
**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.

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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.

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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 irrefutable 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.

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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.

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).

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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.

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 Umberto 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
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the law of the land*

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.