsibility it was relying on and the required elements to establish it. The Court of Appeal thus upholds the sentence and conviction without substantively addressing one of the three grounds of appeal (UNTAET 2000/30, Section 41.5). Especially given the shortcomings of the treatment of command responsibility in the Special Panel's Judgment, this issue demanded serious consideration and analysis.

D. Trial of Aparicio Guterres: Justice in a hurry

Aparicio Guterres was indicted on 18 June 2004 after his case was severed from an Indictment charging 57 other individuals. ²³⁶ On 4 November 2004 the prosecution sought to withdraw the Indictment on the grounds that it wanted to call a "more egregious" case to be tried instead. This motion was denied. ²³⁷ On its face the prosecution's motion seems odd, because Aparicio Guterres was accused of the murder of 13 individuals as a crime against humanity. This ranks among the most serious charges in a case brought against a single individual in the entire Serious Crimes process.

Clearly the completion deadline of 20 May 2005, mandated by Security Council Resolution 1543, was making itself felt. The prosecution, as noted earlier, had been instructed that it was to complete the cases already in the pipeline and not bring any new Indictments, because doing so might mean that some cases remained unfinished on 20 May 2005. In order to bring a new case forward, a case already in the queue would have to be dropped. Apparently because the case was relatively weak, the prosecution sought to withdraw its Indictment.

Clearly the completion deadline, mandated by the Security Council, was making itself felt

²³⁵ "O arguido sabia que estaria a participar naqueles actos e quis esse participacao..." (Court of Appeal Judgment, p. 7).

²³⁶ Case No. 18a/2003, Judgment of 28 February 2005.

²³⁷ See the ruling of Judge Schmid on 19 November 2004, which adds further details to the account provided here.

It was prevented from pursuing this strategy because, as Judge Schmid rightly pointed out, withdrawal of the Indictment would mean that the accused was still at jeopardy of prosecution. The case went forward and trial commenced on 28 January 2005. The prosecution called three witnesses and then again asked leave to withdraw the Indictment because it had no further witnesses to call. Essentially, it deliberately failed to make a case against the accused. The defense argued that a Judgment of acquittal was instead the appropriate response because the prosecution had closed its case. The Panel accepted this argument and entered a verdict of acquittal.

This case is troubling for several reasons. It shows the direct impact that the completion date of 20 May 2005 had upon proceedings in the courtroom and upon prosecution strategy. It confirms that cases ready for trial against defendants who were in East Timor were not brought forward because of the Resolution 1543 mandate. The case also wasted time and resources in the closing months of the trials. Ordered to proceed upon the failure of their initial motion to withdraw, the prosecution came to trial and deliberately did not make its case, forcing an end to the proceedings. The result was an acquittal that benefited the accused, but what of the families of the 13 victims of whose murder he was accused? If the case was so weak, why was he indicted and brought to a preliminary hearing? If the case was not so weak that it could not be prosecuted, what was the justification for not preparing an adequate case to prosecute these most serious charges? It was the UN's completion deadline that drove the proceedings, not the interests of justice. If the prosecution's representation that it had a "more egregious" case than 13 murders to bring forward was true, then the imposition of the deadline meant that an extremely grave case was never tried. From every perspective this manner of proceeding is unacceptable.

E. Trial of Januario da Costa and Mateus Punef: What 'the Court cannot ignore'

This trial for murder, extermination, inhumane acts, and other crimes against humanity connected to the Passabe massacre was one of the last heard at the Special Panels. The Judgment was handed down on 25 April 2005.²³⁸ Although Januario da Costa was a Sakunar militia commander, the amended Indictment only charged him with individual responsibility under UNTAET 2000/15, Section 14. The trial raises many of the issues already discussed, including weak Indictments, great difficulties with testimony of witnesses, and a Judgment that goes into great detail in its "Factual Findings" yet deals with key legal issues in a very truncated and confused manner.²³⁹ In considering the Judgment, we will focus principally on one issue related to the prosecution's burden of proof and the Court's apparent willingness to overlook the prosecution's failure to meet it.

In considering the role of da Costa as a commander, the Court addressed the problem that the prosecution had not produced witnesses who could testify directly to the particular killings with which the two accused were charged. The Court made the following decision on how to deal with this issue:

²³⁸ Case No. 22/2003, Judgment of 25 April 2005.

²³⁹ The discussion of command responsibility is particularly troubled. The elements are not defined and the Court appears to confuse this theory of liability with co-perpetration, which it also does not define and analyze. Its findings of liability under command responsibility are particularly problematic in that the prosecution sought leave to withdraw its allegations on this issue (pp. 1, 13–14).

... the Court is ready to accept that killings took place in those villages [Nibin Tumin and Kiubiselo]. *While not a single direct testimony has been heard in this trial in relation to the murders described in count 1 of the indictment*, the Court finds that it can be agreed that these events have happened for the following reasons:

In the first instance at least two witnesses have made an indirect reference to these murders, the first one saying that Gabriel Colo ... stated that himself killed a person in Kiubiselo and the second one generically stating that murders ... had taken place at that time.

In the second instance the Court cannot ignore that this episode is the basis from which all counts of the indictment originate. *It is the single most severe criminal event in the history of East Timor*. ... It would unduly limit the Court to ignore these events and their relevance to this case. *Based on the stated magnitude of the facts the Court finds it impossible not to take them into consideration* (emphasis added).

This finding is extraordinary. We have seen how the practice of the Special Panels was to accept international reports of human rights investigations to demonstrate the general context of the violence that transpired in East Timor in 1999. It is one thing to blindly accept such reports as establishing a general historical context of violence in East Timor in 1999. It is altogether different, and deeply troubling, for the Special Panel to find that in regard to *the specific episode of killings "from which all counts of the indictment originate"* (emphasis added), that general knowledge can substitute for evidence. No reports are referred to here. The Court openly admits that not a single witness has given any direct testimony as to the events on which the central count of the Indictment is based. It cites only two witnesses, who give what it calls "indirect testimony." One is based on a hearsay statement and only involves one murder and no allegation of the involvement of the accused. The second is just a "generic" statement that murders had taken place at that time, without any information about the basis for that opinion or identification of the accused as having participated.

The real reason for the Court's finding appears from its "second instance." The Court essentially says that this incident is so important in the history of the East Timor violence that it would be "impossible" not to take it as established. This is tantamount to saying that it is impossible to acquit the accused. This suggests, of course, that the Court was not impartial, did not take the presumption of innocence and burden of proof seriously, and that the accused was denied his right to a fair trial.

Given the magnitude of these crimes, how can the Court not require the prosecution to produce evidence of them? Surely the burden of the prosecution's failure cannot fall on the accused, whose guilt must be proved beyond a reasonable doubt. This finding seems to confirm the concern expressed by some judges that some Panels were simply not prepared to acquit when the prosecution failed to make its case and meet its statutorily mandated burden of proof.²⁴⁰

F. Trial of Rusdin Maubere: Conviction for crimes not charged

Rusdin Maubere was indicted on 22 September 2003 on charges of enforced disappearance and torture as crimes against humanity.²⁴¹ The defense called no witnesses at trial and the

²⁴⁰ See the section on "Equality of Arms" in Part Two above for a discussion of this issue.

²⁴¹ Case No. 23/2003, Judgment of 27 May 2004.

The accused was convicted of a crime with which he was not charged and against which he had no opportunity to defend himself

Judgment hardly refers to allegations or arguments made by defense counsel. The Judgment also displays a number of features that have been noted frequently above, including basing findings on the chapeau elements of crimes against humanity on the fact that the violence in East Timor in 1999 is “known world-wide.” The Court acknowledges contradictions in the testimony of the prosecution’s witnesses but states that this is understandable because of the five-year lapse in time and the fact that the witnesses are illiterate and have a limited capacity for reasoning and memory. All of this, and other features as well, could be discussed at length, but there is another far more serious aspect of the Rusdin Maubere Case: The accused was convicted of a crime with which he was not charged and against which he had no opportunity to defend himself. How did this happen?

In considering the evidence on the charge of disappearance, the Court concludes that there was no disappearance because the victim was taken to a militia post to be beaten and murdered. His body was not found, but his fate was known. This might have simply led to acquittal on the charges in the Indictment. The Court, however, takes a further step and claims that the facts alleged in the Indictment and the evidence before the Court are sufficient to establish the elements of murder. Therefore, they conclude, they are justified in making what they call a “new juridical-penal qualification of these facts” (*uma nova qualificacao juridico-penal desse mesmos factos*) and on this basis, entering a conviction against the accused for murder as a crime against humanity even though it was not charged in the Indictment and he received no notice of the charge. This conviction violates the Rules of Criminal Procedure for the Special Court as well as the fundamental principle of justice that an individual be informed of the charges against her and have an adequate opportunity to defend against them.²⁴²

The Coordinating Judge attributed this decision to the belief of some of his brethren that in civil law jurisdictions there is a principle that “no one is surprised by the law.”²⁴³ The German Code of Criminal Procedure, however, provides that “[t]he accused may not be convicted of another penal provision than the one mentioned in the Indictment unless this change of legal aspect has been especially pointed out to him and he was given the opportunity for defense” (Section 265). Lest one think that the Portuguese-speaking judges of the Panel that convicted Maubere were relying on civil law principles enshrined in Portuguese law, the Portuguese Code of Criminal Procedure, of which they were apparently also unaware, has a similar provision which requires that in such an instance the Presiding Judge communicate the change in charge to the accused so that he may defend himself against it (Article 358). A further provision of the Portuguese Code of Criminal Procedure provides that the violation of this obligation must lead to a nullification of the sentence (Article 379).

²⁴² UNTAET Regulation 2001/25, Section 32, makes provision for the amendment of the Indictment, *at the request of the prosecutor*, after the trial has commenced and before the final decision. This procedure was not employed here as it was the judges who changed the charges in their final decision. Section 32 also requires that the accused be informed of the amendment and be given an opportunity to defend against the new charges.

²⁴³ Interview, 30 September 2004. Judge Rapoza also noted that because this Judgment, like others from the Portuguese-speaking Special Panel, was only promulgated in Portuguese, it could not be read by the English-speaking judges. This kind of situation produced what he referred to as the “fragmented jurisprudence” of the Special Panels. By the end of the Serious Crimes trials steps were taken to ensure that all SPSC decisions in Portuguese had been translated into English.

The point here is that the erroneous belief of some judges in regard to a purported civil law principle apparently led them to ignore and violate the law of their own court, which they were sworn to apply. The UNTAET Transitional Rules of Criminal Procedure (Sections 32.1–4) explicitly prohibit the kind of decision made by the Special Panel in this case. It also violated basic human rights procedural guarantees, as expressed, for example, in Article 14.1 of the International Covenant on Civil and Political Rights, which is binding upon East Timor and therefore on the Special Panels.

In short, the conviction of Rusdin Maubere on a charge of which he was not informed and given no opportunity to defend himself against, represents a serious miscarriage of justice. It also demonstrates the apparent ignorance of these members of the Special Panels of the procedural law of their own court, the Constitution of East Timor, and fundamental international norms binding on the Special Panels under their Statute.

The indifference to the rights of the accused is manifested also by the fact that after making their “juridical-penal qualification” their Judgment does not enumerate the elements of this “new” charge of murder as a crime against humanity or make specific findings on the evidence and facts that support the conviction.²⁴⁴ Moreover, because the victim’s body was never recovered, the cause of death was not established at trial. The Court makes no specific finding that the accused beat the victim or about the specific injuries that caused his death. They state only that although the injuries could not have been evaluated they must have been serious because they caused the victim’s death. But the victim was removed from the station after the beating, and the Court specifically found that the accused did not go with the men who took the body. Since murder was not charged, the prosecution made no attempt to prove causation and no evidence was produced on this crucial issue.

The finding of the Special Panel was appealed and the Court of Appeal changed the conviction to a lesser degree of murder (Indonesian Penal Code 338), which was also not charged in the Indictment. The Court of Appeal appeared equally unconcerned about convicting an individual while denying him an opportunity to defend himself. This complete disregard for the rights of the accused occurred in mid-2004, in the final year of the process.

G. Trial of Alarico Mesquita and Seven Others

A brief account of the Judgment in the trial of Alarico Mesquita and seven other defendants will also illustrate the wide range in quality of the Judgments of the Special Panels at a late stage in the trials.²⁴⁵ The eight accused were charged with crimes against humanity, including “persecution in the form of abduction” and torture. They were indicted on 10 October 2003 and the trial took place over 19 days between July and November 2004. The defense apparently called no witnesses.

The Judgment in this case is a model of clarity and competence in comparison with some of those just described. Written by Timorese Judge Maria Pereira, the decision sets out the chapeau elements of crimes against humanity in detail and then makes factual findings with specific reference to the witness testimony that supports them. The Judgment includes a detailed discussion of jurisprudence and the definition of persecution in international humanitarian law. Relevant ICTY and ICTR cases such as Kupreskic, Blaskic, and

²⁴⁴ As noted in the Josep Nahak Case, the prosecution has the burden to “prove every element of the offense beyond a reasonable doubt” Case No. 1a/2004, Findings and Order, p. 23.

²⁴⁵ Case No. 28/2002, Judgment of 6 December 2004.

Nahimana are cited. After discussing persecution, the Judgment turns to an analysis of the elements and definition of torture as a crime against humanity. Judge Pereira had written strong dissenting opinions at the very beginning of the Special Panels trials. In this Judgment, one sees the way in which the experience of serving on the Special Panels had enabled her to acquire a grasp of international humanitarian law doctrines that goes well beyond a number of her international brethren on the Special Panels and the Court of Appeal.

H. Trial of Francisco Pereira: The dissent has it, and ‘isn’t attempt an inchoate offense?’

Francisco Pereira was charged with murder and persecution as crimes against humanity.²⁴⁶ The account of the procedural history of the case is truncated and incomplete. The accused is indicted on 14 November 2003. The Judgment contains no date for the preliminary hearing or any information about what transpired there. The trial began on 6 September 2004 and continued, over 20 trial sessions, until the promulgation of the final decision in April 2005. The Judgment is very long and convoluted, with a detailed examination of the evidence. It also, as the dissent points out, reaches some very surprising legal conclusions.

I call brief attention to this case because of the excellent dissenting opinion of Judge Rapoza, particularly in regard to the conviction of the accused for attempted murder in a case where the victim died after being stabbed in the back and shot in the head.

The accused was one of a number of militia guards that chased an escapee and, during the pursuit, killed him. The accused was armed with a machete, with which he hacked the victim with considerable force. The victim was also shot by another one of the pursuers. The majority reasoned that even though the pursuers clearly acted together, the evidence did not produce an “unequivocal result” in regard to the charge of murder. This was based upon their reasoning that Joint Criminal Enterprise (JCE) doctrine would require that all of the pursuers share the specific purpose of killing the victim. As a result of the lack of an “unequivocal result,” the majority decided to convict the defendant of attempted murder. It must be remembered here that murder is an inchoate offense. That is, by definition an attempt cannot occur where the substantive underlying offense at which the attempt aims has been accomplished. Since the accused directly participated in the attack that caused the death of the accused, stabbing him in the back just before he was shot in the head at close range by one of his militia colleagues, the charge of attempt is legally incoherent. Conviction for attempted murder in this case calls into question the basic competence of the majority of the judges on the Panel in regard to basic criminal law doctrines.

In his separate opinion, Judge Rapoza points out that the majority also do not properly understand Joint Criminal Enterprise doctrine. His exposition is utterly lucid compared to the majority opinion. It sets out in detail the required elements, carefully analyzes them (particularly the mental element), and then applies them to the facts of the case. His opinion also shows how this interpretation of JCE was applied by the Special Panel in two earlier cases. In short, he shows how the facts of the case are precisely the situation for which Joint Criminal Enterprise, as a theory of responsibility, was developed. The result of the majority’s misunderstanding of JCE, he shows, is the absurd acquittal for murder and conviction for attempt, when the victim was killed by a group, including the accused, that was using deadly force to prevent his escape.

²⁴⁶ Case No. 34/2003, Judgment of 27 April 2005.

One might argue that in 2003–2004, the Court of Appeal was the epicenter of incompetence in the Serious Crimes process

Moreover, even if one accepted the majority's contention that the death of the accused fell outside of the scope of the common purpose of the group, this would still not preclude liability under JCE. Familiarity with the jurisprudence of the ICTY would have informed the majority that the so-called "extended version" of JCE covers cases where the crimes committed were clearly not part of the common plan, but were a foreseeable consequence of its execution.²⁴⁷ Thus, ICTY cases have held that when a plan is developed to carry out ethnic cleansing, and a militia group is employed to execute the plan, and it is foreseeable that that group may murder some of those being ethnically cleansed, then all of the participants in the common plan are liable under JCE.²⁴⁸ None of this jurisprudence is referenced in the majority opinion, nor is there a clear analysis of the requirements for JCE.

The Francisco Pereira Case provides a fitting close to this review of decisions of the trial Judgments of the Special Panels. It shows how, despite important improvements in overall performance in 2004–2005, significant shortcomings in the Panels' central functions persisted to the conclusion of the process. In the end, the quality of the Judgments rendered depended not upon what year the trial took place but rather upon which judges were sitting in a particular case.

These shortcomings extended, as has been seen, to the Court of Appeal. Indeed, one might well argue that in 2003–2005 it was the epicenter of incompetence in the Serious Crimes process (with the notable exception of its Timorese Judge, Jacinta da Costa). It not only failed to provide effective guidance to the Special Panels in jurisprudence and other areas, but in a number of cases it compounded these errors through its own inability or unwillingness to apply standards of appellate review and limit its focus to grounds of appeal, and through its own fundamental lack of familiarity with international criminal law. It thus failed to fulfill effectively the most central functions of the only appellate court in East Timor. The results of these failures were, as will be seen in Section 6, decisions that resulted in serious violations of the rights of the accused.

SECTION 5: THE JOSEP NAHAK CASE

Although the Case of Josep Nahak never proceeded to trial, it is included here to provide an example of some of the best jurisprudence produced by the Special Panels so as to give a fair representation of the range of practice of the Court.²⁴⁹ Josep Nahak was arrested in March 2002 in connection with a crimes against humanity investigation but released at the request of the prosecutor because of what was perceived as his abnormal behavior. After an SCU psychiatric examination not based upon any court order and without affording Nahak access to counsel, he was indicted on 15 March 2004 on multiple counts of crimes against humanity. Following an independent evaluation ordered by the Court, a competency hearing was held on 19–20 January 2005. The case was taken under submission by Judge Rapoza, who, on 1 March 2005, ruled that the accused was not competent to stand trial. His Interlocutory Decision shows the level of judicial opinion writing and jurisprudence that was available at the Special Panels and should have been the standard for that Court. It also demonstrates

²⁴⁷ See the ICTY Vasilijevic Appeals Judgment, paras. 95–101, for a discussion of the three types of JCE.

²⁴⁸ Applied most recently (March 2006) at the ICTY in the Stakic Appeals Judgment, paras. 64–104.

²⁴⁹ Case No. 1a/2004.

that there was no reason why the judges of the Special Panels could not produce written decisions reflecting best international practice.

The Interlocutory Decision addresses a question that has not been extensively dealt with by other international and hybrid tribunals, namely, the standards by which competency determinations should be made. In the absence of East Timorese statutory provisions, the Decision had to address the treatment of the issue of competency under “international norms and principles applicable in East Timor” (p. 10). In a succinct review of relevant international case law from the Nuremberg and Tokyo Trials to the Strugar and Nahimana cases at the ICTY and ICTR, the Decision analyzes the relation of the issue of competency to the fundamental right to a fair trial (pp. 10–20). Of particular importance is the exploration of the “rationale behind the competency requirement” (pp. 13–20), and of the required standard of proof in such cases (pp. 23–28) which may be said to contribute to the development of jurisprudence on this question in international practice. The principles adduced through careful analysis of the relevant case law, international conventions, and underlying rationale, are then meticulously applied in a thorough treatment of its “Findings of Fact” (pp. 28–39) and “Analysis” (pp. 39–50) to reach the conclusion that accused was not, in fact, competent to stand trial.

In the context of the Special Panels, this opinion stands as a model of what a “reasoned decision” should be, a standard most of the other decisions of the Special Panels and the Court of Appeal do not meet. The decision in the Nahak Case shows the vital importance of using applicable international case law and of providing a logical and complete analysis of the essential issues of the case. An individual deprived of his or her liberty by a UN-sponsored tribunal should be entitled to no less.

SECTION 6: THE ‘APPLICABLE LAW’ DECISIONS OF THE COURT OF APPEAL – THE WORLD TURNED UPSIDE DOWN

This analysis of the performance of the Special Panels and the Court of Appeal through a review of their decisions from 2000–2005 has often been highly critical. In regard to the “applicable law” decisions of the Court of Appeal to be considered here, the question of how such a situation could have been allowed to continue is raised with far greater force. As already noted, there was a 19-month hiatus in the activities of the Court of Appeal until it was reconstituted in mid-2003.²⁵⁰ During this time no appeals from final decisions, interlocutory motions, or from decisions on pre-trial detention could be heard. In June 2002 there were already eight Serious Crimes convictions awaiting appeal, five of them from Judgments made in May 2001.²⁵¹

Judge Jacinta da Costa, who was the Timorese Judge on the Court of Appeal during this hiatus, commented: “How can it be that there are no judges at the Court of Appeal? Human rights,” she said, “can’t be only talk.” Judges, she explained, have to protect the rights of the accused but during this period there were many urgent cases that were not heard and the human rights of those involved were violated.²⁵² She stated that she had written a letter to

*‘Human rights,’
said one judge,
‘can’t be only talk’*

²⁵⁰ During this interval UNTAET did convene one special panel of the Court of Appeal, but it only heard one case during the one month of its existence.

²⁵¹ SCU Fact Sheet, *Justice and Serious Crimes*, June 2002.

²⁵² See also JSMP, *Right to Appeal in East Timor*.

the Special Representative of the Secretary-General about the problem and was told that there were political issues about the appointments and that some highly qualified candidates were rejected by the East Timorese side. This situation finally came to an end in mid-2003 with the reconstitution of the Court.

While the controversial issue of Portuguese language politics in East Timor undoubtedly played a significant role in the long delay in reconstituting the Court, no one imagined what would happen after this Portuguese-dominated court began to once again hear cases. The initial result was the Armando dos Santos decision, which provoked a scandal that embarrassed the Court, UNMISSET, and the Timorese government, and called into question the legitimacy, competence, and integrity of the newly appointed highest court in East Timor. Because of the international criticism which this opinion provoked, it was widely reported on and has been the subject of intense scrutiny by JSMP and international NGOs.²⁵³

A. Trial of Armando dos Santos

Armando dos Santos was indicted on 5 June 2001 for murder and “other inhumane acts” as crimes against humanity for his participation as a platoon commander in BMP militia attacks on civilians, including the attack on the Liquica Church, in 1999.²⁵⁴ The trial took place over 10 hearings from January to July 2002. The defense called no witnesses. The accused was convicted and sentenced to 20 years imprisonment.

The trial Judgment of the Special Panel indicates that this Portuguese-speaking panel was confused as to the nature of murder as a crime against humanity. In the Indictment, the accused was properly charged with murder as a crime against humanity, under Article 5.1 of UNTAET Regulation 2000/15. The Judgment of the trial chamber, however, describes the charges in the Indictment as the “crime against humanity of *premeditated* murder” (*Um crime contra a Humanidade, homicidio com premeditacao, previsto e punido pelos artigos 5.1, alinea a*). The problem here is that Article 5.1 does not mention “premeditation,” because it is not an element of murder as a crime against humanity in international criminal law, but, rather, “intent.” The Court has confused murder in the domestic criminal law with murder as a crime against humanity under international law, as incorporated into the Statute of the Special Panels. This is, however, by no means the only mistake that the Court makes in regard to applying the law of crimes against humanity.

First, the Court does not clearly understand the distinction between the chapeau elements of crimes against humanity and the elements of the specific crime against humanity (e.g., murder) with which the accused is charged. For this reason they state that what they mistakenly call the three elements of crimes against humanity (widespread or systematic attack, an enumerated crime, and knowledge that the act charged is part of the larger context of the attack) are in reality only two elements, the “actus reus and mens rea” of the crime charged. This is doctrinally incoherent and seems to reflect a desire on the part of the Panel to assimilate the more complex jurisprudence of crimes against humanity into the more familiar terminology of domestic criminal offenses. Among other things, they ignore that the knowledge requirement of the chapeau element is completely independent of the mental element required by each different enumerated crime against humanity, in this case

²⁵³ JSMP, *Report on the Court of Appeal Decision in the Case of Armando dos Santos* (August 2003); *Overview of the Jurisprudence of the Court of Appeal*.

²⁵⁴ Case No. 16/2001, Judgment of 9 September 2002.

murder and other inhumane acts. They also err in their definition of the mental element and make basic mistakes in analyzing the chapeau elements. These errors led the Special Panel to find the accused not guilty of crimes against humanity and to convict him instead of ordinary murder under the Indonesian penal code.

The appeal: 'talking like a lawyer.' This, then, was the case that came before the Court of Appeal. One might have expected that the Court of Appeal would have taken this opportunity to clarify the proper elements of crimes against humanity and to correct the errors of the court of first instance. On the contrary, the decision of the Court of Appeal staked out a path that led even deeper into confusion, mistaken jurisprudence and, ultimately, a violation of the rights of the accused.

The ground of appeal advanced by the prosecution was that the Special Panel erred in finding that the accused was not aware of the context of the attack on the civilian population and its connection to his own acts. Rather than dealing immediately with this issue, the Court of Appeal first considered the issue of what law should govern the case. It was its ruling on this issue that produced an immediate local and international scandal, and, consequently, profound embarrassment for the UN.

The ruling of the Court of Appeal went against what had been held in every case decided by the Special Panels and the Court of Appeal in their first three years of existence by ruling that Portuguese law was the applicable law for the Serious Crimes trials. This implied, of course, that every single one of the previous convictions for crimes other than crimes against humanity were invalid because they had applied the wrong law: Indonesian.²⁵⁵ How did the Court of Appeal reach this surprising conclusion?

To summarize briefly, they read the UNTAET Regulation 1999/1 as requiring the Special Panels to apply the *law applicable in East Timor before 25 October 1999*. They further reasoned that Indonesian law was not actually *applicable* during this period because the Indonesian occupation of East Timor was illegitimate. Hence, the applicable law was the law before the Indonesian occupation: Portuguese law. All previous cases since the inception of the Special Panels in 2000 had held the contrary, that is, that Indonesian law was the relevant law. But was the ruling of the Court of Appeal, however surprising, well founded?

According to the Special Panels, which consistently refused to recognize this manifestly erroneous decision by the Court of Appeal, it was not. To leave aside various details and concentrate on the central point, the Court of Appeal had made a glaring error, an error that was itself due to its linguistic dispositions. The passage italicized above stated that the Court of Appeal focused on the law “applicable” (*as leis vigentes*) in East Timor before the specified date. They interpreted the word “applicable” in the sense of “ought to be applied.” The problem was that their analysis relied upon the Portuguese translation of the Regulation, while the original English version is the authoritative one. This version they never seem to have consulted. Accordingly, they relied upon the Portuguese word “vigentes,” which is a gerundive meaning “applying” or “applicable.” This, however, is a mistranslation of the authoritative English version which refers instead to the “law *applied* in East Timor” before the specified date. Because the phrase “law applied” lacks a normative dimension and simply refers to what law was actually used by the judicial institutions of East Timor prior to

²⁵⁵ As will be seen, the crimes against humanity convictions in previous cases would also be invalid, but on the grounds of retroactivity.

*The Court of
Appeal attempted
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October 1999, there can be no doubt that the law in question is Indonesian law. This is what the Special Panels and the Court of Appeal had recognized in every previous case, since Indonesian law was *applied* in East Timor for almost 25 years up to October 1999.

Several months after the Court of Appeal decision, on 30 September 2003, the Parliament enacted a law which essentially reprimanded the Court of Appeal and affirmed that until new legislation could be enacted Indonesian law was to be applied, within the limits provided by the Constitution.²⁵⁶ This made perfect sense, and was the reason for this provision in the first place, because virtually every Timorese lawyer and judge in the country had been educated in Indonesian law schools and knew nothing of Portuguese law.

The Court of Appeal, in attempting, as it were, to stage a judicial coup and establish Portuguese law as the law of the land, made a basic interpretative error. It misread the UNTAET Regulation because it did not bother to refer to the authoritative English version of its own Statute, which does not admit of the same ambiguity. The political dimensions of the decision are made clear by the circumstances surrounding the dissenting opinion of the Timorese Judge on the Court of Appeal, Judge Jacinta da Costa.

Judge da Costa dissented in this and all subsequent “applicable law” decisions up to the intervention of the legislature. She correctly argued that a reading of the relevant statutes clearly established that Indonesian law was the law to be applied. According to a well-placed source, in Chambers she had tried to convince the two Portuguese international judges of the Court of Appeal of the lack of a legal basis for their ruling. Their response was that she was “*talking like a lawyer,*” but that *this issue was “a matter of politics.”* Given that these were in principle deliberations on the correct interpretation of the Court’s Statute, one would expect that “talking like a lawyer” would be appropriate. That Judge da Costa’s international mentors should reject her arguments because she was analyzing the statutory language and making legal arguments as a judge should, is indicative of the state of affairs that led to the decision in this case to establish the primacy of Portuguese law.²⁵⁷ Their decision also calls into question the independence of the Court of Appeal. The proper channel for such “politics” is through the legislative process and not the courts.

The two international judges also refused her request in the Armando dos Santos Case for more time so that she could write a dissenting opinion. Because of this refusal she only wrote a note on the signature page of the Judgment indicating that she dissented. In all the subsequent applicable law cases she did dissent, which was quite courageous considering that the other two judges on the Court of Appeal are her mentors and evaluated her in the crucial examination that would determine whether she would receive a permanent appointment as a judge.²⁵⁸

After making this finding on the “applicable law,” the Court of Appeal next had to deal with the fact that UNTAET Regulation 2000/15, Article 5.1, and not Portuguese law, provides the obvious statutory basis for the application of crimes against humanity by the Special Panel against Armando dos Santos. This Article, as noted above, defines crimes against humanity as one of the crimes within the jurisdiction of the Special Panels for Serious Crimes. How did the Court of Appeal then deal with this obstacle to establishing Portuguese law as governing the case at hand?

²⁵⁶ For comment see JSMP, “JSMP Press Release,” 10 October 2003.

²⁵⁷ Interviews, 29 March and 1 April 2005. The interviewee requested anonymity.

²⁵⁸ Interviews, 29 March and 1 April 2005. The interviewee requested anonymity.

The Court of Appeal, after three years of prosecutions, convictions, and appeals under this Article, decided that a conviction for crimes against humanity on this statutory basis would involve the application of retroactive legislation. Hence, they declared the Statute of their tribunal invalid in this central regard as violating the prohibition against ex post facto laws. They did this in apparent ignorance of the vast amount of jurisprudence on this subject which had been raised in regard to the trials before the ICTY and ICTR. Since crimes against humanity are part of international customary law, it is not true, as the Court of Appeal maintains, that the crimes charged were not crimes at the time they were committed. This position was explicitly rejected by the Special Panels and was subsequently not followed by the Court of Appeal itself.

This edifice of error led the Court to an even more fundamental mistake in grounding its conviction of the accused. In looking at Portuguese legislation, which they had held to govern rather than Article 5.1, they determined that murder was not a crime against humanity under the Portuguese Penal Code. The Portuguese Code in force at the time (and subsequently amended in pertinent part to conform to international standards) contained a formulation of crimes against humanity that confused all of the primary categories of international criminal law, and jumbled them together under the rubric of “crimes against humanity.” Thus, although it did not enumerate murder as a crime against humanity, the Code did include provisions for “genocide” and “war crimes” as specific crimes against humanity. This is conceptually incoherent, as these are separate generic categories of crimes under international law, not specific offenses like murder, extermination, rape, torture, and so on, which can constitute crimes against humanity.²⁵⁹

The international judges of the Court of Appeal were apparently unaware of the erroneous nature of the provisions in the Portuguese Code. This was the case despite the fact that the Statute of the Special Panels clearly distinguished between crimes against humanity and genocide as separate categories of crime, not related in any way. On the basis of its application of these flawed provisions of the Portuguese Code, the Court of Appeal reached its ultimate disposition in the case. They held that Armando dos Santos was not guilty of murder as a crime against humanity because such a crime does not exist under the Portuguese Penal Code. Far from acquitting him, on this basis, however, they found him guilty of a completely different crime, with which he had never been charged: “a crime against humanity in the form of genocide” (*um crime contra a humanidade na forma de genocidio*). On this basis they sentenced him to 15 years imprisonment.²⁶⁰

Since this crime was not charged in the Indictment and the accused had been given no notice and opportunity to defend, this finding would have even been illegal under the Portuguese law they had held to be applicable. The Portuguese Penal Code (like UNTAET 2000/30, Section 32.4, which the Court of Appeal is legally bound to apply) provides that an accused must be informed of any changes in the charges against him and that any conviction rendered where he has not had such notice and an opportunity to defend is a

²⁵⁹ Genocide is defined by the 1948 Genocide Convention, which forms the basis of the definition of genocide in the statutes of all of the international and hybrid tribunals. The sources of law for crimes against humanity are utterly distinct and more complex.

²⁶⁰ This sentencing revision is in itself curious, since genocide is considered the most serious international crime, often referred to as the “crime of crimes.” One would have thus expected the Court of Appeal to impose a more severe sentence, not a lighter one.

nullity (Portuguese Penal Code Articles 358 and 379). The decision of the Court of Appeal thus would have also violated Portuguese law had it in fact been applicable. It also violated the Court's Statute and Article 14.1 of the International Covenant on Civil and Political Rights, which is also binding upon the courts of East Timor.²⁶¹ Such matters of procedural due process and respect for the provisions of the law do not seem to have informed their decision.

There are four fundamental problems raised by this result.

1. First, there is no such thing as genocide as a crime against humanity, or "a crime against humanity in the form of genocide." This is simply a nonexistent crime and doctrinally incoherent. Accordingly, the accused was convicted of something that is not recognized as a crime under either the Court's own Statute or the international norms and practices that the Special Panels' Statute requires it to apply and respect. The decision of the majority of the Court of Appeal thus displays the absence of even a rudimentary understanding of some of the most basic concepts in international criminal law.
2. Genocide was not charged in the Indictment, the accused was not informed of this charge against him, and no evidence was ever introduced to establish its elements. He thus had no opportunity to defend himself against these new charges. The decision thus violates the Transitional Rules of Criminal Procedure (Section 32.1–4) which prohibit any change in the charges against the defendant after a final decision by the Special Panel.
3. The Court of Appeal does not discuss the definition or elements of genocide and does not refer to evidence that might establish them (leaving aside the primary objection in two above). In addition, it bases a genocide conviction on intent to destroy a group because of their political affiliation, in violation of both the definition of genocide contained in its Statute (UNTAET 2000/15, Article 4) and in the 1948 Genocide Convention, which is also binding upon the tribunal.
4. Armando dos Santos has no recourse from this conviction and the sentence imposed on him of 15 years imprisonment. The Court of Appeal is the highest court in East Timor until the establishment of a Supreme Court at some date in the distant future. They have ruled that there is no appeal from this decision and its sentence of 15 years imprisonment.

UNMISSET was profoundly embarrassed by the Armando dos Santos Case and hence was well aware of its shortcomings. The international judges, Ximenes and Antunes, responsible for this decision have continued to be reappointed by the UN and also to serve as trainers and mentors at the Judicial Training Center as well as in their own court. Judge da Costa, who risked her career to dissent and stand up for the right legal decision, is a "probationary trainee" under their supervision and her career depends largely upon their goodwill.

B. Trial and Appeal of Manuel Goncalves Bere

Despite local and international critiques pointing out the errors in its holding in the Armando dos Santos Case, the Court of Appeal continued undeterred down this path until stopped by the intervention of the legislature. We will consider one more of these

²⁶¹ Under UNTAET 1999/1, Section 2 and UNTAET 2000/15, Section 3.1a.

“applicable law” decisions to make clear that the Armando dos Santos Case was not a one-time aberration.²⁶² Manuel Goncalves Bere was charged with murder under the Indonesian Penal Code. There was no charge for crimes against humanity.²⁶³ The defense called no witnesses and presented no evidence. The prosecution called three witnesses on 19 April 2001 and the trial was then continued to the next day for closing statements. The accused was convicted and sentenced to 14 years imprisonment.

On appeal, the majority decision (Judge da Costa dissenting) nullified the conviction for murder under the Indonesian Penal Code. It substituted instead a conviction for murder under the Portuguese Penal Code *and* for genocide as a crime against humanity under the same code. As in the Armando dos Santos Case, genocide was not charged in the Indictment, nor were crimes against humanity. The Court of Appeal in reaching its conclusion did not mention the definition of genocide or the elements required to convict. They made no attempt to show how the meager evidence introduced by the prosecution might support conviction under these crimes not charged. As in the Armando dos Santos Case, their decision violates Section 32.1–4 of the Court’s Transitional Rules of Criminal Procedure.

The Court of Appeal’s entire discussion of the issue of genocide occupies two brief paragraphs which assert, without adducing any evidence, that the accused knew that the murder he was participating in aimed at destroying the supporters of independence. They concluded that this supported a conviction for “a crime against humanity in the form of genocide.”

The errors contained in the Judgment’s discussion of genocide are numerous and grave. To name a few (and leaving aside the entire applicable law issue):

1. Lack of awareness that genocide cannot be a crime against humanity and failure to distinguish the very different elements of these categories of criminal conduct. This indicates lack of even the most elementary understanding of international humanitarian law.
2. No enumeration of the elements of genocide or of the very complex jurisprudence on this topic.
3. The decision applies genocide to a campaign against a *political group* (supporters of independence). It appears ignorant of the fact that genocide, as the Court’s Statute makes clear in UNTAET Regulation 2000/15, Article 4, can only be committed in regard to a “national, ethnical, racial, or religious group.” (As in the 1948 Genocide Convention, also binding on East Timor.)
4. Lack of awareness that conviction for genocide requires a finding of a specific intent to destroy the specified group as such.

As in the previous cases, Judge da Costa dissented against the two Portuguese international judges. The accused has no opportunity to appeal against this conviction and his 14-year sentence for “a crime against humanity in the form of genocide.”

²⁶² In a Decision of 9 December 2003, the Court of Appeal again began to apply Indonesian law as the “applicable law” in the Domingos Amati and Francisco Matos Case. “The SCU Prosecutor in the Appeal case, Essa Faal commented that the decision of the Court of Appeal ... is a positive development for the prosecution of serious crimes ... in that it removes uncertainty as to the applicable law that applies in Timor Leste.” SCU, *Serious Crimes Unit Information Release*, 12 December 2003.

²⁶³ Case No. 10/2000, Judgment of 15 May 2001.

CONCLUSIONS

A number of common themes have emerged from this consideration of this jurisprudential legacy of the Special Panels and the Court of Appeal. The overarching themes are the failure of the recruitment process for international judges (especially at the Court of Appeal), the lack of oversight, and the lack of proper training and resources for the judges of the Special Panels and the Court of Appeal.

Special Panels

The following major points stand out from the survey of the cases:

- Many Judgments so short and abbreviated that they serve as a summary of the findings and conclusions of the Court rather than as a reasoned analysis of the facts and legal issues that indicates how these conclusions were reached and justified.
- Many Judgments that do not follow the standards of UNTAET 2000/30, Section 39, for Final Written Decisions. This is particularly so in regard to adequate representation of the defense case and of the testimony of all of the witnesses. In too many cases it is impossible to tell what arguments the defense made, what testimony they presented (if any), and how (or if) they attempted to undermine the credibility of the prosecution witnesses. No standard format for the Judgments that is consistently applied, though there is clear improvement in this regard in 2004–2005.
- Many Judgments that do not weigh the versions of the facts and the legal arguments presented by the two parties or assess the credibility of the witnesses so as to explain why the Court made the findings it did or how it reached its decision.
- In many Judgments: failure to enumerate adequately the elements of all of the offenses; failure to state clearly the theory of liability and the requirements necessary to prove it; failure to define the elements that are enumerated or to consider the jurisprudential aspects of their interpretation and application.
- In many Judgments: failure to engage in a meaningful way, and often even to refer at all to, the jurisprudence of the ICTY and ICTR or other authorities on international criminal law. This is even more true of the Court of Appeal.
- Lack of due consideration on the part of the judges for the interests of the accused, especially in cases where the defense was manifestly unprepared to represent those interests. This is particularly true in regard to advice pertaining to the right to remain silent and the consequences of admissions or partial admissions of guilt as well as to the production of potentially exculpatory witnesses or evidence.
- Lack of attention in the Judgments to the case of the defense and the apparent frequent ineffectiveness and passivity of defense counsel; the failure of the defense in many trials to call witnesses or introduce any evidence.
- A significant number of cases where the rights of the accused appear to have been compromised. This is especially glaring in the cases where individuals were convicted of crimes not charged and on which they had no opportunity to defend. This is also true

Overarching themes are failure of the recruitment process, lack of oversight, and lack of training and resources

in cases where the Court misunderstood or misapplied the basic legal doctrines on which the conviction was based, or in which they failed to consider evidence or issues of credibility that would have weighed in favor of the defense.²⁶⁴

Court of Appeal

The Court of Appeal enjoys greater resources than those that were available to the Special Panels. Its Judgments, however, manifest all of the problems indicated in regard to the Special Panels, and in some aspects to a much greater degree. The Judgments of the Court of Appeal manifest a wide range of serious problems:

- Lack of attention to the grounds of appeal and to the standard of review.
- Functioning as a second court of first instance and simply overruling decisions as to credibility and the like solely on the basis that they might have reached a different conclusion.
- Seeming lack of awareness of the concepts of burden of proof and the presumption of innocence, and how they function in regard to the weighing of evidence.
- Judgments that display an apparent lack of basic knowledge of fundamental doctrines of international criminal law that the Court of Appeal was applying and reviewing. As a result, many of these doctrines were incorrectly applied, often to the detriment of the accused.
- Failure to address or in most cases even to acknowledge the jurisprudence of the ICTR and the ICTY, including in cases where reference to this jurisprudence might have saved the Court from serious doctrinal errors.
- On appeal, convicting defendants of crimes that had not been charged in the Indictment and that were not considered at trial, and doing so with no notice and no opportunity to defend.
- Legally incoherent decisions, such as convictions for “a crime against humanity in the form of genocide.” Such decisions, as well as the deeply flawed Judgments in the “applicable law” cases, call into question the basic competence of some of the judges of the Court.²⁶⁵

²⁶⁴ Among the more egregious cases, though there are others that could be cited, are the trials of Augusto Tavares, Rusdin Maubere, Marculino Soares, Umbertus Ena and Carlos Ena, Carlos Soares, Carlos Soares Carmone, Julio Fernandes, Francisco Pereira, Mateus Lao, Damiao da Costa Nunes, and Augusto dos Santos.

²⁶⁵ Examples could be multiplied beyond those discussed above. See, for example, the reasoning of the Court of Appeal in the Pascoal da Costa Case (No. 11/2002). Here the Court of Appeal ruled that UNTAET 2000/30, Section 34.3, which provides a non-corroboration rule (“no corroboration of the victim’s testimony shall be required”) for sexual violence cases, was unconstitutional. On what basis did the Court of Appeal determine that this regulation, so central to the contemporary regulation of sexual violence in international and national law, was unconstitutional? It reasoned that because the Constitution gives the defendant an inviolable right to a defense, then the non-corroboration rule violated this right because it assumed that the statements of the victim are always true. This assumption, it said, would always lead to a conviction. This is reasoning hardly worthy of a first-year law student and appears to simply mask the objection of the judges of the Court of Appeal to the non-corroboration requirement. The Court, in the face of a wave of outrage and criticism, subsequently modified its view somewhat, but this does not excuse the reasoning in this decision. See also JSMP, *Overview of the Jurisprudence of the Court of Appeal* for further examples.

PART FOUR. THE FUTURE OF THE SERIOUS CRIMES PROCESS

The Serious Crimes trials did not end because the Special Panels had dealt with all the available cases. Rather, Security Council Resolution 1543 mandated their conclusion as part of the closure of UNMISSET even though only 572 murders out of 1,400 had been captured in Indictments, more than 500 investigative files remained open, and numerous cases that were ready to go trial were not brought forward. This is to say nothing of the ongoing issue of how to provide accountability for the high-level indictees who are at-large in Indonesia. UNOTIL, the small advisory successor mission remaining in East Timor, has no mandate to involve itself in any future trials, which could now only result from decisions by the Timorese government and would be their sole responsibility.²⁶⁶ What, then, are the prospects for a completion of the work of the Special Panels within the Timorese justice system?

In regard to the question of the high-ranking Indonesian indictees never brought to trial, this is a matter that will never be dealt with through a continuation of the Serious Crimes process. The government of East Timor has embarked upon its own solution by means of the joint Commission on Truth and Friendship (CTF) which it has established with the government of Indonesia. It is widely acknowledged that this is a mechanism that will not provide accountability because it lacks the necessary mandate, authority, and political backing. This is not surprising, in that to date the government of East Timor has given no indication that it has a serious interest in pursuing accountability. It seems clear that any mechanism that might achieve accountability for Indonesian indictees will have to come from the international community in response to the Report of the UN Commission of Experts. As such, it falls outside the scope of this report.

This section examines two factors that play a significant role in shaping any potential future East Timorese trials. The first has to do with the handover process by which the files and information necessary for a continuation of the process were provided to the Timorese government after the closing of the Special Panels. Examination of the handover will also provide a good indication of the political will of the government to pursue future prosecutions. The second involves the capacity of the Timorese justice system to deal with these cases. Discussing this issue will also enable us to evaluate aspects of the UN's capacity-building efforts in the judiciary during the five years of UNTAET and UNMISSET administration.

All through the 2004–2005 completion process senior members of the SCU and SPSC were warning UNMISSET and their Timorese counterparts that provision had to be made for future prosecutions because it was inevitable that individuals suspected of involvement in crimes against humanity would cross the border from West Timor and be apprehended in East Timor. For example, the UNMISSET Report of the Transition Working Group on the Future of the Serious Crimes Process noted in early 2005 that although a plan for the handover of documents from the SCU had been adopted, there was no plan that would

²⁶⁶ UNOTIL continues to assist the Timorese government in the area of the judiciary through international advisors in various government offices and by paying the salaries of many of the international judges and prosecutors from Portuguese-speaking countries who are functioning in the four District Courts of East Timor. If the Timorese government decided to pursue new Serious Crimes trials, statutes still in force would require it to recruit two international judges for the panel. In such a circumstance they would in all likelihood appoint one of the international judges from the District Courts to also serve on the new Serious Crimes panel.

*The future of the
Serious Crimes
process is
inextricably linked
to the future of the
Timorese judiciary*

enable the continuation of the Serious Crimes trials. The report explained that this was particularly serious in regard to alleged perpetrators who might cross the border back into East Timor after 20 May. At a public meeting at the Judicial Training Center to discuss the Report of the Transition Working Group on the Justice Sector, Judge Rapoza made an extended argument for the need for a post-UNMISSET strategy to deal with this issue. Judge Claudio Ximenes, who co-chaired the meeting with Prime Minister Alkatiri, tersely dismissed the issue by saying it could be dealt with by international judges working in the Dili District Court.

The warnings as to the inevitability of arrests of serious crimes suspects after May 2005 proved accurate. This is precisely what happened when an SCU suspect, Manuel Maia, was arrested in August 2005, and other such incidents followed. There was in fact no plan in place to deal with them. It remains to be seen how they can or will be tried. The plan, as suggested by Judge Ximenes, to use international judges from the Dili District Court has the drawback that they are completely inexperienced in cases involving Serious Crimes and in the body of law involved. Moreover, it is hard to conceive how these judges will have the time to commit to Serious Crimes proceedings, which are often protracted, especially considering that in May 2006 they were facing a 2,500 case backlog of ordinary criminal cases.²⁶⁷

The Transition Working Groups' report also notes that "[t]he consequences of both Resolution 1543 and the absence of a successor judicial process will be to shift the Serious Crimes process from one that is almost entirely dependent upon international support to one that will be increasingly, if not exclusively, reliant on Timorese judges, prosecutors, and defense attorneys."²⁶⁸ Therefore, the future of the Serious Crimes process is inextricably bound up with the future of the Timorese judiciary as a whole, which is why this report will consider the capacity-building efforts of the UN, the performance of Timorese members of the judiciary, the Judicial Training Program, and the troubling developments that have made it presently impossible to have Timorese judges, prosecutors, and defense counsel staff a successor process as envisioned by the report.

THE 'HANDOVER PROCESS'

The anticlimactic aftermath of the SCU handover plan does not bode well for the future of Serious Crimes prosecutions in East Timor. As noted in Part One, the SCU embarked upon a very intensive effort to prepare its files so that they would be in manageable form for future use by Timorese prosecutors. This involved not only putting all of the often chaotically maintained files in order, but also creating a database to organize their contents, scanning them into the database, translating them into Tetum, etc.²⁶⁹ Apart from putting most existing staff at the SCU into the effort, Deputy Prosecutor General for Serious Crimes DeFaria hired 35 full-time translators, 10 data entry staff, and 9 scanning staff to

²⁶⁷ See United Nations, *End of Mandate Report of the Secretary-General on the United Nations Office in Timor-Leste S/2006/251* (20 April 2006), para. 15.

²⁶⁸ *Reports of the Transition Working Groups*, p. 63.

²⁶⁹ DeFaria ("ET's Quest for Justice," p. 12) enumerates what the handover preparation involved: "an Herculean effort ... to organize hundreds of indicted and non-indicted files; prepare standard handover notes and indexes for all files; Translate thousands of pages of documents, indictments, arrest warrants, judgments ... into one or both of the official languages of TL; Scan 60,000 to 80,000 pages of documents and enter them into an electronically searchable database; And prepare all the files and evidence to be handed over to the Prosecutor-General of TL"

make this possible.²⁷⁰ After months of planning and sometimes almost around-the-clock efforts, all of which consumed the bulk of the resources available to the SCU in the last six months of its existence, the Timorese government indicated that it could not find a place to house the records. An initial plan to temporarily place them at the Commission on Truth and Friendship came to naught. As a result, when the SCU closed its doors the documents still had not been picked up. It must be remembered that these include the original investigative and case files. Months after the planned handover that was publicly announced and described in great detail by the DPGSC at the UN conference at the end of May, the documents still sat in boxes in the morgue at the SCU, with skeleton staff charged with their security. They remained there until October 2005, when they were transferred to the Crocodile Alley offices of the Timorese Prosecutor General. They remain, however, at least nominally under UN custody under a rather opaque arrangement as negotiations over access and other issues are still ongoing. Without them, however, there can be no possible meaningful continuation of the search for accountability.

Regardless of what happens in the case of Manuel Maia, numerous factors indicate that it is unlikely that there will be any serious attempt to take up the many cases contained in the SCU's files that were investigated but never brought to trial. The behavior of the Prosecutor General Longuinhos Monteiro in the aftermath of the indictment of Indonesian General Wiranto eloquently expresses the grounds for these doubts. The same was true in regard to the issuance of an arrest warrant against Wiranto. For months the Prosecutor General had been publicly criticizing the Special Panels in the press for failure to move ahead against Wiranto. When Judge Rapoza issued the warrant, however, the Prosecutor General immediately backtracked. Ultimately, the Timorese government refused to forward it to INTERPOL and request the issuance of an international arrest warrant. Shortly after, President Xanana Gusmao flew to Bali, where he publicly embraced his "dear friend" Wiranto. The most disgraceful part of this story, however, was the UN Secretariat's disavowal of the indictment and arrest warrant by saying the SCU was not part of the UN but rather of the Timorese Office of Public Prosecution.²⁷¹ Political will was in short supply on all sides during the Serious Crimes process.

CAPACITY AND CAPACITY BUILDING

This chapter in the story of the quest for justice in East Timor is one of the most disturbing. As will be seen, it calls into question not only the integrity of central players and institutions in the Timorese justice system, but also raises serious questions about the capacity-building roles of UNMISSET and the UNDP.

Examining and Evaluating the Judges

In regard to the question of the capacity to continue the Serious Crimes trials within the Timorese justice system, the answer, from one perspective, is very simple. At the moment,

²⁷⁰ Interview with DPGSC DeFaria, 29 April 2005.

²⁷¹ The UN press statement on the Wiranto indictment, dated 26 February 2003, stated that "Timor-Leste and not the UN has indicted ... General Wiranto." In 2003, SCU Indictments 1/2003, 2/2003, 3/2004, 4/2003, 4a/2003, 4b/2003/ 4c/2003, and 5/2003 (the latter against Wiranto) were issued on UN letterhead. From 6/2003 on, UN letterhead was not used, confirming what prosecutors told me: The SCU was ordered by the UN not to use UN letterhead for any more Indictments.

All of the judges failed what had been announced as an examination of basic competency

and for the next one and a half years, there are no Timorese judges, prosecutors, or public defenders in office. The reason for this is clear, though the explanation is complex. All of the judges in East Timor were serving in a probationary status pending an examination that would qualify them for a permanent appointment to the bench. That examination of 22 judges, including the 4 who had served in Serious Crimes cases, took place in mid-2004. The results, for reasons that were never explained, were long delayed and only finally announced at the end of January 2005.

All of the judges failed what had been announced as an examination of basic competency. All of the prosecutors and public defenders in East Timor were given a similar examination in November 2004. Although regulations required the results to be published by 15 December 2004, and despite the repeated protests of the Prosecutor General at the delay, the results, again for reasons that were never satisfactorily explained, were not announced until June 2005. Again, all failed. Because these results left the country quite literally without a judiciary, there is no way that, apart from isolated instances, Serious Crimes trials can continue for the foreseeable future as a Timorese process.²⁷²

Before inquiring into how and why this could have happened, two points must be emphasized:

1. This event suggests the complete ineffectiveness of five years of UN support for the justice system of East Timor. The failure of every single one of the judges, prosecutors, and public defenders in a minimum competency examination is itself an indictment of the UN and Timorese government's joint efforts at capacity building in the judiciary.
2. If one takes the results of the examination at face value, the failure of the four Timorese judges involved in the Serious Crimes trials in the Special Panels and the Court of Appeal raises serious concerns about the verdicts handed down by those judges. If all of these judges failed an examination to test their minimum competency, what does that say about the 83 convictions that they had voted on? Further, if they were so incompetent that after four to five years of experience on the bench they failed a minimum competency examination, why had the President of the Court of Appeal and the Superior Council of the Judiciary allowed them to continue exercising the authority of judge for so long? Moreover, how could they permit such purportedly unqualified judges to continue sitting on Serious Crimes cases, even after they had failed the exam?

A variety of factors indicate, however, that the examination cannot be taken at face value. Since the focus of this report is on the Serious Crimes process, the inquiry will confine itself largely to the Timorese judges who participated in that process. For those who know the Serious Crimes process, the most striking thing about the results of the examination was the discrepancy between these results and the actual performance of the judges on the Special Panels.

After the examination results were announced, when interviewed on this issue five of the six international judges of the Special Panels commented on the performance of Judges

²⁷² A small number of ordinary criminal and civil cases are being processed by international judges and prosecutors from Portugal and other Portuguese-speaking countries. One of the reasons for the delay in announcing the results was clearly to allow time to recruit international Portuguese-speaking personnel. It was, of course, denied that the results were being delayed and claimed that the evaluation of the examinations had not been completed.

Maria Pereira, Deolindo dos Santos, and Antonio Helder.²⁷³ All of them praised Timorese judges they had sat with as very good, conscientious, and capable. Two of them, incensed at the outcome of the examination, wrote a very positive evaluation of Judge dos Santos and sent it to the Superior Council of the Judiciary.²⁷⁴ All of them expressed considerable skepticism about the results of the examination. Several of them praised Judge Maria Pereira as one of the very best judges who had ever served on the Special Panels. The evaluation of Judge Jacinta da Costa of the Court of Appeal was equally positive. Indeed, she is regarded by many as the best judge on the Court of Appeal. As noted above, her record on the Court of Appeal speaks for itself, for she was the one who repeatedly and correctly dissented against the aberrant ruling of the international judges in the “applicable law” cases.

The general opinion of the poor performance of international judges of the Court of Appeal on the other hand, was a constant refrain in discussions within the Serious Crimes community. Two of these international judges on the Court of Appeal, nevertheless, played a key role in the examination, in the training process, and, ultimately, in determining the fate of these judges.²⁷⁵ Indeed, one of the concerns for the future of the Timorese judiciary is the enormous amount of power that has been concentrated in the hands of the President of the Court of Appeal.

Judge Claudio Ximenes is President of the highest court in the land and, by virtue of this office, is the head of court administration for all the courts in the country, encompassing policy, personnel, and budgetary matters. This office thus gives him far-reaching powers, which he has used, for example, by issuing an administrative decree on 5 February 2005 that restricts the right of public access to court records, such as Judgments and Indictments, which had previously been readily available to the public.²⁷⁶ In addition to this office, he holds five additional key offices in the judiciary. He is:

- President of the Superior Council of the Judiciary (Constitution, Section 128[2])
- Chairman of the Evaluation Committee of the National Trainee Prosecutors
- Chairman of the Evaluation Committee for the National Trainee Public Defenders
- Member of the Council of Coordination for the Justice Sector
- Member of the Executive Board of the Judicial Training Center and a member of its Executive Committee

²⁷³ Judges Rapoza, Schmid, Blunk, Florit, and Gomes interviewed by the author (various dates).

²⁷⁴ Interview with Judge Schmid, 17 February 2005. She and Judge de Silva wrote the evaluation.

²⁷⁵ Judge Ximenes wrote the examination. Judge Antunes was one of the three graders for the judges. The evaluation of the prosecutors and public defenders was done by two committees, both of which were presided over by Judge Ximenes. Judge Ximenes informed me that the ultimate decision as to the examination was made by the Superior Council, of which he is the head (interview, 31 March 2005).

²⁷⁶ According to this decree, access for non-parties to such records is only available upon written application setting out the justification for the request. This decree was even applied against members of the SCU seeking access to records from other cases. It must be emphasized that this includes public court documents like Indictments and Judgments. Some SCU staff were told that even the case numbers of files were covered by this ruling, so that one would have to make a written request for the case number before one could make a written request for the record itself. JSMP has been denied access to records even upon written application. On 29 April 2005, at the UN Symposium in Dili, Judge Ximenes stated that such written requests for access could not be processed because of lack of staffing.

By virtue of these offices, he is the central person who will largely determine the careers of all of the judges, prosecutors, and public defenders in East Timor. According to Judge Ximenes, the Superior Council of the Judiciary is the body that has the ultimate decision as to which judges will pass the two-and-a-half-year training program they are now required to complete at the Judicial Training Center. If judges or prosecutors had passed, they would have received tenured, career appointments. The failure of all Timorese judges, prosecutors, and public defenders offers an opportunity to control the composition of all of these vital judicial functions. Judge Ximenes will play a leading role in virtually all aspects of that process.²⁷⁷

In an interview with Judge Ximenes on 31 March 2005, he discussed the examination at great length and provided copies of both of its two versions (for the evaluation of judges and the evaluation of prosecutors and public defenders). When I asked if he was surprised by the failure of the judges he had been working with on the Court of Appeal and the Special Panels, Judge Ximenes stated that the failure of the judges “was a reality I had been expecting.” The problem, he explained, was that they had been “holding trials and writing opinions without knowing how to do it.” Asked if this wasn’t surprising or disappointing in that he was the mentor of some of these judges, he replied that he knew with absolute certainty that every one of them would fail because they are all incapable and incompetent. He knew this, he explained, because he has been working with them for four years. He went on to say that the results were also not surprising because after their appointment they were asked to do judges’ work with some judges acting as their mentors. But, he added, “[t]he mentors were sitting there every day, but nobody asked questions to their mentors. So the mentors got frustrated and left.” He did not mention that the mentors spoke English or Portuguese and the judges they were supposed to mentor did not.²⁷⁸

Judge Ximenes confirmed that the examination was “a minimum competency examination based upon Indonesian codes and UNTAET regulations that they had applied every day.” The exam included “questions that someone without any kind of legal knowledge could answer. But they could not answer even these questions.” Later he returned to this and said, “What we are seeing is that all of them need to get the minimum legal basis they don’t have. We are starting from scratch trying to get the minimum legal basis. To do this we have to overcome the problem of language.”

Judge Ximenes also stated that he was particularly disappointed that eight of the trainee judges (none from the Special Panels) who had been sent to the Judicial Training Center in Portugal for one year of training also all failed. His explanation was that “they did not get enough legal knowledge, though they did improve—just not enough.” He did not mention that they were not given sufficient Portuguese language instruction before being placed into advanced law courses along with Portuguese law graduates who were being trained as judges.²⁷⁹ Finally, asked if the judges will have to take another qualifying examination at the end of their two and a half years of training, he explained that they will not and that the

²⁷⁷ These multiple roles also raise concerns about potential conflicts of interest.

²⁷⁸ According to Judge Ntukamazina, no provision was made for translators so that the mentors and probationary judges could communicate. Interview, 16 January 2002.

²⁷⁹ They not only failed, but according to the examination results they scored on average lower than the judges who were not given this opportunity. This indicates the total lack of preparation that the Timorese judges were given, in particular adequate language training in Portuguese, so that they could be expected to benefit from such an experience.

evaluation will be subjective and “continuous,” based upon their performance in class, attendance, examinations, evaluations, etc. This view of how the process will proceed appears to conflict with the provision of UNTAET Law 8/2000 for an examination for the probationary judges.

There are some puzzling aspects to Judge Ximenes’s account. In January 2005, the Superior Council of the Judiciary voted to allow Judges Pereira, Helder, and da Costa to continue serving until the end of the Serious Crimes process. They are in theory now awaiting assignment to any new case that is brought forward to trial and appeal. If the judges were considered not even minimally competent, how can they have been allowed to continue to exercise the judicial function by the council responsible for judicial appointments and for maintaining the quality of the judiciary?

If the judges were considered not even minimally competent, why were they allowed to continue to serve?

Focusing on the Court of Appeal in particular, since Judge Ximenes stated that he had long known that none of the judges was capable of passing a minimum competency examination how could he have reappointed Judge da Costa to his Court? How could he have been sitting with her on cases since 2000, serving as her mentor, and nonetheless allowed an “incompetent” judge not only to vote but to write opinions? How could the highest judicial official, whose duties include supervising the judiciary, have sat by silently for years knowing that all of the Timorese judges whose opinions he was reviewing were completely incompetent yet done absolutely nothing to remedy this situation? Since all of these judges were probationary judges it would have been possible to take appropriate action. There are two possibilities here. The first one is that Judge Ximenes failed utterly in his role as President of the Court of Appeal by watching decisions that to his mind reflected incompetence pile up, doing nothing about it. The second is that the results of the examination were predetermined (hence not a single passing score).

Based on his public statements, Judge Ximenes has not acknowledged that the failure of all the judges in any way reflects upon his leadership of the judiciary. In an interview with *TIME* magazine after the examination results were announced, Judge Ximenes indicated that he expected the people of East Timor to find the results reassuring. Stating that he did not find the results surprising because the cases coming to the Court of Appeal had told him the judges “were not skilled,” Judge Ximenes added, “People are more confident when they see that if someone is not skilled, they are not allowed to serve as career judges.”²⁸⁰ He does not seem to recognize that declaring every judge in the country incompetent after they have been sending people to jail for five years might not inspire confidence in the general public.

There is no question that the examination itself was deeply flawed.²⁸¹ The examination was written in two languages, Portuguese and Tetum. All of the examinees answered in Tetum. The examination for the judges was prepared, Judge Ximenes informed me, by himself. He has both Portuguese and Timorese nationality and speaks both languages. The examination was graded by a Judicial Evaluation Commission chaired by Judge Antunes of the Court of Appeal and consisted of judges who speak Portuguese but not Tetum, requiring that all answers had to be translated into Portuguese to be graded.

The examination was rife with translation errors, typographical errors, and serious editorial mistakes. In 26 questions (in two parts) there are more than 30 such mistakes,

²⁸⁰ *TIME* Pacific, 14 February 2005.

²⁸¹ The examination is reproduced in the Appendix.

many of them serious enough to interfere with the ability of the examinee to answer correctly. A detailed analysis of the errors in the examination is attached in the Appendix. It is evident that this examination, which determined the fate of the entire Timorese judiciary, was sloppily prepared and translated, and never proofread. Considering that one of the examinees failed by only half of one point,²⁸² and another by only one point, even one or two minor errors in the examination could have made the decisive difference between a lifetime judicial appointment and two and a half years of probation. Judge Maria Pereira, for example, stated that she completely misunderstood three questions because of mistranslations.²⁸³ Any errors would be a serious problem; more than 30 is simply inexcusable in an examination of this importance.

After the examination the Timorese judges expressed considerable dismay about the translation errors that had caught the attention of some of them during the exam. This was also one of the bases on which they appealed against the result. Judge da Costa, for example, said that the errors in the examination made her worry about the accuracy of the translation of the answers.²⁸⁴ She added, "The translation was sometimes incorrect and caused confusion." Because her Portuguese is very good she could notice some of the errors, but this is not the case for many of the other examinees.²⁸⁵

Translation, Judge da Costa noted, was a problem in several ways. The test covered Indonesian law and UNTAET regulations. All of the examinees were trained in Indonesian law at Indonesian law schools. But, she pointed out, the test was written by Judge Ximenes, who has no expertise in Indonesian law, cannot read Bahasa Indonesia, and would have had to use English translations of Indonesian codes (though his own English is far from perfect). None of the evaluators has had any training in Indonesian law or can read Bahasa Indonesia. As she further pointed out, the answers were written in Tetum and then translated back into Portuguese, because none of the evaluators could read that language. It is hard to think of a process more likely to produce problems than this. Nineteen of the 22 judges immediately appealed. In late May 2006, 16 months after the appeal was lodged, it was rejected by the reviewing committee appointed by the Superior Council of the Judiciary. International Judge Sandra Silvestre of Brazil dissented, maintaining that the judges' appeal should have been approved.

Interviews with the evaluators who graded the examinations revealed that only one of them was furnished with the Portuguese translations of the answers and that he read them out to the others. The two others were not informed as to who prepared the translations, which were handwritten. This is inappropriately informal. The judges/examinees were not allowed to see the translation of their answers. They were given back only the Tetum originals which had no comments or marks, only a score.²⁸⁶ An informant who had been connected to the process, but preferred to remain anonymous, stated that there was a very wide discrepancy between the grades of the evaluators. In his opinion the discrepancy and the pattern of grading of one of the evaluators was deliberately low so that no matter what scores the other examiners gave, all the judges would fail.²⁸⁷

*The judges/
examinees were
not allowed to see
the translation of
their answers*

²⁸² Judge da Costa had the highest score on the examination: 9.45. A score of 10 was required for passing. This is based upon a copy of the examination results which I was provided by an informant in UNMISSET.

²⁸³ Interview, 28 March 2005.

²⁸⁴ Interview, 30 March 2005.

²⁸⁵ Interviews, 30 March and 1 April 2005.

²⁸⁶ Interview with Judge da Costa, 30 March 2005.

²⁸⁷ Interview, 27 April 2005.

That the results of the examination were not solely determined by performance on the test may also find some confirmation in a remark by Judge Ximenes. At the end of a lengthy discussion in which he described the entire examination process, he concluded by saying that “[t]he final decision on the exam was taken by the Superior Council.”²⁸⁸ If the failure of all of the judges was based on the examination results alone, what “decision” would the Superior Council have had to make?

The translation errors, omissions, and egregious lack of proofreading in the exam itself call into serious question the accuracy of the translation of the answers. At the very least, the general lack of professionalism displayed calls for an independent evaluation of the examination itself, the translations of the answers, and the administration of the examination and evaluation process. This responsibility should fall to the UN, since those who wrote, graded, and administered the examination were international judges employed by UNMISSET.

The Judges’ Training Program

An examination of the training program currently underway for those who failed will clarify the nature of the political context in which the evaluation and training of the Timorese judiciary operates. It will also reveal much about the UN’s efforts at capacity building and their prospects.

The lack of forethought given to the Judges’ Training Program is indicated by the fact that after their failure on the exam, the Timorese judges of the Special Panels were authorized to continue to serve. At the same time, because they had failed, they were required to attend classes at the Judicial Training Center (JTC), where missing more than a small number of class sessions, no matter what the reason, mandates dismissal from the program. It was unclear how they could have been expected to fulfill both functions as required; that is, to sit in court hearing cases and attend classes at the same time. This arrangement was particularly puzzling in that it was Judge Ximenes who was responsible for both the designations to serve on the Special Panels and the requirement to attend daily classes. Thus this was not a case where the “left hand didn’t know what the right hand was doing.” It was only through the intervention of the Judge Coordinator that the class schedule was adjusted and “make-up” classes were scheduled for weekends.²⁸⁹

The training takes place through daily courses at the JTC.²⁹⁰ The program is developed, financed, and administered by the United Nations Development Programme (UNDP). Attendance is mandatory. Any participant who does not attend 90 percent of the classes will be failed, and sickness, vacation, and official business all count as absences. The instruction is conducted by international judges, prosecutors, and public defenders, all of whom are Portuguese speaking. These include the three international judges from the Court of Appeal. Instruction is in the new draft law codes in legal Portuguese and legal Tetum. In effect, Portuguese law is the basic subject because all of the new legal codes that have been drafted for adoption (Criminal Code, Code of Criminal Procedure, and Code of Civil Procedure) are basically cut-and-paste versions of Portuguese codes, which have been prepared by a

²⁸⁸ Interview with Judge Ximenes, 31 March 2005.

²⁸⁹ Email communication by a source involved closely in the process, April 2006.

²⁹⁰ A more detailed account of the Judicial Training Center and its programs may be found in David Cohen, *The Legacy of the Special Panels for Serious Crimes* (International Center for Transitional Justice, forthcoming).

consultant from Portugal.²⁹¹ They exist only in Portuguese language versions. There are no Tetum translations, even though this means that a majority of the members of Parliament cannot read them. The same is obviously true for the 90–95 percent of the Timorese population who also can not read or speak Portuguese. It is worth recalling that according to the Constitution both Tetum and Portuguese are the official languages of East Timor.

In an interview on 28 March 2005, Judge Helder stated that the problem was not training but communication. He said the judges feel they can benefit from further training, but the problem is that they cannot understand the trainers. The trainers, he explained, speak high Portuguese in class and “98 percent of trainees cannot understand what they are saying.” He explained that the trainees come to class anyway in the hope that they will understand something and because they have to: “We waste mornings and afternoons. We students meet after class and the students don’t understand anything. This happens every day. And the teachers ask if we understand and no one says anything. So the teacher goes on lecturing.” Though his Portuguese is quite good and better than that of most of the others, he also cannot understand the high formal Portuguese often used in the lectures. Because the other students know that he speaks better, after lectures they ask him, “Did you understand that?” He has to tell them that he didn’t understand it either. Asked if the teachers know that the students don’t understand because they can’t speak Portuguese well enough, he became very heated and replied, “They know! They are aware 200 percent that 99 percent don’t know Portuguese and can’t understand!” He concluded with resignation, “It is a political decision. We must go with the wave or be washed away.”

Judge Helder’s account was corroborated by the other Timorese judges from the SPSC. Judge Pereira explained that there has never been any translation in the training courses. Some governments and NGOs offered to fund interpreters, but, she explained, this offer was refused by the Ministry of Justice. The trainees were told they would have to use Portuguese exclusively because the new codes would only be available in Portuguese. What they are learning in the training, she explained, is much what they had been taught early in law school, but because it is in Portuguese they don’t understand it. She concluded, “In theory there are two official languages; in reality, only one.”²⁹²

Judge da Costa also stated that in the training, the teachers are her international colleagues from the Court of Appeal and the instruction is basically all Portuguese law.²⁹³ Her Portuguese is quite good, she explained, as she has been working in the Portuguese-speaking Court of Appeal, but she says that when the trainers speak high Portuguese even she cannot understand. “None of [the trainees] can,” she adds. She concluded by asking why the judges did not receive training from the very beginning.

Judge da Costa reported that the trainers had informed the trainees of how different the system of legal education in Portugal is compared to what the trainees experienced in Indonesia. The trainers, she stated, repeatedly told them that, unlike in Indonesia and East Timor, in Portugal only the most brilliant and highly motivated students are able to study law because it is so intellectually demanding. She understood the implication to be that the East Timor trainees would not have had the intellectual capacity to survive in the Portuguese system.

*‘In theory there
are two official
languages; in
reality, only one’*

²⁹¹ UNDP Senior Legal Advisor Marcus Ferreira, who visits East Timor every two to three months.

²⁹² Interview, 28 March 2005.

²⁹³ Interview, 30 March 2005.

A theme running below the surface of all these interviews was the condescension of the Portuguese trainers toward the Timorese trainees. Several very well-placed sources, all of whom asked not to be named, stated that disparaging remarks were commonly made by a number of the trainers at the JTC. Three informants stated that one trainer in particular, an international judge from the Court of Appeal, had fits of temper in the classroom, where he had repeatedly called the trainees “stupid,” “ignorant,” and “incapable of learning.” On one such occasion, the three informants stated, he called the trainees “savage misfits.” One administrator in the Court of Appeal, according to my informants, said of the non-Portuguese speaking Timorese, “Are they goats that they can’t speak Portuguese?”

Judge Antunes of the Court of Appeal is one of the trainers at the JTC. Asked about the results of the examination and about how the training program was progressing, he explained that the basic problem with the trainees is that Indonesian law schools are so abysmally poor.²⁹⁴ As a result, although the trainees were working as judges for several years, “their legal knowledge is very poor.” As for the examination, he stated that “[i]n most parts of the world *students in their first or second year* could do this exam” (emphasis added). Reflecting further, he said that the real problem underlying the judges’ poor performance was not their education in Indonesia, but “their intellectual ability to reason with the law.” He concluded by saying that although the trainees are motivated, in two and a half years “we will not have good judges,” but they will have “basic knowledge.” One may recall here that Judge Antunes wrote the Paulino de Jesus decision for the Court of Appeal and, together with Judge Ximenes, made up the majority in the “applicable law” cases discussed above.

Turning to language problems in the training program, Judge Antunes stated that “they are getting better.” He confirmed that the training lessons are all in Portuguese and stated that since beginning the preliminary training in October 2004, the students are trying to speak Portuguese. Now, he explained, they are “beginning to be able to understand Portuguese at a basic level.” Thus he was aware that for eight months of instruction his students had been unable to understand, because only now are they “beginning” to grasp “basic Portuguese.” When asked about his role as a mentor, he affirmed that he had a very good mentoring relationship with the trainees. Asked to illustrate, he explained that for many months the trainees did not talk to him at all, but that now during the breaks they sometimes have some “small talk” conversations. Under normal professional standards, such small talk does not demonstrate an effective mentoring relationship.

Not all those involved in the training process shared the views of Judges Antunes and Ximenes. The International Public Defender Pedro Andrade, from Portuguese-speaking Cape Verde, also serves as a trainer at the Judicial Training Center.²⁹⁵ He was particularly outspoken in his criticism. He confirmed that the Timorese public defenders, for example, badly needed training. On the other hand, he referred to the language policy of the training program as “crazy.” He stated, “You must speak Tetum to them so they can understand.” He explained that he considered a large part of the problem to be what he calls the “amazing degree of cultural isolation” of the Portuguese judges/trainers who cannot speak any other

²⁹⁴ Interview, 27 April 2005.

²⁹⁵ Interview, 1 April 2005.

languages and who, he continued, have a very narrow national perspective and range of knowledge.²⁹⁶

I also interviewed several persons from both the Timorese government and the UNDP involved in developing and running the training program. In many ways, these interviews were even more troubling than those with the program's critics. Two of them are particularly worth discussing here.

Ana Graca is the UNDP Coordinator of the training programs at the Judicial Training Center.²⁹⁷ She explained that the UNDP judicial training program was a result of an assessment of needs in 2002 and characterized it as one of the "main achievements" of the UNDP program. Asked who selected and appointed the trainers, she replied that the Superior Council of the Judiciary, headed by Judge Ximenes, assessed the qualifications of the trainers and appointed them. Asked about the UNDP role in this process, she explained, "The UNDP did not evaluate the qualifications of the trainers," adding, "They are not trainers." When asked if this meant that none of those appointed were professionally qualified as trainers, she confirmed that was the case. But, she added, she and her colleagues at UNDP have no doubt that they are "the best people for the job."

Upon further inquiry about the applicant pool and why they did not look for professionally qualified trainers, she explained that "the Council of Coordination and Superior Council did not want trainers from outside." She clarified that "from outside" meant those who were not already working as internationals in the judiciary in East Timor. She further stated that they had also decided that only native Portuguese speakers would be considered. Asked to summarize the selection criteria for the trainers, she confirmed that there was an explicit policy decision to hire trainers who had no professional qualifications as trainers, and to consider only those already in East Timor and who had native proficiency in Portuguese. She also stated again that the UNDP did not evaluate the qualifications of the trainers.

Asked about the UNDP's position on the issue of language, she stated that the UNDP policy is that the training is to be conducted only in Portuguese "because that is the policy." She confirmed that it was for this reason that the Timorese Council of Coordination decided not to allow translation into Tetum in the classroom when the provision of translators had been offered. The UNDP was thus aware translation was needed to facilitate the learning process but completely deferred to the policies of the Timorese government on this issue, regardless that doing so might undermine the capacity-building program that the UNDP was financing and administering.

She stated that the UNDP not only recognized, but also fully approved and supported *that failing the judges on the examination was a tool used to force the trainees to exclusively use Portuguese*. Indeed, her explanation directly linked the failure of the judges on the examination to the issue of Portuguese language politics. She stated, "*It's their fault. They had three years to learn Portuguese*" (emphasis added). Upon inquiry as to what she meant by "fault," she explicitly stated that the trainees had to be forced to learn Portuguese by failing

²⁹⁶ Similar highly critical views of the training program and its language policy were expressed by Prosecutor General Monteiro. He stated that whenever he raised the issue of the language policy, "the government always has 101 answers." In his opinion the language policy was being driven in response to impetus from the government of Portugal. Interview, 30 March 2005.

²⁹⁷ Interview, 30 March 2005.

them on the examination because they had previously not done so voluntarily. This, she explained, was a mechanism to coerce them through the training program. Asked to confirm what she had just said, in order to make sure that there had been no misunderstanding, she did so.

Her remarks indicate that the results of the examination were manipulated according to political concerns wholly extraneous to performance on the questions. It also indicates the knowledge of at least some UNDP staff, including the person most directly responsible for the JTC program, of this attempt to use a blanket failure on the exam as the instrument for enforcing the unpopular language policies of the Superior Council and Council of Coordination.²⁹⁸ Graca's linking of the failure on the examination to failure to learn Portuguese is revealing. Since the examination of the judges was given in both Tetum and Portuguese, and since they could write their answer in Tetum (and receive two bonus points for doing so), knowledge of Portuguese had nothing to do with their ability to take the examination. It was rather that having failed previously to learn Portuguese, a mechanism had to be found to force them to do so. That mechanism, on her account, was the examination.

'We fully support this policy of the exclusive use of Portuguese in the judiciary'

Graca also stated the UNDP position on the use of Portuguese to the exclusion of Tetum in the judiciary: "We fully support this policy of the *exclusive* use of Portuguese in the judiciary" (emphasis added). When asked about her use of the word "exclusive," given that the Constitution provides for two official languages, she stated, "The UNDP fully supports the policy of the Superior Council that only Portuguese will be used in drafting laws, training judges, and in the court system." She added, "One day, maybe in five or six years, Tetum will be introduced." Asked for an explanation, she stated that Tetum (which she does not speak) is "unfit" for drafting laws and for legal usage because it is such a "primitive" language. When it was pointed out that she herself had admitted that one of the courses for trainees at the JTC was called "Legal Tetum" and that in their training they are translating parts of the Portuguese Codes into Tetum, she said, "That's different." When it was also pointed out that at the Court of Appeal decisions are being written in Tetum by Judge da Costa and at the Special Panels translators are translating closing and opening arguments, legal discussions, and the like into Tetum every day, she broke off the interview.

Perhaps the most striking thing about the interview, apart from her admission that the examination results were predetermined, was that throughout she did not distinguish the capacity-building goals of the UNDP from the policies of the Timorese government. She displayed no awareness that it might be inappropriate for the UNDP Coordinator of the Judicial Training Center's programs to deem it legitimate to coerce the trainees to use Portuguese by failing them on the examination. Like many of the Portuguese individuals I encountered working as UN employees, she expressed a fundamentally neo-colonial outlook towards the Timorese. This came out repeatedly when talking about both the trainees and the "primitive" nature of Tetum as a language.²⁹⁹

²⁹⁸ Graca's account was confirmed by another UNDP staff member who requested to remain anonymous and asked me not to use any of the specific information he provided. Interview, 1 April 2005.

²⁹⁹ In early 2005 three Timorese judges approached Judge Rapoza and asked him to be their mentor, "as they felt abandoned by the international staff working in the judicial sector." They subsequently had to ask him to forget their request because they had been given reason to fear retaliation by Judge Ximenes if they proceeded. Email communication with the author by one of the parties involved, December 2005.

To inquire further about the rationale of these language policies, Carla Marcelina Gomes, Legal Adviser to the Minister of Justice, was also interviewed.³⁰⁰ When asked if there were plans to translate the Draft Portuguese Codes into Tetum, she stated that there were none. Because Tetum is “too undeveloped,” she explained, the drafting team for codes used Portuguese “because it is the only language left.” When asked about the advisability of enacting laws exclusively in a language that only five percent of the population can read, she replied, “Do you expect that in any country in the world the little peasant can read the law?” As an international advisor, part of her job is to help establish a democratic legal system and the rule of law.

In the course of a lengthy discussion about the use of Tetum in the Special Panels and in the “Legal Tetum” course at the JTC, she took the position that it is simply “impossible” to translate “any legal terms or abstractions into Tetum.” Her response to the daily translation of Tetum over the past five years in the Special Panels was, “If you can call it translation.” Because, in her view, Tetum is such a “primitive language,” what the Special Panels’ translators are doing “is not really translation.” The translators, she stated, “are just explaining in simple words” what the person speaking “meant.” When it was pointed out to her that the Superior Council of the Judiciary had apparently decided that the technical legal questions *could* be translated into Tetum, because they themselves ordered that the examination of the judges be drafted in that language as well as in Portuguese, and the examination included both statutory interpretation and the drafting of Judgments, she responded by saying that Tetum was still “in development” and that some few terms had been “provisionally translated.” She soon after ended the interview.

These interviews give a good sense of the depth of the ideological commitment to the Portuguese language politics of the Timorese regime by these international advisers (both Portuguese themselves). As stated by Graca, it is here that one finds the explanation of the results of the examination and an indication of the goals of the training program. Obviously, only those who manage to learn Portuguese well enough along the way will survive this program. Since there appears to be little concern with what the trainees are actually learning in the program, the enforced production of a Portuguese-speaking cadre of judges, lawyers, and public defenders appears to be its real aim.

Concerns about the exclusive use of Portuguese in the legal system despite the constitutional mandate for two official languages are heightened by recent developments in the training of lawyers. The government of East Timor recently announced that with the help of the Portuguese government the law faculty of the University would begin accepting applications for its first class. A written examination of Portuguese competency is a prerequisite for admission, the language of instruction will exclusively be Portuguese, and all of the faculty will come from Portugal.

The training program described above (including the examination process) was financed and staffed by the United Nations, through UNMISSET, UNOTIL, and the UNDP. The UN administration in East Timor has been well aware of all of these problems. An interview with one of the UNMISSET Human Rights Officers concerned with the judiciary confirmed that these issues had indeed long been a matter of concern in the Human Rights Office and had been brought to the attention of the Special Representative of the Secretary-General.³⁰¹ This Human Rights Officer also stated that they had received

³⁰⁰ Interview, 31 March 2005.

³⁰¹ Interview with an UNMISSET Human Rights Officer, 31 March 2005.

'In large part the administration of UNMISSET abandoned the judicial sector to its international staff from Portugal'

repeated protests from the trainee judges that they were not benefiting from training because of language problems.³⁰² As for the appointment of trainers, the Officer confirmed that an arrangement was made between UNMISSET and the UNDP that rather than hire international trainers, the judges who were hired for District Courts, or who were serving in the Court of Appeal, would do both tasks. There was no attempt to recruit professional or even experienced trainers. She also confirmed that the Human Rights Office had received repeated complaints that some trainers treated the trainees in an insulting and contemptuous manner. She had heard complaints from the trainee judges that they had been “treated like animals.” She had also been told of the insulting remark that the trainees were “savage misfits.”

A number of themes have run through this section on the UN's capacity-building efforts for the Timorese judiciary. One of them has been the way in which Portuguese language policies and the “neo-colonial” role assumed by Portuguese experts, and the Portuguese-speaking Timorese elite that runs the country, have skewed these efforts in ways that scarcely seem compatible with the democratic values that the UN espouses and that undermine its capacity-building goals. In regard to these issues, it is worth reflecting upon the conclusions drawn by a person who played a key role in the Serious Crimes process and in judicial capacity building in East Timor in 2003–2005:

In large part the administration of UNMISSET abandoned the judicial sector to its international staff from Portugal. Although international staff from Portugal (both UNMISSET and UNDP) took the same oath as all other UN employees to operate pursuant to UN goals and guidelines, they invariably used their positions to advance the agenda and interests of their home country. This was, of course, with the approval of the Timorese leadership, but it produced what was essentially a bilateral program in international guise.

Another example: At a point the Brazilian Ambassador in Dili announced that his government was prepared to provide, at its sole expense, teams of judges, court clerks/registrars, prosecutors and defense lawyers for each of the district courts in Timor (Dili, Baucau, Suai, Oecussi). This offer was rejected by Chief Justice Ximenes on the ground that one country should not play such a dominant role in Timor's judicial system. This position would have rung true if it were not for the fact that almost every such position was already held by a Portuguese paid for by the UN. In other words, his real concern was that the Brazilian offer challenged the already dominant role of Portugal.³⁰³

An underlying issue in this discussion is the failure of the UN to effectively monitor and evaluate the work of its staff and their implementation of training and other programs. This problem is further complicated by an apparent policy to defer to any decision made by the President of the Court of Appeal. The rationale is that despite his dual citizenship and employment by the UN as an international judge, because he is also Timorese he represents the national framework that the UN must allow to make policy decisions. Such a rationale offers an easy out for not accepting responsibility for the actions and policies of a UN employee. When policies or programs go wrong, it is then possible for the UN to simply say that this is what the Timorese wanted and they can only act in an “advisory” capacity.

³⁰² This problem was highlighted in 2005 to the Commission on Human Rights.

³⁰³ Written communication to the author, March 2006. The writer requested to remain anonymous.

CONCLUSIONS

In terms of the prospects for a continuation of the Serious Crimes process, this discussion has provided few grounds for optimism. For one thing, it is clear that there is no political will in the Timorese government to pursue such a course. The debacle of the handover process and the adoption of the Commission on Truth and Friendship with Indonesia make this clear enough. Though there may be a few trials of individuals who are apprehended, the Superior Council has indicated no interest in taking up the task left unfinished by UNMISSET. An amnesty measure for those convicted of serious crimes has recently been proposed to the Parliament.

In terms of capacity building, the five years of UNTAET/UNMISSET and UNDP efforts can scarcely be credited as a success in light of the failure of all of the probationary judges, prosecutors, and public defenders in the entire country. A mentor who sees all of his or her charges fail in a “minimum competency” evaluation should ask himself some very hard questions. In this case the international mentors of the trainee judges have acknowledged no responsibility for the results. As shown, there are sound reasons to maintain that the failure of all the judges was not determined by the examination, but by political aims. These political aims have thus far admirably succeeded. As Judge Helder put it, the wave will wash away all who resist this trend.

That the United Nations has financed this effort is deeply troubling. That international trainers in a UNDP program spent at least eight months lecturing in a language that they *knew* their students could not understand, and insulted them in the process, is even more disturbing.

Finally, that another UN employee, whose own performance and competence in the judiciary is at best controversial, now occupies six key positions that put the future of the judiciary basically in his hands, does not bode well for the future of the courts or for the rule of law in a democratic Timor-Leste. There are serious concerns here regarding transparency, impartiality, and conflicts of interest. When one takes into account the record of the Court of Appeal, including the incompetent jurisprudence and methodology of many of its decisions, its reputation in the Serious Crimes community for a lack of professionalism in its administration, and its persistent disregard for the provisions of its own Statute and international norms, one can only question the management and oversight policies of the United Nations, which has been well aware of these problems.

The service of UN international advisers and other judicial personnel should assist in the foundation of a culture of judicial independence, impartiality, the rule of law, and a vigorous legal culture. Yet in East Timor too many of them are rather neo-colonialist in their outlook. This diagnosis was confirmed by a number of persons employed by UNMISSET/UNOTIL or the UNDP in advisory or other capacities connected to the justice system. It is also fair to characterize such an assessment as widespread among present and former members of the Serious Crimes community.³⁰⁴ If this assessment is accurate, this, of course, will be the greatest failure of UN capacity building in East Timor.

³⁰⁴ Those who expressed such sentiments preferred not to be named, though I note that they include individuals who served in a wide variety of positions in UNDP, UNMISSET, SCU, and SPSC. These concerns are also widely shared in the NGO human rights community in East Timor.

PART FIVE.
CONCLUSIONS AND ‘LESSONS LEARNED’

*Three aspects of
the trials place
the legacy of the
Special Panels
in question*

What is the balance sheet of the UN’s four-and-a-half-year effort at achieving accountability in East Timor? To be sure, a relatively large number of alleged perpetrators were tried and convicted. But as Judge Maria Pereira aptly commented, the reputation of the Serious Crimes Panels cannot rest upon the “mass production of Judgments” to enhance the statistics of the Court. In retrospect, there are three aspects of the trials that place the legacy of the Special Panels in question.

The first, as Deputy Prosecutor General for Serious Crimes (DPGSC) Siri Frigaard feared, is that lack of an adequate defense and of competent translations and other resources will lead critics to conclude that justice was not done. These shortcomings were compounded by the inadequacies analyzed in the trials and appeals process. They were confirmed by the views of the Special Panels judges. Both at the trial level and before the Court of Appeal, an inadequate defense and flawed Judgments call into question the legitimacy of a significant number of convictions. This is especially the case in regard to the conviction of the accused for crimes with which they were never charged, in direct violation of the Transitional Rules of Criminal Procedure. The failure of UNMISSET to take corrective measures only makes the matter worse.

In light of the failures referred to above, the persistent attempt by the UN to label its justice process a success because of the large number of convictions and the completion of all pending cases by the target date of 20 May 2005 is unconvincing. The willingness of the Commission of Experts to endorse such conclusions calls into question the impartiality of their report. Further, such bureaucratic measures of “success” are radically inappropriate for a trial process whose aim must be to provide meaningful accountability while protecting the rights and interests of the accused through providing a fair trial, with a vigorous and adequate defense, accurate translation and transcription of proceedings, impartial and competent judges, and an appeals process that meets international standards. As this analysis has demonstrated, all of this the Serious Crimes process too often failed to do.

The second aspect has to do with the premature conclusion of the process. The decision not to limit prosecution to a small circle of those who bear the “greatest responsibility” and to instead conduct broad investigations into all the murders that occurred in East Timor created expectations among the population that justice would be done for the deaths of their relatives and friends. These expectations were solidified by numerous pronouncements on the part of the SCU and other UN bodies. As shown by the community meetings conducted by DPGSC Carl DeFaria, there was widespread anger among the communities of East Timor that had been most affected by the violence that the process was shut down midway toward completion. One can express this quantitatively, as Judge Rapoza has, in terms of the only 572 out of 1,400 murders that have as yet led to indictments. Or one can ask, as DPGSC DeFaria has, what someone in his position says to the father in Oecussi that still sets a place at the table for his son who was murdered in the 1999 violence.³⁰⁵

Whichever way one puts it, ending the process in midstream produced great frustration and resentment both within the Serious Crimes community and, more importantly, among

³⁰⁵ Speaking at the UN Symposium in Dili, 28 April 2005.

the East Timorese whose interests the trials were to serve. This will remain as another blemish on the record of the trials. This is particularly the case because there has never been an adequate explanation from the Security Council as to why they mandated a premature conclusion just when the Special Panels were beginning to function at an acceptable level of international practice.

The third aspect has to do with the failure to obtain custody of any even mid-level, let alone high-level, defendants. Here one may properly blame Indonesia, but the Security Council must also take a share of the blame for its failure to even attempt to give the trials the political support they required to succeed. This blame must be shared by the Timorese government who not only did not support the process but undermined attempts to pressure the Indonesians by indicating their lack of interest in, if not their outright opposition to, such prosecutions. From the very beginning of the process vocal critics like Judge Pereira pointed out the injustice of bringing to trial only the lowest-level Timorese perpetrators, mostly impoverished illiterate farmers who perpetrated single acts of violence in their villages under orders of the militias and TNI. As we saw, this view was shared by many of the judges of the Special Panels.

Underlying these three failings of the Serious Crimes process is the failure of the Security Council and UNTAET to define a clear mandate for the SCU at the very beginning of the process. DPGSC Siri Frigaard's decision in 2002 to pursue priority cases and to also focus upon a select group of high-level Indonesian perpetrators offered multiple advantages. It provided a focus for prosecutorial strategy, which was sorely lacking in the early stages when crucial decisions were made. It also enabled a concentration of prosecutorial and investigative resources to build strong cases and document the historical record, not just of individual killings, but the organizational and political mechanisms that enabled them to be perpetrated.

The indictments of high-level Indonesian suspects, and particularly General Wiranto, provided the kind of documentation of the larger picture of violence in East Timor that, as we have seen, was sorely lacking in the trials that were actually held. In very few cases was any evidence actually produced in Court about the broader context of the violence, and above all about those responsible for organizing it. The decision of the prosecution to rely solely upon a few human rights reports to establish the context for crimes against humanity prosecutions was consistently encouraged by the judges and rarely challenged by the defense. Because the prosecution did not make its case in Court about the full sweep and organization of the violence, little was added to the historical record beyond these reports, which predated the trials. For this reason, it is hard to see how most of the trials that did occur laid a foundation for the eventual prosecution of those at the highest levels of command. The Judgments in the 84 convictions do not provide a coherent account of the organization, financing, planning, and direction of the attacks and the mechanisms by which they were implemented at the local level. In this sense, as well, the Serious Crimes trials fell far short of their potential.

Despite all of the challenges, however, the dedication and hard work of very capable individuals in all three branches of the process—chambers, prosecution, and defense—saved the trials from what could have been a complete failure of credibility and legitimacy. Also of crucial importance was the willingness of UNMISSET's head in 2004–2005, Special Representative of the Secretary-General Sukehiro Hasegawa, to provide the support requested by the Judge Coordinator and others. The history of these trials shows how individuals can

The hard work of individuals in all three branches saved the trials from what could have been a complete failure of credibility and legitimacy

make a difference, because at crucial junctures they did. Without their efforts, the Special Panels, the prosecution, and the defense would have fared far worse. Though it is an indictment of the UN that it was not until mid- to late-2004 that the Special Panels began to function as they should, it is a tribute to the contributions of many individuals that this was possible at all. No matter how harsh some of these criticisms of the process may seem, an effort has been made throughout this report to highlight the ways in which many outstandingly capable individuals struggled to improve it.

The remaining part of this Conclusion will draw together some of the main themes and rephrase them in terms of lessons to be learned from the challenges of seeking accountability in East Timor:

- At the root of all the problems of the Serious Crimes process was the failure by the UN to ensure proper leadership, a clear mandate, political will, and clear “ownership” of the process from the very beginning. This means appointing individuals to key positions of responsibility who understand the needs of a Court and have the experience to build one from the ground up in a post-conflict environment. A fatal mistake in regard to administration, resources, and management was the failure to appoint a Registrar and to invest him or her with appropriate authority and responsibility. The tenure of Robin Vincent as Registrar at the Special Court for Sierra Leone demonstrates what a difference the presence of a highly capable person in such a position can make.
- Underlying the problems encountered by the Special Panels was the failure to create a position of a President or Presiding Judge empowered to speak on behalf of the Panels and to appoint a person of sufficient stature and experience (as eventually happened in 2004) who would know what the Court required and fight effectively to get it. Four years was too long to have to wait for this to happen.
- Underlying both of these first points are the obvious and well-known problems in the UN recruitment process. If the UN is to be in the tribunal business it should develop a mechanism that ensures vigorous recruitment of the best persons available and a selection process advised or staffed by internationals of sufficient experience as judges and prosecutors to know how to select such individuals.³⁰⁶
- The UN should also have in place a standard process for creating tribunals and ensuring they have what they need to function properly. This means, above all, providing oversight through some kind of committee composed of very experienced judges, prosecutors, and judicial administrators rather than UN bureaucrats who understand nothing of the functioning of a judicial process.
- There should be no need to fight for the resources necessary to enable a court to function as a proper court and to meet the standards that the United Nations aims to promulgate. The failure to provide the basic resources described in Parts One through Three of this report is a disgrace to the United Nations. There is no excuse for a UN

³⁰⁶ Prior to the appointment of Judge Rapoza as Coordinator, judges and court staff had been recruited entirely by UNMISSET staff with little or no participation by or consultation with the Court. Judge Rapoza instituted a process whereby the judges of the Special Panels reviewed applications, interviewed candidates, prepared a ranked shortlist, and forwarded it to UNMISSET with recommendations. The result was a significant improvement in both transparency and the quality of successful candidates.

court not to have, at the very least: competent translators and an appropriate translation system; accurate and professional transcription facilities; competent defense counsel to represent the accused; basic tools for legal research for all three branches; competent and experienced judges; legal officers and clerical staff to enable those judges to do their job; a functioning witness protection program that ensures that the interests of witnesses and victims are given their due; adequate and functioning case management, evidence management, and file management systems with personnel trained to run them; and adequate security for the court. All of these were lacking for at least a substantial part of the time the Special Panels and SCU existed. The lack of accountability for the failure to provide these is itself a systemic failing of the UN system.

- The lack of equality of arms for, at the very least, the first two and a half years of the Serious Crimes trials, points to the lack of attention given to establishing a viable defense function. Proper planning must ensure human and material resources for the defense from the very beginning. Failure to meet acceptable international standards in providing an adequate defense undermines the legitimacy of the trials and calls into question the convictions handed down in such cases.
- There must be proper management and oversight of the three branches of the judicial operation. The UN practice of operating with short-term contracts has many disadvantages, but it also allows for moving out incompetent or unmotivated personnel. There was a striking failure to do so in East Timor. Many cases have been noted here that called for intervention in the form of not renewing personnel whose work did not meet even minimum standards of competence let alone the best international standards. One must ask why, in light of UNTAET/UNMISSET's awareness of the problems, this was not done. One reason is that lack of clear ownership of the process provided an easy excuse for shifting the blame from the UN to the Timorese side.³⁰⁷ But if the UN recruits and pays the salaries of its appointees it should also provide effective oversight and management of them.
- The problem of lack of accountability cannot be underscored enough. Failures such as the non-existence of a Court of Appeal for 19 months are simply inexcusable because they have such a direct impact on the rights and interests of accused. As Timorese Judge Jacinta da Costa commented, "How can it be that there are no judges at the Court of Appeal? Human rights can't be only talk." Likewise, the failure of UNMISSET to take any steps at all after the Armando dos Santos, Paulino de Jesus, and other notorious decisions of the Court of Appeal only harmed the standing and ultimately the legitimacy of this important institution. It did not serve the interests of anyone, or of "judicial independence," to allow the highest court in the land to become a standing joke and source of constant mockery among all branches of the UNMISSET legal operation, yet this is exactly what happened in Dili.
- There must be adequate and effective training for court actors. The failure to either hire individuals who already possessed the requisite skills, or to provide mandatory training

The problem of lack of accountability cannot be underscored enough

³⁰⁷ For example, the Superior Council of the Judiciary officially appointed the international judges after the UN shortlisted them.

for the international judges of the Special Panels and especially the Court of Appeal, as well as members of the Defense Lawyers Unit, did much to compromise the quality of the trials in ways that directly harmed the interests of the accused. The failure to provide adequate legal officers to advise the judges on international criminal law only exacerbated this problem. The results of this failure were detailed in the critiques of the jurisprudence of the Special Panels and Court of Appeal in Part Three.

- Capacity building in the Serious Crimes process was an almost complete failure, from the collapse of the use of Timorese public defenders in 2002 to the debacle of the failure of all the judges in their competency examination in 2005. In regard to the latter, effective training should have been in place from the very beginning and should have been integrated into the judges' workload so as to enable them to do both. The only exception was the fine training program for Timorese prosecutors at the SCU, which ultimately proved futile because the UNDP training program refused to recognize this training. All of the SCU-trained prosecutors and investigators were made to start over at the Judicial Training Center.³⁰⁸
- If the UN is to engage in judicial capacity building it should ensure the recruitment of experienced and professional qualified trainers and teachers. That every judge is not necessarily a competent professional trainer is amply manifested by the problems of the program implemented at the Judicial Training Center, as described in Part Four. If the UN is going to hire and pay trainers, they should not allow incompetence, language policies, or cronyism to dictate hiring, as was done in East Timor.

Four concepts represent what was missing most from the justice process in East Timor and should, instead, have been its mantra: *political will, leadership, management, and accountability*. In the end, the necessity of a commitment to these concepts is the most important lesson to be learned if the UN is going to put its imprimatur on a judicial mechanism that has the power to deprive individuals of their liberty.

³⁰⁸ See Cohen, *The Legacy of the Special Panel for Serious Crimes* (forthcoming) for a detailed account.

APPENDIX: THE EXAMINATION FOR TIMORESE JUDGES

This Appendix provides documentation for the discussion in Part Four of the examination which all of the Timorese judges failed. It consists of three sections:

Section 1: A scanned version of the two parts of the examination itself (document furnished to me by the President of the Court of Appeal and the Superior Council of the Judiciary, Judge Claudio de Jesus Ximenes)

Section 2: An enumeration of errors in translation, typographical mistakes, omissions, etc.

Section 3: Conclusions

SECTION 1: THE EXAMINATION

PROVAS ESPECÍFICAS – I PARTE

Dili, 07.05.2004



Esta prova compõe-se de 13 pontos.

A seguir ao número de cada ponto está indicada a cotação respectiva.

A prova tem a duração de 3 horas. Para quem quiser, haverá uma tolerância de 30 minutos.

Boa sorte!

_____ *

Ponto 1
(5 valores)

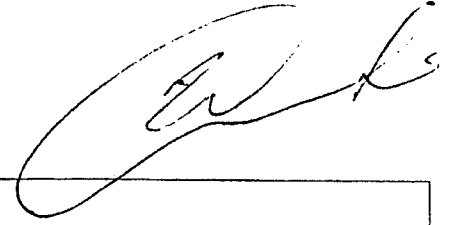
Num processo crime encontramos as seguintes peças:

a) O Ministério Público acusa António e Bento de terem cometido um crime de homicídio previsto no artigo 340 do CPI, dizendo que:

No dia 21 de Setembro de 1999, em

PROVA ESPECÍFICA – PARTE I

Dili, 07.05.2004



Prova idané iha pontu 13.

Pontu idaidak nia kotasaun hakerek hela tuir pontu-né nia número.

Prova-né demora horas 3. Emanebé hakarak bele uza tolerânsia to minutu 30.

Sorte diak!

_____ *

Pontu 1
(valor 5)

Iha prosesu crime ida nia laran ita hetan pesa sira tuirmai-né:

a) Ministériu Públiku acuza António no Bento katak sira komete krime ida previstu iha artº 340 hõsi Indonésia nia Kodigo Penal. Ministériu Públiku dehan katak:

<p>Colomera, Dili, Carlos estava na loja de Domingos a falar com Eduardo e Francisco;</p> <p>Quando António e Bento chegaram junto de Carlos, António espetou uma faca três vezes no peito de Carlos, e Bento espetou também uma faca três vezes nas costas de Carlos;</p> <p>Carlos faleceu em consequência dos ferimentos;</p> <p>António e Bento quiseram matar Carlos quando lhe espetaram a faca no corpo;</p> <p>Carlos deixou a viuva com dois filhos da ambos, um de 3 anos e outro de 4 anos.</p>	<p>Iha loron 28 Setembro 1999, iha Colomera, Dili, Carlos koalia hela ho Eduardo no Francisco iha Domingos nia loja;</p> <p>Kuandu António no Bento to besik Carlos, António sona-bórus Carlos iha nia hirus-matan dala tótu ho tudik ida; Bentu mos sona-bórus Carlos nia kotuk dala tótu ho tudik ida;</p> <p>Carlos mate tambá kanek sirané;</p> <p>António no Bento hakarak oho Carlos quando sira sona -bórus nia ho tudik;</p> <p>Carlos hosik-hela nia fen-faluk ho sira nia oan rua: ida ho tinan tolu, ida ho tinan 4.</p>
<p>b) Na audiência de julgamento os arguidos António e Bento não quiseram falar sobre os factos de que eram acusados.</p> <p>Foram ouvidas quatro testemunhas: Domingos, Eduardo, Francisco e Gregório.</p> <p>Domingos disse que não tinha visto o que aconteceu porque estava nas traseiras da loja; que sabia que António e Bento estavam zangados com Carlos havia uma semana; que Carlos foi enterrado no dia seguinte.</p> <p>Eduardo disse que estava a falar com Carlos quando chegaram António e Bento e começaram a discutir com este, e, na sequência disso, envolveram-se os três em agressão física; que a certa altura António pegou numa faca que estava no balcão e espetou três vezes no peito de Carlos; que Bento tirou a faca da mão de António e</p>	<p>b) Iha audiênsia ba julgamentu arguidu António no Bento lokóhi koalia konobá factu siranebé acuzasaun ható ba tribunal hasóru sira.</p> <p>Tribunal rona deklarasaun hósi testemuña nain-hat: Domingos, Eduardo, Francisco no Gregório.</p> <p>Domingos dehan katak: nia la haré buat nebé akontese, tambá iha altura-né nia ba tiha loja-kotuk; António no Bento hirus-málu hela ho Carlos semana ida nia laran ona; ema hakoi Carlos iha 22 Setembro 1999; Carlos hosik-hela nia fen-faluk ho sira nia oan rua: ida ho tinan tolu, ida ho tinan 4.</p> <p>Eduardo dehan katak: Nia koalia hela ho Carlos kuandu António no Bento to; António no Bento hahu diskuti-malu ho Carlos i, tuir mai, sira nain tólu baku-malu; tuir fáti, António fóti tudik ida hósi meza-leten i sona-</p>

<p>lançou-a para longe; que Carlos morreu antes de chegar a ambulância; que António e Bento ganhavam cada um US\$3.000,00 por mês.</p>	<p>bórus Carlos nia hirus-matan dala tótu; Bento hasai tiha tudik hósi António nia liman e soe ba dok; Carlos mate molak aubulânsia to; António no Bento manan ida-idak US\$3.000,00 fulan ida.</p>
<p>Francisco disse que, quando estava a falar com Carlos, chegaram António e Bento e começaram a discutir com este; que teve que ir chamar Domingos e, quando voltou viu o Carlos morto; que António e Bento estavam zangados com Carlos havia uma semana; que Carlos foi enterrado no dia seguinte; que António e Bento ganhavam cada um US\$3.000,00 por mês.</p>	<p>Francisco dehan katak: kuandu nia koaliala hela ho Carlos António no Bento to i hahu diskuti-malu ho Carlos; nia ba loja kotuk atu bólu Domingos, i, kuandu nia filamai, nia haré katak Carlos mate tiha ona; António no Bento hirus-málu hela ho Carlos semana ida nia laran ona; ema hakoi Carlos iha 22 Setembro 1999; António no Bento manan ida-idak US\$3.000,00 fulan ida.</p>
<p>Gregório disse que quando ia a passar junto da loja de Domingos viu o Bento com uma faca com sangue na mão e, três horas depois, ouviu na rádio que António e Bento tinham morto Carlos porque estavam zangados com ele.</p>	<p>Gregório dehan katak: kuandu nia liu besik Domingos nia loja nia haré Bento kaer hela tudik ida ho ran iha nia liman; liu tiha oras 3, nia rona iha radiu katak António no Bento oho Carlos tambá sira hirus-malu hela ho nia.</p>
<p><i>- Seguindo o disposto no artigo 39.3 do Regulamento 2000/30, da UNTAET, faça uma sentença de acordo com a prova produzida na audiência e os factos que considerar provados, indicando os artigos do Código Penal, das Regras do Processo Penal e do Código das Custas Judiciais em que se baseia a sua decisão.</i></p>	<p><i>- Haré-tuir artigo 39.3 hósi UNTAET nia Regulamento 2000/30, hakerek sentensa ida, tuir prova nebé mosu iha audiência no faktu sira nebé ita bele considera provadu tuir prova-né, hatudu ho artigu sira hósi Kodigu Penal, Regulamento 2000/30, no Kodigu ba Kustas, nebé uza nudar base ba desizaun-né.</i></p>
<p>Ponto 2 (1,5 valores)</p>	<p>Pontu 2 (valor 1,5)</p>
<p>O Procurador requereu ao Juiz de</p>	<p>Procurador húsu ba Juiz ba</p>

<p>7</p> <p>Investigação que passasse um mandado de detenção de Alberto porque no processo havia indícios de que ele devia US\$200.000,00 de salários aos trabalhadores da sua empresa e estava a procurar fugir para o estrangeiro para não lhes pagar quando o tribunal o condenar a pagar essa quantia.</p>	<p>7</p> <p>Investigasaun atu hasai mandadu atu kaer Alberto, tambá iha prosesu laran iha prova katak Alberto deve hela US\$200.000,00 konabá ba ema sira nebé servistú iha nia empreza nia vencimentu i nia buka dalan atu halai ba rai-liur (estrangeiru) atu labele sélu osan-né ba nia empregadu sira wianhira tribunal haruka nia sélu.</p>
<p>8</p> <p>- <i>Dê uma decisão sobre esse requerimento, indicando a fundamentação legal.</i></p> <p>Ponto 3 (1,5 valores)</p> <p>Basílio está acusado pelo Ministério Público de ter cometido um crime previsto no artigo 406º do Código Penal Indonésio. Já está em prisão preventiva há 2 anos e 8 meses. Durante esse tempo fugiu da prisão quatro vezes, para ameaçar as testemunhas, e quatro vezes foi recapturado pela polícia. O julgamento está em curso.</p> <p>O Procurador requer ao Juiz que prolongue a prisão preventiva dele por mais 30 dias para terminar o julgamento.</p>	<p>8</p> <p>- <i>Hakerek desizaun konabá rekerimentu-né, hatudu ho artigu no lei siranebé uza nudar base ba desizaun-né.</i></p> <p>Pontu 3 (valor 1,5)</p> <p>Ministériu Públiku akuza Basílio katak nia halo krime ida tama iha artigo 406 hósi Indonésia nia Kodigu Penal. Basílio tama iha prizaun preventiva iha tinan 2 fulan 8 nia laran ona. Durante tempu-né nia halai hósi kadeia dala hat, atu halotauk testemuña sira, i dala hat polisia kaer nia fila fali. Julgamentu lao daudaun.</p> <p>Prokurador ható rekerimentu ida húsu ba Juiz atu hanaruk nia prizaun preventiva loron 30 tan, atu bele hótu julgamentu.</p>
<p>9</p> <p>- <i>Dê uma decisão sobre esse requerimento, indicando a fundamentação legal.</i></p>	<p>9</p> <p>- <i>Hakerek desizaun konabá rekerimentu-né, hatudu ho artigu no lei siranebé uza nudar base ba desizaun-né.</i></p>

<p>Ponto 4 (2 valores)</p> <p>Em 20 Janeiro de 2001 o Tribunal Distrital de Dili condenou Manuel, por sentença transitada em julgado, por um crime previsto no artigo 520 do Código Penal Indonésio, na pena de 20 dias de prisão. Mas quando foi levado pela polícia para a cadeia para cumprir a pena fugiu. Em Abril de 2004 o Ministério Público recebeu a informação de que ele estava a morar em Oecússi e apresentou ao juiz do processo um requerimento a pedir a emissão de um mandado de detenção dele para cumprir a pena.</p> <p>- Dê uma decisão sobre esse requerimento, indicando a base legal.</p>	<p>Pontu 4 (valor 2)</p> <p>Iha 20 Janeiro 2001 Tribunal Distrital iha Dili kondena Manuel ba tama kadeia lora 20, tambá nia halo krime ida tuir artigo 520 hosi Indonésia nia Kodigu Penal. Maibé, kuandu polisia lori nia ba kadeia, Manuel halai tiha. Iha 20 Abril 2001 Ministériu Públiku simu informasaun katak Manuel hela iha Oecúsi; nuné Ministériu Públiku ható rekerimentu ida husu ba juiz nebé kaer prosesu atu hasai mandadu atu kaer Manuel atu hatama iha kadeia atu kumpre kastigu nebé nia simu.</p> <p>- Hakerek desizaun ida konabá rekerimentu-né, hatudu ho artigu no lei siranebé uza nudar base ba desizaun-né.</p>
<p>Ponto 5 (1 valor)</p> <p>Num julgamento que decorre perante um Colectivo de Juizes um desses juizes morre no decurso do julgamento.</p> <p>- O que deverá fazer o tribunal? Fundamente e indique a base legal.</p>	<p>Pontu 5 (Valor 1)</p> <p>Iha julgamentu kolektiv (ho juiz nain tolu), to iha klaran, juiz sirané ida mate.</p> <p>- Tribunal ténki halo saída? Fo justifikasaun konabá resposta, hatudu ho baze legal.</p>
<p>Ponto 6 (1,5 valores)</p> <p>José foi condenado no Tribunal Distrital</p>	<p>Pontu 6 (valor 1,5)</p> <p>Iha 20 Marsu 2004 Tribunal Distrital hosi</p>

de Dili, em 20 de Março de 2004, numa pena de 11 anos de prisão. Já se encontrava detido, preventivamente, desde 17 de Abril de 2002.

- 14 a) Quando terminará o cumprimento da sua pena? 6, 9 / 2013
- 15 b) Quando poderá ele beneficiar da liberdade condicional? 16/8/2009
- 16 c) Quais são as condições para o juiz lhe conceder a liberdade condicional?
- 17 d) Quem supervisiona e controla a execução da pena?

Ponto 7
(1,5 valores)

Em 20 de Maio de 2002 a polícia deteve Luís e entregou-o ao Procurador por ele ter sido encontrado em Baucau a praticar actos que integravam o crime do artigo 281 do Código Penal Indonésio. Em 21 de Maio de 2002 o Procurador requereu, ao Tribunal Distrital de Díli o seu julgamento nos termos do artigo 44.1 do Regulamento 2000/30 da UNTAET.

- 18 - Faça a decisão que o juiz do Tribunal Distrital de Díli deverá dar de acordo com a lei, indicando a fundamentação legal?

Ponto 8
(1 valor)

- 19 Num processo crime o juiz do Tribunal

Dili condena José ba tama kadeia tinan 11. José tama tiha ona prizaun preventiva hahu iha 17 Abril 2002.

- 14 a) Iha sa loron maka José kumpre nia kastigu iha kadeia hótu?
- 15 b) Iha loron sa maka nia bele hetan liberdade kondisional?
- 16 c) Saída maka presiza atu juiz bele fo liberdade kondisional ba nia?
- 17 d) Se maka kontrola ka supervizona prosesu atu exekuta kastigu prisaun?

Pontu 7
(valor 1,5)

Iha 20 Maiu 2002 Polisia kaer Luís i entrega ba Prokurador, també Policia toman nia iha Baucau halo krime idanebé tama iha artigu 281 hósi Indonézia nia Códigu Penal. Iha 21 Maiu 2002 Prokurador ható rekerimentu ba Tribunal Distrital iha Dili atu halo julgamentu tuir artigu 44.1 hósi UNTAET nia Regulamentu 2000/30.

- Halo desizaun nebé Juiz hósi Tribunal Distrital iha Díli ténki fo, tuir lei, hatudu ho artigu no lei siranebé uza nudar base ba desizaun-né.

Pontu 8
(valor 1)

- 19 Iha prosesu krime ida juiz hósi Tribunal Distrital iha Dili hasai sentensa dahan katak

<p>Distrital de Díli decidiu em sentença absolver o arguido do crime que lhe era imputado pelo Ministério Público. No recurso interposto pelo Ministério Público o Tribunal de Recurso ordenou a repetição do julgamento desse processo crime. Quando o processo baixou à primeira instância, o juiz do Tribunal Distrital de Díli decidiu mandar arquivar o processo por entender que a decisão do Tribunal de Recurso violava a Constituição.</p>	<p>arguidu la halo krime nebé akuzasaun dehan iha katak nia halo. Iha rekursu nebé Ministériu Públiku ható, Tribunal ba Rekursu haruka Tribunal Distrital repeté filafáli julgamentu iha prosesu idané. Kuandu prosesu fila ba Tribunal Distrital iha Díli, juiz hósi Tribunal Distrital iha Díli haruka arkiva tiha prosesu-né, tambá, tuir nia hanoin, Tribunal ba Rekursu nia desizaun viola Constituisaun.</p>
<p>20 - O juiz do Tribunal Distrital de Díli decidiu bem ou mal? Justifique a resposta, indicando também a base legal?</p>	<p>- Juiz hósi Tribunal Distrital iha Díli nia desizaun-né lós ka lae? Fo justifikasaun ba reposta, hatudu mos ho base legal.</p>
<p>Ponto 9 (1 valor)</p>	<p>Pontu 9 (valor 1)</p>
<p>Um juiz pode emitir opinião sobre a decisão dada por outro juiz num processo ou não?</p>	<p>Juiz bele fo nia opiniaun konabá desizaun nebé juiz seluk fo iha prosesu ka lae?</p>
<p>Justifique a resposta, indicando também a base legal?</p>	<p>Fo justifikasaun konabá resposta, hatudu ho base legal.</p>
<p>Ponto 10 (1 valor)</p>	<p>Pontu 10 (valor 1)</p>
<p>21 - O que acontece ao juiz estagiário nomeado juiz de terceira classe que falte injustificadamente à tomada de posse?</p>	<p>- Saída maka akontese ba juiz estagiáriu nebé, hetan tiha nomeasaun ba juiz terseira klase, la ba simu pose i la fo justikasaun konabá nia falta-né?</p>
<p>Responda, indicando a base legal.</p>	<p>Fo resposta, hatudu ho base legal.</p>

<p>Ponto 11 (1 valor)</p> <p>- Como e em que circunstâncias é que a Constituição permite a restrição dos direitos, liberdades e garantias fundamentais? Indique o artigo ou artigos da Constituição sobre essa matéria.</p>	<p>Pontu 11 (valor 1)</p> <p>- Oisá no iha situação siranebé maka Constituisaun fo fatin atu habadak direitu, liberdade no garantia fundamental sira? Hatudu artigu iha Constituisaun konabá kestaun idané.</p>
<p>Ponto 12 (1 valor)</p> <p>- Quais as semelhanças e diferenças que existem entre o Provedor de Direitos Humanos e Justiça e um Juiz, de acordo com a Constituição?</p>	<p>Pontu 12 (valor 1)</p> <p>- Tuir Constituisaun, iha saída maka Provedor ba Direitus Humanus no Justiça hanesan ho Juiz, no iha saída maka Provedor ba Direitus Humanus no Justiça la hanesan ho Juiz?</p>
<p>Ponto 13 (1 valor)</p> <p>- O que são direitos humanos? Indique 10 artigos da Constituição que tratem de direitos humanos.</p>	<p>Pontu 13 (valor 1)</p> <p>- Direitus umanus ne saída? Hatudu artigu 10 hósi Konstituisaun nebé koalia konabá direitus umanus.</p>

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PROVAS ESPECÍFICAS – II PARTE

Dili, 10.05.2004

Esta prova compõe-se de 13 pontos.

A seguir ao número de cada ponto está indicada a cotação respectiva.

A prova tem a duração de 3 horas. Para quem quiser, haverá uma tolerância de 30 minutos.

Boa sorte!

*

Ponto 1
(3 valores)

Num processo encontramos as seguintes peças:

a) Domingos intentou no Tribunal distrital de Díli uma acção contra Eduardo pedindo a condenação deste a pegar-lhe a indemnização por prejuízos sofridos num acidente de automóvel, sendo US\$100,00 por danos no seu automóvel e US\$60.000,00

PROVA ESPECÍFICA – PARTE II

Dili, 10.05.2004

Prova idané iha pontu 13.

Pontu idaidak nia kotasaun hakerek hela tuir pontu-né nia número.

Prova-né demora horas 3. Emanebé hakarak, bele uza tolerânsia to minutu 30.

Sorte diak!

*

Pontu 1
(valor 3)

Iha prosésu ida nia laran ita hetan pesa sira tuirmai-né:

a) Domingos ható ba Tribunal Distrital iha Díli prosésu ida hasóru Eduardo, húsu ba tribunal átu kondena Eduardo sélu indemnizasaun ba nia, tambá prejuízu nebé nia hetan iha asidente ida ho karreta: US\$100,00 tambá nia karreta estraga:

<p>por salários que deixou de receber.</p> <p>b) Na audiência de julgamento o juiz considerou provados os seguintes factos:</p> <p>Em 20 de Abril de 2002, Eduardo conduzia, em Díli, um automóvel. Por não ter carta de condução e conduzir sem atenção, o automóvel por ele conduzido veio a embater no automóvel conduzido por Domingos, provocando-lhe danos. Domingos e Eduardo foram ao hospital receber tratamento por ferimentos ligeiros sofridos no acidente. No hospital Domingos contraiu uma doença contagiosa e, por isso, ficou doente e impossibilitado de trabalhar durante um ano e de receber o salário correspondente a esse período, no valor de US\$60.000,00. Domingos pagou US\$100,00 pela reparação dos danos sofridos pelo seu automóvel no acidente.</p> <p><i>- Faça uma sentença, de acordo com os factos provados e a lei aplicável ao caso, incluindo o Código das Custas Judiciais, indicando os factos e a lei em que baseia a decisão.</i></p> <p>Ponto 2 (2valores)</p> <p>Abúti, de 10 anos de idade, costuma fazer-se acompanhar com o seu cão de nome Lesso. Ontem Abúti foi passear com o cão ao jardim e o cão fugiu-lhe. Nessa altura Fernanda estacionou o seu veículo</p>	<p>US\$60.000,00 também vencimentu nebé nia la simu.</p> <p>b) Iha audiênsia ba julgamentu juiz konsidera provadu factu sira tuirmajnë:</p> <p>Iha 20 Abril 2002, iha Díli, Eduardo kaer karreta ida. Tambã nia laiha karta átu kaer karreta no tam mós nia. Iha kaer karreta ho atensuan, nia karreta ba xoke kareta nebé Domingos kaer, halo estraga ba karreta idané. Domingos no Eduardo ba simu tratamentu iha ospital tambá kanek kikoan siranebé sira hetan iha asidente-né. Iha ospital moras ida dait ba Domingos, i, tambá moras-né, Domingos labele ba Servísu durante tinan ida nia laran e la simu US\$60.000,00 konabá vensiméntu iha períodu idané. Domingos sélu US\$100,00 atu hadian estragu nebé nia karreta hetan iha asidente-né.</p> <p><i>- Hakerek sentensa ida, tuir faktu provadu sirané no tuir lei aplikável, hatúdu ho faktu no artígu siranebé uza núdar base ba desizaun-né, no aplika mos Kódigu ba Kustas.</i></p> <p>Pontu 2 (valor 2)</p> <p>Abúti, labarik ho tinan 10, kostuma lao ho nia asu ida, naran Lesso. Horseik Abúti ba pasiar ho nia asu iha jardim i asu-né halai tiha. Iha altura-né Fernanda para nia karreta iha nia uma-oin. Kuandu Fernanda sai hósi karreta, Abúti nia asu ataka Fernanda i tata nia ain</p>
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<p>automóvel à frente da sua casa. Ao sair do carro Fernanda foi atacada pelo cão de Abúti, que a mordeu na perna esquerda. Para se defender, Fernanda entrou no carro e fechou precipitadamente a porta do carro, com isso partindo o vidro dessa porta, e deixou cair a sua mala de mão, que foi inutilizada pelo cão. O cão de Abúti circulava sem qualquer trela ou açaimo.</p> <p>23</p> <p><i>Responda às seguintes perguntas, indicando os factos e a lei em que baseia a sua resposta:</i></p> <ul style="list-style-type: none"> - Fernanda terá direito a ser indemnizada? - De que danos terá ela direito a ser indemnizada? - Quem terá o dever de a indemnizar? <p style="text-align: center;">Ponto 3 (1,5 valores)</p> <p>Em 20 Março de 1978 o Governo Indonésio de Timor-Leste vendeu a André, por US\$5.000,00 a casa 199, sita no Bairro de Farol, em Díli, de que o Estado Português era proprietário quando se deu a invasão de Timor-Leste pela Indonésia em Dezembro de 1975. André registou essa casa em seu nome nos Serviços do Registo Predial. Em 20 Abril de 1980 André vendeu essa casa, por US\$10.000,00, a Benjamim que o registou em seu nome nos Serviços do Registo Predial. Em 20 Maio de 1985</p>	<p>karuk. Átu defende-án, Fernanda tama iha karreta i taka karreta nia odamatan lalais résin, halo rahun odamatan idané nia vidru; i Fernanda husik nia mala monu iha rai, i Abúti nia asu tata halo-estraga tiha mala-né. Abúti nia asu lao iha líur livre, la kési ibun i la lóri ho tálin.</p> <p>23</p> <p><i>Fo resposta ba pergunta sira tuimainé, hatúdu ho faktu no lei siranebé uza núdar baze:</i></p> <ul style="list-style-type: none"> - Fernanda iha direito átu simu indemnizasaun? - Fernanda iha direito átu simu indemnizasaun konabá lakon (prejuízu) siranebé? - Se maka ténki sélu indemnizasaun ba Fernanda? <p style="text-align: center;">Pontu 3 (valor 1,5)</p> <p>Iha 20 Marsu 1978 Governu Indonésiu iha Timor-Leste fan ba André, ho fólin US\$5.000,00, uma ida ho número 199, iha Bairro de Farol, Díli. Kuandu Indonézia mai okupa Timor-Leste iha Dezembro 1975, uma-né nia nain maka Estadu Portugês. André regista uma-né iha nia naran iha Servíu ba Regístu Predial. Iha 20 Abril 1980 André fan uma-né ba Benjamim, ho fólin US\$10.000,00, i Benjamim regista uma-né iha nia naran iha Servíu ba Regístu Predial. Iha 20 Maio 1985 Benjamim fan uma-né ba Carlos, ho fólin</p>
	<p>24</p>

<p>Benjamim vendeu esse casa a Carlos, por US\$30.000,00 que era a valor das casas do género em Díli nessa altura. Antes de comprar essa casa, Carlos verificou nos Serviços de Registo Predial que ela tinha estado registado como propriedade do Governo Indonésio, depois como propriedade de André e por último como propriedade de Benjamim. Carlos estava convencido que a casa era utilizada pelo Consulado da Indonésia no tempo da Administração Portuguesa.</p> <p>Em 20 de Janeiro de 2004 a Direcção de Terras e Propriedades do Ministério da Justiça (DTP) procedeu ao despejo de Carlos da casa 199.</p> <p>Carlos recorreu dessa decisão para o Tribunal Distrital de Díli.</p> <p><i>- Faça uma sentença sobre o processo de recurso, de acordo com os factos provados, indicando os factos e a lei em que se baseia a decisão.</i></p> <p>Ponto 4 (1,5 valores)</p> <p>António intentou uma acção de divórcio, contra a sua esposa, Joaquina, pedindo o divórcio e a condenação de Joaquina a indemnizá-lo em US\$75,00, alegando que ela cometeu adultério com Felisberto.</p>	<p>US\$30.000,00. Iha Díli uma sira hanesan idané nia folin iha altura-né maka idané. Molok sosa uma-né, Carlos haré iha Servisu ba Registu Predial katak uma-né regista úluk hanesan Governu Indonésia nian, tuir-fali, hanesan André nian, iha ikus, hanesan Benjamim nian. Carlos hanoin katak Indonésia nia Konsuladu maka uza uma-né iha Administrasaun Português nia tempu.</p> <p>Iha 20 Janeiro 2004 Diresaun ba Terras no Propriedades hosi Ministériu ba Justisa (DTP) hasai Carlos hosi uma número 199.</p> <p>Carlos ható rekúrsu hasóru desizaun-né ba Tribunal Distrital iha Díli.</p> <p><i>- Hakerek sentensa ida konabá rekúrsu idané, hatúdu ho faktu no lei siranebé uza núdar baze ba desizaun-né.</i></p> <p>Ponto 4 (valor 1,5)</p> <p>António ható prosésu ba divórsiu hasóru nia fen, Joaquina, hasu tribunal átu fo divórsiu no kondena mos Joaquina átu sélu ba nia, núdar indemnizasaun, US\$75,00, ho fundamentu katak Joaquina komete adultériu ho Felisberto.</p> <p><i>- Fo resposta ba pergunta sirané:</i></p> <p>a) <i>Valor ba acção, konabá kustas, iha prosésu idané hira?</i></p> <p>b) <i>Preparu inicial átu séluk quando prosésu tama iha tribunal hira?</i></p>
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<p>26</p> <p>- Responda às seguintes perguntas:</p> <p>a) Qual o valor da acção, para efeito de custas?</p> <p>b) Qual é o preparo inicial a pagar?</p> <p>c) Qual é a taxa de justiça devida a final?</p> <p>Ponto 5 (1,5 valores)</p> <p>Alexandre é proprietário de uma fazenda de café, em Ermera. Em 1999 mudou-se para Austrália e autorizou Joaquim a explorar aquela propriedade como se a mesma fosse sua, colhendo o café e amanhando-a e cõservando-a. A partir de então Joaquim explorou e amanhou a dita Fazenda, dela colhendo café, o que era do conhecimento do Alexandre. Em Janeiro de 2004 Joaquim faleceu. Então o filho deste, Manuel, pretendeu continuar a explorar a dita propriedade, mas Alexandre não o autoriza.</p>	<p>c) Taxa ba justisa átu sélu iha final hira?</p> <p>Pontu 5 (Valor 1,5)</p> <p>Alexandre iha nia kintal ida ba café, iha Ermera. Iha 1999 Alexandre muda ba Austrália i fo autorizasaun ba nia amigu Joaquim átu esplora kintal-né hanesan ninian-rasik: ku kafé, hamós no hadian kintal-né. Hahu hósi tinan idané Joaquim esplora kintal-né, ku kafé, ho Alexandre nia coñecimentu. Iha Janeiro 2004 Joaquim mate. Entaun Joaquim nia oan, naran Manuel, hakarak esplora nafatim kintal-né. Maibé Alexandre la fo autorizasaun.</p> <p>Fo resposta ba pergunta sira tuimainé, hatúdu ho faktu no lei siranebé uza núdar baze:</p> <p>- Joaquim bele fan kintal-né ka lae?</p> <p>- Joaquim nia oan bele kontinua explora nafatin kintal-né ka lae?</p>
<p>27</p> <p>Responda às seguintes perguntas, indicando os factos e a lei em que baseia a sua resposta:</p> <p>- Podia Joaquim vender a fazenda?</p> <p>- Pode agora o filho de Joaquim continuar a explorar a fazenda, contra a vontade do Alexandre?</p> <p>Ponto 6 (1,5 valores)</p>	<p>Pontu 6 (valor 1,5)</p> <p>Manuel empresta US\$500,00 ba Lourenço. Átu halo prova konabá empréstimo idané Manuel iha deit deklarasaun idanebé Lourenço fo ba nia.</p> <p>Nicolau sélu US\$500,00 né ba Manuel, també nia hanoin katak Manuel empresta US\$500,00 né ba nia oan Lourenço. Tambá</p> <p>28</p> <p>29</p>

<p>28 Manuel emprestou a Lourenço US\$500,00, e tinha como única prova dessa dívida uma declaração passada por este.</p>	<p>símu tiha US\$500,00 hósí Nikolau, Manuel soe tiha declarasaun nebé nia símu hosi Lourenço.</p>
<p>29 Pensando que Manuel tinha emprestado essa quantia ao seu filho Orlando, Nicolau pagou-lhe os US\$500,00; e, por se considerar pago, Manuel desfez-se da declaração passada por Lourenço.</p>	<p><i>Fo resposta ba pergunta tuirmainé, hatúdu ho faktu no lei siranebé uza núdar baze:</i> - <i>Tuir lei, tribunal bele haruka Manuel fo fila-fáli US\$500,00 ná ba Nicolau?</i></p>
<p><i>Responda à seguinte pergunta, com justificação de facto e de direito:</i> - <i>Segundo a lei, pode o tribunal condenar Manuel a devolver a Nicolau os US\$500,00?</i></p>	<p>Pontu 7 (valor 1,5)</p>
<p>Ponto 7 (1,5 valor)</p> <p>Francisco vendeu uma casa sita na Praia dos Coqueiros, em Díli, a Gabriel, cidadão estrangeiro, recebeu o preço, mas recusou-se a entregar a casa ao Gabriel. Gabriel põe uma acção no Tribunal para obter a entrega da casa. Mas o Tribunal negou-lhe o pedido com o argumento de que, segundo a lei e a Constituição, Gabriel não tinha direito a ficar com a casa, por ser estrangeiro.</p>	<p>Francisco fan uma ida iha Praia dos Coqueiros, Díli, ba Gabriel, cidadaun estrangeiru ida. Francisco símu tiha uma nia fôlin, maibé la entrega uma-né ba Gabriel. Gabriel hatama procesu hasoru Francisco husu ba tribunal átu haruka Francisco entrega uma-né ba nia. Maibé tribunal la símu Gabriel nia pedidu ho argumentu katak nia laíha direitu átu hela ho uma-né, tambá nia sidadaun estrangeiru.</p>
<p>30 Mas o Tribunal negou-lhe o pedido com o argumento de que, segundo a lei e a Constituição, Gabriel não tinha direito a ficar com a casa, por ser estrangeiro.</p>	<p><i>Fo resposta ba pergunta tuirmainé, hatúdu ho faktu no lei siranebé uza núdar baze:</i> - <i>Tribunal nia desizaun-né tuir lei no Konstituisaun ka lae?</i></p>
<p><i>Responda à seguinte pergunta, indicando a base de facto e de direito:</i> - <i>A decisão do tribunal está de acordo com a lei e a Constituição ou não?</i></p> <p>Ponto 8</p>	<p>Pontu 8 (valor 1,5)</p> <p>Iha 28 Janeiro 1995 Ilda fan ba João nia rai ida ho 40 ectares, ho fôlin US\$200,00 deit, tambá João ameasa Ilda katak, se la fan</p>

<p>(1,5 valores)</p> <p>31 Em 25 Janeiro de 1995 Ilda vendeu a João um terreno de 40 hectares por US\$200,00 por ter sido ameaçada por este de que, se não o fizesse, iria dizer à Intel</p> <p>32 indonésia que ela dava apoio às FALINTIL e ela seria presa.</p> <p><i>Responda à seguinte pergunta, com justificação de facto e de direito:</i></p> <p>- Qual é o mecanismo legal que Ilda pode usar para recuperar o terreno vendido?</p> <p>- Até que data pode Ilda utilizar esse mecanismo?</p> <p>Pontu 9 (1 valor)</p> <p>A Constituição e a lei impõe que as audiências de julgamento sejam públicas por várias razões.</p> <p>- Indique duas dessas razões.</p> <p>Ponto 10 (2 valores)</p> <p>Explique o significado das expressões utilizadas pela Constituição no artigo 1º, nº 1, para qualificar a República Democrática de Timor-Leste.</p> <p>Ponto 11</p>	<p>karik, nia ba dehan ba Indoneaia nia Intel katak Ilda fo apoio ba FRETILIN i Intel sei kaer Ilda hatama kadeia.</p> <p><i>Fo resposta ba pergunta tuirmainé, hatúdu ho faktu no lei siranebé uza núdar baze:</i></p> <p>- <i>Mekanísmu legal idanebé maka Ilda bele uza átu símu fila-fáli nia rai nebé nia fan ba João?</i></p> <p>- <i>To sá loron maka Ilda bele uza mekanísmu idané?</i></p> <p>Pontu 9 (valor 1)</p> <p>Konstituisaun no lei obriga katak audiência ba julgamentu ténki lóke ba públiku tamba razaun barak.</p> <p>- <i>Hatúdu razaun sirané rua.</i></p> <p>Pontu 10 (valor 2)</p> <p>Fo esplikasaun konabá expresaun siranebé Konstituisaun usa iha artigu 1º, n. 1, átu kualifika Repúblika Demokrátika Timor-Leste.</p> <p>Pontu 11 (valor 1)</p> <p>Governu aprova i Presidente da República</p>
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<p>(1 valor)</p> <p>O Governo aprovou e o Presidente da República promulgou um decreto-lei a amnistiar os crimes cometidos por menores de 18 anos a que corresponde pena de prisão até 1 ano.</p> <p><i>Responda à seguinte pergunta indicando a base legal:</i></p> <p>- Os tribunais devem aplicar ou não esse decreto-lei?</p>	<p>promulga deretu-lei ida fo amnistia ba krime siranebé ema ho tinan 18 ba kraik halo kuandu krime sirané nia kastigu ba to deit prizaun to tinan 1.</p> <p><i>Fo resposta ba pergunta tuirmainé, hatúdu ho baze legal:</i></p> <p>- Tribunal sira ténki aplika dekretu-né ka lae?</p> <p>Pontu 12 (valor 1)</p>
<p>Ponto 12 (1 valor)</p> <p>Que mecanismos dá a Constituição aos tribunais para contribuírem para a defesa da própria Constituição?</p> <p>Indique os artigos em que esses mecanismos estão previstos.</p> <p>Ponto 13 (1 valor)</p>	<p>Mekanísmu siranebé maka Konstituisaun fo ba tribunal sira átu defende Konstituisaun rasik?</p> <p>Hatúdu artigu siranebé estabelese mekanísmu sirané.</p> <p>Pontu 13 (valor 1)</p>
<p>Explique por que a Constituição estabelece a proibição do artigo 123º, nº 2.</p>	<p>Explika tambá sa maka Konstituisaun estabele proibisaun sira iha artigu 123º, n. 2.</p>

SECTION 2: ENUMERATION OF MISTAKES AND DISCREPANCIES IN TRANSLATION AND DRAFTING

The examination was written in Tetum and Portuguese and the judges could answer in Tetum, Portuguese, Bahasa Indonesia, or English. All chose Tetum.³⁰⁹ There were 13 questions in each of the two parts of the examination. The judges had three hours for each part, with a 30 minute grace period. In analyzing the text of the examination, I relied upon two translations of the Portuguese, one by a court certified Portuguese-English translator in Los Angeles, California, the other by a tri-lingual English-Portuguese-Tetum professional translator with considerable experience in the Special Panels and elsewhere. This same translator also prepared a translation of the Tetum version of the examination. In addition, I commissioned two other Tetum-English translators with extensive experience at the SCU to prepare translations. Finally, I consulted a native Portuguese speaker with many years of experience in Dili in the Serious Crimes process on questions concerning the Portuguese part of the examination, and another, similarly experienced person with questions on the Tetum portion. In short, I have attempted to be scrupulously fair in analyzing the formal defects of the examination. I must make it clear, however, that I do not present this analysis as a final, definitive, or complete account of the examination. Rather, the purpose is merely to show that there are so many apparent mistakes that the examination must be subjected to a rigorous and independent professional evaluation. I make no substantive comments about the content of the examination or its length. These, too, should be considered by an independent evaluation.

The following will detail 32 discrepancies and errors, translation mistakes, and typographical errors in the examination. As the examination was divided into two parts, the analysis will take each of these by turn, enumerating the questions where there were problems or errors. I will list minor errors as well as major ones. More serious errors are boldfaced in my text. In the reproduction of the examination the errors are highlighted and numbered in the margins of the examination to correspond to the numbers (1–32) below.

It should be noted that much of the examination consists of hypothetical questions based upon often complicated factual scenarios. Answering such questions in legal examinations requires focusing on the details of the factual scenario and analyzing the legal consequences of these details. This also involves deciding which details are irrelevant. For this reason, even small mistakes in translation from Portuguese to Tetum (including omitting translation of some phrases) could make a difference in the answer. For this reason great care should have been exercised to ensure the greatest possible accuracy of the questions. This would have been less critical if the examiners could have read the Tetum version of the questions (i.e., what the judges actually answered) but none of them could do so. They relied instead on the Portuguese versions of the questions and the translation of the examinees' answers into Portuguese. They thus would have been completely unaware of the differences in the Tetum version of the question. The danger here, as will be seen, is that a correct or complete answer to the Tetum version of the question might have been an incorrect or incomplete answer to the Portuguese version.

³⁰⁹ I received this information from one of the examiners. Sources for my information about the exam are indicated in the footnotes of this report.

Examination Part 1.

Question 1.

1. Subsection (a). Portuguese version gives the date on which the crime was committed as *21 September* 1999, the Tetum version gives the date as *28 September*, 1999.
2. Subsection (b). Portuguese version says Carlos was buried the following day. The Tetum text says that he was buried on September 22, though above it had stated that he was killed on 28 September. The Tetum version also repeats what had been stated in both languages in subsection (a): that Carlos left a widow with two children, one three years old, the other four years old. The Portuguese version omits this.
3. Subsection (b). Portuguese version says that the witness Francesco testified that *he had to go call Domingos*. Tetum version states that *he went to the back of the shop to call Domingos*. These details might be thought important for evaluation of the testimony.
4. Subsection (b). Repeats no. 1 above. Portuguese version has that Carlos was buried the following day, the Tetum version has that he was buried on 22 September 1999 (which was impossible given the question's statement of when the crime occurred).
5. Subsection (b), last paragraph. Portuguese version asks the examinees, "In accordance with article 39.3 ... prepare a judgment" The Tetum version has, "To keep an eye on article 39.3 ... write a judgment"
6. Subsection (b), last paragraph. Portuguese version asks them to prepare their Judgment, "indicating the articles of the Penal Code, the *Regulations of Criminal Procedure*, and the Code of *Court Costs* on which you base your decision." The Tetum version asks them to write their Judgment, "indicating the Penal Code, *Regulation 2000/30*, and the Code of Costs used as a basis for the decision." UNTAET 2000/30 is the Transitional Rules of Criminal Procedure.

Question 2.

7. Paragraph 1. Portuguese version says that there were "*indications* [indicias]" of an obligation. Tetum version says that there was "*proof* [prova]" of the debt.
8. Paragraph 2. Portuguese version tells the examinees to "[m]ake a decision about this request, indicating *the legal basis*." Tetum version tells the examinees to "[w]rite a decision regarding this request, indicating *the articles and laws* used as the basis for this decision." The phrasing of the Tetum version might indicate that a fuller answer is required than in the Portuguese version. Given that none of the examinees was able to complete the full exam in the time allotted, this could have created a disadvantage. (See point 20 below.)

Question 3.

9. Same as 8 above. Portuguese: "Make a decision about this requirement, indicating the *legal basis*." Tetum: "Write a decision regarding this requirement, indicating the *articles and laws* used as a basis for this decision."

Question 4.

10. The first sentence of both versions begins by stating that “[o]n 20 January 2001, the District Court of Dili condemned Manuel... .” The Portuguese version then has an important phrase which is omitted in the Tetum version: “*a sentence from which there is no further appeal* [sentença transitada em julgado].” There is no translation of these words in the Tetum version.

11. The second sentence of both versions states that when the police took Manuel to prison, he escaped. The Portuguese version then says that “[i]n *April 2004*, The Ministry of Justice received information... .” The Tetum version, however, states: “On *20 April 2001*, the Ministry of Justice” According to the Portuguese version Manuel had escaped and been at large for more than four years. According to the Tetum version only four months had passed. This information could be vital in formulating an answer. Also, the Tetum version gives the precise day (20 April), whereas the Portuguese version does not.

12. Portuguese: “Make a decision about this requirement, indicating the *legal basis*.” Tetum: Write a decision regarding this requirement, indicating the *articles and laws* used as a basis for this decision.”

Question 5.

13. Portuguese version states: “In a trial before a Panel of Judges [Colectivo de Juizes], one of the judges dies during the course of the trial.” Tetum version states: “In a collective trial [julgamentu kolektivo] (*with three judges*) at *halfway* one of the judges dies.”

Question 6.

14. Subquestion (a). Portuguese version asks, “*When* [Quando] will he finish serving his punishment?” Tetum version asks, “*On what date* [Iha sa loron maka] will he finish serving his punishment in *prison*?” The Tetum version might be taken to require a more precise answer than the Portuguese because it asks for a precise date. The word “prison” does not appear in the Portuguese original.

15. Subquestion (b). Portuguese version: “When [Quando].” Tetum version: “On what date [Iha loron sa maka].”

16. Subquestion (c). Portuguese version asks, “What are the conditions” for a judge to grant conditional release? Tetum version asks, “What is needed for a judge ... ?” Portuguese version may be taken to require greater precision. The examiners could not read the less-precise Tetum version of the question.

17. Subquestion (d). Portuguese version asks who will supervise the “execution of the punishment [pena].” Tetum version says “execution of the punishment *in prison* [kastigu prisaun].”

Question 7.

18. This question asks the examinees to make a decision as the Dili District Court should make. In the Portuguese version they must indicate *“the legal basis [fundamentacao legal].”* The Tetum version asks them to indicate *“the articles and laws used as the basis of the decision [hatudu ho artigu no lei].”* The Tetum answer may be read as requiring greater precision (i.e., enumerating all of the specific code sections, regulations, and laws). “Legal basis” may be interpreted more generally. These phrases are not synonymous. (See point 20 below.)

Question 8.

19. Portuguese version states, “During sentencing in a criminal proceeding the judge of the Dili District Court *decided to acquit the accused of a crime* with which he was charged by the *Ministry of Justice.*” The Tetum version states, “In a criminal proceeding a judge in the Dili District Court *passed a sentence saying that the accused did not commit the crime* that the indictment stated he committed.” These phrases are not identical in nuance. “Ministry of Justice” is omitted and not translated in the Tetum version.

20. The Portuguese question asks if the judge made a *“good or bad [bem ou mal]”* decision. Tetum version asks if the decision was *“correct/right or not.”* These two ways of putting it could be interpreted quite differently, especially since many legal scholars believe that a correct decision may nonetheless be a bad one.

NOTE: This question asks that the examinee indicate “the legal basis” of his or her decision. The Portuguese phrase “a base legal” is correctly translated into Tetum as “ho base legal.” In Questions 2, 3, 4, and 7, discussed above, “the legal basis [a base legal]” was translated into Tetum as “articles and laws [ho artigu no lei].” The formulation in Question 7 thus points up that a more accurate translation was readily available. Question 9 also says “legal basis” in both languages. This raises the question of why this correct translation was not employed earlier in the examination.

Question 10.

21. Portuguese version asks what will happen to a probationary judge who *“unjustifiably fails to take up his appointment.”* The Tetum version says that the probationary judge *“does not attend the swearing in and does not provide justification for his absence.”* These are completely different factual formulations of the question.

Question 13.

22. The Portuguese version states, “Indicate *10 articles of the Constitution* that deal with human rights.” The Tetum version is ambiguous and can be translated in two ways: (1) “Indicate what *article 10 of the Constitution* says about human rights,” or (2) “Indicate what 10 articles of the Constitution say about human rights.”

This question was widely regarded in the Serious Crimes community as having caused difficulties on the examination. I asked three Tetum-English translators and two university-educated native Tetum speakers to translate this sentence. Four translated it as version 1 and one translated it as version 2. Further inquiry with specialists indicated that because Tetum

plurals are not always marked (“artigu” could mean “article” or “articles”), and because of the carelessness with which the question was phrased, it is ambiguous and can admit both meanings. Needless to say, this ambiguity could result in an incorrect answer. It could easily have been avoided by saying, “Hatudu artigu sira 10 hosi Konstituisaun ...” or “Hatudu artigu 10 hosi Konstituisaun” Both of these formulations clearly indicate the plural “articles.”

Examination Part 2.

Question 2.

23. End of first paragraph. In the Portuguese version, the dog that causes the injury is said to have been “without a leash or collar.” In the Tetum version, the dog was “without a muzzle and didn’t take a leash.”

24. Fourth paragraph. Portuguese version asks, “*For which damages* will she have the right to be compensated?” The Tetum version asks, “*Does Fernanda have the right* to get compensated for these damages/losses?”

Question 3.

25. Last paragraph. The Portuguese version tells the examinees to make a Judgment [sentenca] about the appeal “*in accordance with the proven facts*, indicating the facts and law” The Tetum version does not translate and omits the vital phrase “*in accordance with the proven facts*,” stating simply: “Write a Judgment regarding this appeal, indicating the facts and law”

Question 4.

26. Subquestion (b). The Portuguese version asks, “What are the *initial* prepayment costs to be paid?” The Tetum version asks, though not in a clear interrogative form, “The prepayment costs to be paid when the lawsuit *was filed at the court*.”

Question 5.

27. The Portuguese version asks, “Can Joaquim’s son continue to exploit the plantation now, *against the wishes of Alexander*?” The Tetum version fails to translate and omits the vital phrase “*against the wishes of Alexander* [contra a vontade do Alexandre].” It merely asks, “Can Joaquim’s son continue to exploit this plantation or not?”

Question 6.

28. The Portuguese version states, “Manuel gave a loan of US\$500 to Lourenco and had a statement as the *only* proof of this debt given by the latter.” The Tetum version states, “To prove this loan Mauel had a statement given to him by Lourenco.” The Tetum version fails to translate the word “only” and therefore fails to mention that this statement was the only proof.

29. The Portuguese version states, “Thinking that Manuel had loaned this amount to his son *ORLANDO*, Nicolau paid him the US\$500 ...” (my capitalization). The Tetum version states, “Nicolau paid US\$500 to Manuel because he thought that Manuel gave the loan of US\$500 to his son *LOURENCO*” (my capitalization). This mistake in the names is vital because it goes to the heart of the question about the mistaken repayment of the loan. In the Tetum version there is no mistaken repayment, because the loan was, in fact, made to Lourenco, so the question makes no sense. Because the examiners could only read the Portuguese version, they would not know why the answers might be mistaken.

Question 7.

30. The Portuguese version states, “But the Court denied his request with the argument that, *according to the law and the Constitution*, Gabriel didn’t have the right” The Tetum version states, “But the Court denied Gabriel’s request with the argument that he didn’t have a right” The Tetum version fails to translate and omits the vital phrase “*according to the law and the Constitution* [Segundo a lei e a Constituicao].”

Question 8.

31. The Portuguese version states, “On January 25, 1995” The Tetum version states, “On January 28”

32. The Portuguese version states that “he would tell the Indonesian intelligence service that she was supporting *FALINTIL*.” The Tetum version states that “he would tell the Indonesian intelligence service that Ida supported *FRETILIN*.” This mistake would naturally change the nature of the threat considerably.

SECTION 3: CONCLUSIONS

The many mistakes and omissions in translation detailed above speak for themselves and require little further detailed comment. The general conclusion to be reached is that there was an extraordinary lack of professionalism demonstrated in the drafting, translation, and general preparation of this examination. This was not an exam for high school students; the fate of the entire judiciary of East Timor hung in the balance. Many of these judges had spent four to five years of their lives serving their country as judges in the District Courts or the Special Panels. Those judges who passed would receive lifetime appointments. Those who failed became probationary trainees, forced to enroll in a two-and-a-half-year training program with no guarantee that they would be appointed at the end. Thus their entire professional careers hung in the balance. It must also be remembered that two of the judges failed by only one point or less. Even a minor mistake or confusion caused by the failings of the examination could have made the difference between passing and failing.

Some mistakes enumerated above can only be attributed to sheer sloppiness and lack of proofreading (for example, *FALINTIL* for *FRETILIN*, or the many mistakes in dates). Some of these small mistakes were vitally important, as in the error where the Portuguese version gave a date of April 2004 for the reappearance of an escapee and the Tetum version gave a date of 20 April 2001. The failure to translate key phrases in the Portuguese version into Tetum also indicates a complete lack of review of the translation and proof-

reading. Some mistakes (e.g., confusion of Lourenco and Orlando in the two versions) rendered the Tetum question either unintelligible or impossible to answer correctly.

Further, the lack of professionalism and basic competence in translating the Portuguese questions into Tetum also calls into question the translation of the judges' answers. Neither the judge/examinees nor the examiners were informed as to who translated the answers. If it was the same person who translated the examination, there is indeed further cause for suspicion and concern. It must be remembered that the individuals who played the key roles in the drafting and grading of the examination were all international judges and employees of the United Nations. The President of the Court of Appeal, international Judge Claudio Ximenes, informed me that he wrote the examination. Since by virtue of this office, and as President of the Superior Council of the Judiciary, he was also responsible for its proper preparation and administration, the ultimate responsibility for this more than unsatisfactory situation is his.

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This Special Report owes much to the fine work that has been done in the form of reports and articles by many Timorese and international organizations and individuals. During numerous visits to Dili, I conducted in-depth interviews with as many participants as I could, meeting with most of them several times. Among those I interviewed I was fortunate to find a number of key individuals who, despite the demands of their jobs, generously allowed me to consult them repeatedly and who steered me towards relevant documents and sources of information. I owe a particular debt of gratitude to them. I have also benefited enormously from the database of the Serious Crimes Unit and the CD/ROMs of the Judgments, interlocutory motions, trial transcripts, and Indictments in the cases before the Special Panels and Court of Appeal that were made available to me by Judge Coordinator Phillip Rapoza and Deputy Prosecutor General for Serious Crimes Carl DeFaria. The Judicial System Monitoring Programme (JSMP) and its director, Tiago Sarmiento, generously provided me with CD/ROMS of all of their reports and other publications on the Serious Crimes process. I am also grateful to Special Representative of the Secretary-General Sukehiro Hasegawa, and to his staff, for their kindness and hospitality and for furnishing me with a number of important documents.

One of my goals in this report is to convey, as much as I am able, the views and experiences of the individuals I interviewed. It is they who know the process most intimately and their perspective, while by no means the whole story, is an essential part of it. In many cases, because of fear of reprisal from the organizations they work for, they are unable to express their views publicly. In such cases, and where they have requested I do so, I have kept their identities confidential. In an organization genuinely devoted to transparency, such fear of retaliation would not be a serious problem, but unfortunately it is very real. It is also for this reason that I do not thank by name some of the individuals who were of great assistance in providing advice, information, and documentation for this report.

I also express my gratitude to the individuals who read parts of my report and offered comments, criticisms, and in some cases additional documentation. This especially includes the Portuguese-Tetum translation expert, who generously assisted in the preparation of the Appendix, and John Rough, who provided key support as well as astute analysis on that part of the report. I thank as well my friends in Indonesia who contributed a valuable perspective on various topics: Asmara Nababan, Aviva Nababan, and Gregory Churchill. I also consulted my colleagues at the International Center for Transitional Justice (ICTJ), Caitlin Reiger and Marieke Wierda. Several other individuals read the entire report and offered extremely detailed criticisms, factual corrections, and suggestions. Mere thanks are not enough, but suffice it to say that I benefited enormously from their expert advice. They include Dr. Sidney Jones, Professor Suzannah Linton, Leigh-Ashley Lipscomb, and Barbara Oliveira.

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Finally, I wish to express my respect and admiration for the many Timorese and international participants in the Serious Crimes process I encountered in Dili who devoted years of their lives to an uphill struggle to achieve accountability for the 1999 violence in East Timor. Their profound personal commitment to an often thankless task was an inspiration to me, and it is to them that this report is dedicated.

David Cohen
Rocky Point, O'ahu
May 2006

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Indifference and Accountability

The United Nations and the Politics of International Justice in East Timor

The goals of this report are fourfold: (1) to provide an overall assessment of the “hybrid” UN-sponsored Serious Crimes process in East Timor; (2) to analyze the performance of the various structural components of that process; (3) to examine the legacy of the Serious Crimes enterprise; and (4) to discuss the lessons to be learned from the five-year experience of the United Nations in seeking justice for the people of East Timor.

The report’s conclusions are based upon a comprehensive and detailed analysis of a number of key areas and a full assessment of the jurisprudence of the trials. It draws heavily upon hundreds of hours of interviews with key participants in every aspect of the Serious Crimes process. The report demonstrates that, on the whole, the process was so deeply flawed from the beginning that, despite the important and successful efforts of key individuals to make structural improvements, egregious problems remained until the very end. These problems are serious enough to at least call into question whether important aspects of the process as a whole met international standards. Further, an analysis of the impact of these problems upon trial and appellate proceedings and Judgments provides substantive grounds for questioning the basic fairness of a significant number of the Serious Crimes trials, the adequacy of the appeals process, and, hence, the legitimacy of some of the ensuing convictions.

One of the questions this report addresses is why this state of affairs was allowed to persist for so long. This is a question that must be answered if the “lessons learned” from East Timor are to be a guide for future tribunals and for the UN in its ongoing role of administering international judicial institutions.

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