



**JUDICIAL SYSTEM MONITORING PROGRAMME**  
**PROGRAM PEMANTAUAN SISTEM YUDISIAL**

**Digest of the Jurisprudence of the Special  
Panels for Serious Crimes**

**JSMP Report**

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## 1. INTRODUCTION

In 2000 the United Nations Transitional Administration in East Timor (UNTAET) established a system of criminal laws and institutional structures designed to bring to justice those who had been responsible for the commission of serious crimes in East Timor<sup>1</sup> (“the serious crimes process”). The judicial arm of this system is referred as the Special Panels for Serious Crimes (SPSC). This report aims to collate some of the SPSC’s most significant juridical findings and observations.

### 1.1. Background

In 1993 the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>2</sup> and in doing so ushered in a new era in the development of international criminal law and its enforcement. Since then the world has witnessed the creation of the International Criminal Tribunal for Rwanda (ICTR)<sup>3</sup>; the International Criminal Court (ICC)<sup>4</sup>; and a number of internationalised domestic court processes designed for the trial of international crimes in Kosovo, Bosnia, Sierra Leone, Cambodia and East Timor. The latter are often referred to as “hybrid tribunals”.

These institutional developments have been accompanied by a proliferation of domestic legislative activity, the creation of landmark governmental policies, high-level advocacy on the part of civil society groups, and an explosion of jurisprudence and academic writing on the subject. Much of this activity has been directed at the goal of ending impunity for international crimes.

Of the so called “hybrid tribunals” mentioned above, East Timor’s SPSC, was the first to “complete” its work<sup>5</sup> and was responsible for hearing the largest number of cases. Furthermore, the SPSC’s decisions constituted the first application and discussion of the substantive provisions of the ICC’s Rome Statute by an internationalized court. These judgments may be of use either to courts in East Timor, the ICC, or future “hybrid tribunals”, reliance on which is likely to continue pursuant to the ICC’s complementarity mechanism.<sup>6</sup>

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<sup>1</sup> Since independence on 20 May 2002 the country’s official Portuguese name “Timor-Leste”, has more often been used even in English. However since this report deals with a period of time covering the UNTAET administration as well, the name “East Timor” will be used throughout for simplicity and consistency.

<sup>2</sup> UN Security Council Resolution 827 (1993).

<sup>3</sup> UN Security Council Resolution 955 (1994).

<sup>4</sup> Rome Statute for the International Criminal Court 1998, which came into force on 1 July 2002.

<sup>5</sup> Regarding the termination of the SPSC’s mandate, see below at section 1.8.

<sup>6</sup> The ICC’s jurisdiction is complementary to that of national courts in that cases are not admissible before the ICC if a genuine investigation, prosecution or trial has occurred in the relevant domestic judicial system. It has been noted that “[t]he system of internationalized courts could prove very effective also when the ICC is firmly established: indeed, it may ensure a proper functioning of the complementarity mechanism and prevent the Court from being flooded with hundreds of cases because of the inadequacy of national systems due to the collapse of the local judiciary.”: Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, at 456; see also Friman, Hakan, ‘Procedural Law of Internationalized Criminal Courts’, in Romano, Cesare; Nollkaemper, Andre; & Kleffner, Jann (eds.), *Internationalized Criminal Courts*, Oxford, Oxford University Press, 2004, at 358.

## 1.2. Purposes and format of this report

For all of the reasons mentioned above, the work of the SPSC merits serious consideration by policymakers, academics, and judicial actors. Numerous reports have evaluated the extent to which the serious crimes process was effectiveness in fulfilling its objectives.<sup>7</sup> However no report to date has focused in detail on the substance of the SPSC's judicial reasoning. As an organisation initially established for the sole purpose of monitoring the SPSC's trials, JSMP is uniquely placed to fill this gap. This report therefore aims to provide an overview of the SPSC's treatment of the substantive and procedural principles of international law which came before it.

This report does not aim to provide a *critical analysis* of the SPSC's jurisprudence. Rather it presents key sections of the SPSC's jurisprudence in an accessible manner, whilst providing readers with some background to the SPSC and concise explanations of the extracted jurisprudence. The report is therefore a guide to the SPSC's decisions, similar in format to the Human Rights Watch topical digest of ICTR/ICTY cases.<sup>8</sup>

The report seeks to be comprehensive in its coverage of the subject matter of SPSC decisions. However for practical reasons the report does omit some aspects of serious crimes jurisprudence. The most significant such omission relates to the decisions of East Timor's Court of Appeal in serious crimes cases. These decisions have been excluded largely for practical reasons: many of the Court's decisions were never translated into English from Portuguese. Additionally, jurisprudence from serious crimes cases tried since the closure of the Serious Crimes Unit in May 2005 has not been included.

Ultimately it is hoped that this report will:

- contribute to the understanding and development of principles of substantive and procedural international criminal law by identifying the legal issues that the SPSC faced and the manner in which the SPSC dealt with them; and
- raise awareness of some of the broad systemic problems facing hybrid tribunals, with a view to their resolution.

Because this report is intended to merely present in an accessible way the jurisprudence of the Special Panels, rather than to critique them, JSMP has sought to present the Panels' case law with minimal interference. Excerpts are presented just as they appear in the judgments made available to JSMP. Many contain grammatical and typographical errors which are perhaps explicable by the limited resources and time available to the Panels, and the fact that most judges were required to write in a language not their native tongue. Because of the frequency of such errors, JSMP has not included any indicators that such errors are replicated from the original texts (such as the usual "*sic*"). Likewise, all emphases contained in extracted sections of text are as found in the original judgments.

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<sup>7</sup> See for example: See *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violation of Human Rights in Timor-Leste (then East Timor) in 1999*, 26 May 2005, Annex II to UN Doc S/2005/458; Megan Hirst & Howard Varney, *Justice Abandoned: An Assessment of the Serious Crimes Process in East Timor*, International Center for Transitional Justice, Occasional Paper Series, June 2005; *Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor*, November 2004, Open Society Justice Initiative & Coalition for International Justice; David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, East-West Centre Special Report No. 9, June 2006.

<sup>8</sup> Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*, Human Rights Watch, 2004.

Footnotes contained in the excepted sections of judgments have also been retained where relevant and are printed immediately following the relevant portion of text.

Readers wishing to access full copies of SPSC decisions can find most available on the JSMP website: [www.jsmp.minihub.org](http://www.jsmp.minihub.org). Relevant legislation is available through the website of the United Nations Integrated Mission in East Timor: [www.unmit.org](http://www.unmit.org).

### **1.3. Creation of the Special Panels for Serious Crimes**

#### **1.3.1. *The Conflict in East Timor***

Following a coup in Portugal on 25 April 1974, a decolonisation process began in Portuguese Timor which eventually deteriorated into civil war in August 1975 between competing Timorese political parties, although with significant involvement from Indonesian elements. Using the civil war, and the apparent victory of the Fretilin Party as an excuse, Indonesian troops began infiltrating East Timor in late 1975. This process culminated in an open Indonesian invasion into East Timor on 7 December 1975.

The Indonesian invasion was the beginning of an almost 24-year occupation marked by extensive military brutality against a lightly armed resistance movement and the Timorese civilian population. Throughout the 1990s, increasing international pressure resulted from ever greater worldwide exposure of these brutalities. After the downfall of the Soeharto regime in Indonesia in 1998, the new Indonesian President, BJ Habibie, announced in January 1999 that the people of East Timor would be able to decide on their future status: to choose by way of a “Popular Consultation” between “special autonomy” within Indonesia or full independence for East Timor.

Subsequently, in May 1999, a series of agreements were concluded between the United Nations, Indonesia and Portugal. Pursuant to these “May 5 Agreements”, the Indonesian government agreed, amongst other things, to implement a fair and transparent ballot and to maintain public order and security before and during the consultation.

It soon became apparent that Indonesia would not fulfil its promise to guarantee security during the ballot period. In the lead up to the population consultation militia violence in East Timor intensified. The consultation eventually occurred on 30 August 1999, with its result announced on 5 September 1999: 78.5% of voters rejected the autonomy option and chose independence. Following the announcement of this result, militia violence escalated dramatically. The violence did not end until after the arrival of the Intervention Force for East Timor (INTERFET) troops on 20 September 1999, as authorized by the United National Security Council.<sup>9</sup>

After its arrival INTERFET began the task of restoring order and detaining militia members suspected of committing crimes.

#### **1.3.2. *Establishment of the Special Panels for Serious Crimes***

Following the end of the conflict in East Timor two UN-appointed bodies of experts were charged with investigating the crimes committed prior to, during, and immediately after the “Popular Consultation”. These were the International Commission of Inquiry on East Timor

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<sup>9</sup> UN Security Council Resolution 1264 (1999).

(ICI)<sup>10</sup> and a group of three Special Rapporteurs<sup>11</sup>. These groups visited the region in 1999 and 2000 respectively.

On the basis of their investigations, both groups recommended that an international tribunal along the lines of the ICTY or ICTR be created.<sup>12</sup> It was clear, however, that the creation of a single international *ad hoc* tribunal would never be politically acceptable to the Indonesian military and political establishments. Perhaps for this reason, the recommendations of the ICI and the Special Rapporteurs on this issue were never implemented. Instead, it was accepted that some suspects would be tried by the Indonesian courts while a parallel process was established by UNTAET in East Timor.

The Indonesian government tried some high-level suspects by way of an *ad hoc* national tribunal sitting in Jakarta.<sup>13</sup> However these trials only dealt with 18 suspects and in any event have been almost universally condemned as a sham.<sup>14</sup>

As concerns trials within East Timor, UNTAET, chose to adopt the Dili District Court (DDC) as the forum for this process. For this purpose “special panels” were created within the Dili District Court.

#### **1.4. Nature and structure of the serious crimes process**

As explained above, the SPSC has been described, together with the Special Court for Sierra Leone and processes established in Kosovo, Bosnia and Cambodia, as an example of a “hybrid tribunal”. There is no precise definition of what constitutes a “hybrid” tribunal, but “hybridity” has been explained as existing when “both the institutional apparatus and the applicable law [used in a judicial process] consist of a blend of the international and the domestic”.<sup>15</sup> Alternatively, the concept of a “hybrid tribunal” could be explained as “a system that shares judicial accountability jointly between the state in which it functions and the United Nations”.<sup>16</sup>

The serious crimes process in East Timor falls within this concept because although staffed with international judges, lawyers and investigators, the process occurred within the domestic judicial system of East Timor.

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<sup>10</sup> *Report of the International Commission of Inquiry on East Timor to the Secretary General*, UN Doc.A/54/726, S/2000/59(2000)

<sup>11</sup> The Special Rapporteur of the Commission on Extrajudicial, Summary and Arbitrary Executions; Special Rapporteur of the Commission on the Question of Torture; and Special Rapporteur of the Commission on Violence Against Women, its Causes and Consequences. *Situation of Human Rights in East Timor*, UN Doc. A/54/660.

<sup>12</sup> *Report of the International Commission of Inquiry on East Timor to the Secretary General*, UN Doc.A/54/726, S/2000/59(2000), para. 153; *Situation of Human Rights in East Timor*, UN Doc. A/54/660, para. 74.6.

<sup>13</sup> The Ad Hoc Human Rights Court was created pursuant to Law No. 26/2000 as a tribunal of specialized jurisdiction within the existing legal system.

<sup>14</sup> See especially David Cohen, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court In Jakarta*, International Centre for Transitional Justice, Occasional Papers Series, August 2003, New York; and the joint JSMP and Amnesty International report, *Timor Leste: The Way Forward*, April 2004.

<sup>15</sup> Laura Dickinson, “The Promise of Hybrid Courts”, 97 *American Journal of International Law* 295, at 295.

<sup>16</sup> Suzanne Katzenstein, “Hybrid Tribunals: Searching for Justice in East Timor”, 16 *Harvard Human Rights Journal* 245 at 245.

The institutional apparatus of the serious crimes process comprised three basic components:

1. The judicial arm was constituted by the Special Panels themselves. These were panels of judges within the DDC, with their own registry. The SPSC was housed in the Court of Appeal building, separate from the DDC proper. Each panel was composed of two international judges and one Timorese judge. The international judges were UN staff members, but carried out their judicial functions as judges of the DDC. Appeals from SPSC decisions were to the Court of Appeal, also a domestic Timorese judicial institution, though when hearing appeals from the SPSC it sat in a panel composed of one Timorese and two international (UN employed) judges.
2. The prosecutorial arm was constituted by the Serious Crimes Unit (SCU). It was created within East Timor's Office of the Prosecutor-General<sup>17</sup> but funded and staffed by the UN. At its peak in 2002, the SCU consisted of 106 staff members, comprising 31 international staff members, 16 UN volunteers, 20 UN Police, 29 national staff members, and ten national trainees.<sup>18</sup> The SCU was under the institutional authority of the Prosecutor-General of East Timor. Its head, the Deputy Prosecutor-General for Serious Crimes was immediately responsible to the Prosecutor-General. Nevertheless, in practice the SCU retained operational independence from the Prosecutor-General.<sup>19</sup> All five persons who served as Deputy Prosecutors-General for Serious Crimes during the SCU's period of operation were international staff appointed by the UN. These Deputy Prosecutors-General were responsible for the development of prosecutorial strategy and the co-ordination of prosecutions on the basis of SCU investigations, and managed to carry out these functions largely independently of external control.
3. The defense arm was constituted by the Defense Lawyers' Unit (DLU). The DLU was responsible for coordination and conduct of the defense for suspects indicted by the SCU. The DLU was not established by UNTAET regulation but operated as an independent and self-contained entity staffed by UN employees.<sup>20</sup>

## 1.5. Jurisdiction of the SPSC

The jurisdiction of the SPSC is set out in UNTAET Regulations 2000/11<sup>21</sup> and 2000/15.

According to sections 10.1 and 10.2 of UNTAET Regulation 2000/11,<sup>22</sup> the DDC has exclusive jurisdiction with respect to the following serious criminal offenses:

- (a) genocide;
- (b) war crimes;
- (c) crimes against humanity;
- (d) murder, if committed between 1 January 1999 and 25 October 1999;
- (e) sexual offenses, if committed between 1 January 1999 and 25 October 1999; and

<sup>17</sup> UNTAET Regulation 2000/16.

<sup>18</sup> Carl de Faria, "ET's Quest for Justice: The Serious Crimes File", paper presented at the UNMISSET International Symposium on UN Peacekeeping Operations in Post-conflict Timor-Leste: Accomplishments and Lessons Learned (2005) 1, at 1.

<sup>19</sup> Suzannah Linton, "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor" (2001) 25 *Melbourne University Law Review* 122, at 147.

<sup>20</sup> During the early trials of the SPSC, the DLU was yet to be formed and defendants were represented by East Timorese lawyers.

<sup>21</sup> This Regulation was subsequently amended by UNTAET Regulations 2000/14, 2001/18 and 2001/25.

<sup>22</sup> Following amendments pursuant to UNTEAT Regulation 2001/25, these provisions became sections 9.1 and 9.2.



(f) torture, if committed between 1 January 1999 and 25 October 1999. UNTAET Regulation 2000/15 established panels within the DDC with exclusive jurisdiction to hear cases involving those crimes.

UNTAET Regulation granted the SPSC “universal” jurisdiction with respect to genocide, war crimes, crimes against humanity and torture.<sup>23</sup> This means that the SPSC have jurisdiction over such crimes regardless of where in the world such a crime was committed, or of the nationality of the perpetrator and victim.<sup>24</sup>

Article 15.5 of the UNTAET Regulation 2000/11 provided that where an appeal occurred in a serious crimes case, a panel of East Timorese and international judges from within the Court of Appeal should be appointed to hear the appeal. Such panels in the Court of Appeal were created by UNTAET Regulation 2000/15.<sup>25</sup>

## **1.6. The law applied by the Special Panels**

### ***1.6.1. The applicable law in East Timor***

During UNTAET's operation, the applicable law in East Timor was specified by UNTAET Regulation 1999/1. It stated that the applicable law in East Timor was UNTAET Regulations, and any Indonesian legislation<sup>26</sup> not in conflict with UNTAET legislation, Security Council Resolution 1272, or internationally recognized human rights standards.<sup>27</sup>

Since East Timor's independence on 20 May 2002 the hierarchy of applicable laws is established by a combination of UNTAET Regulation 1999/1, section 1 of Democratic Republic of East Timor (RDTL) Law 2/2002 and section 165 of East Timor's Constitution. The applicable law is as follows:

- International law (including customary international law as well as treaties that have been ratified and published on the official gazette) is part of the domestic law of East Timor, and any laws that are inconsistent with ratified and published international treaties are invalid.<sup>28</sup>
- RDTL laws are binding when they are consistent with the constitution and the provisions of treaties which have been ratified and published.<sup>29</sup>
- UNTAET Regulations continue to apply except where inconsistent with Constitution or subsequent valid RDTL legislation.<sup>30</sup>
- Indonesian laws will continue to apply if they are not inconsistent with RDTL laws or UNTAET Regulations, and to the extent that they are consistent with accepted international human rights norms.<sup>31</sup>

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<sup>23</sup> Section 2.1 UNTAET Regulation 2000/15.

<sup>24</sup> Section 2.2 UNTAET Regulation 2000/15.

<sup>25</sup> Section 1.2 UNTAET Regulation 2000/15.

<sup>26</sup> The legislation refers to the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor. This was ultimately held to mean that the applicable law was Indonesian in effect prior to 25 October 1999..

<sup>27</sup> Section 3.1 UNTAET Regulation 1999/1. Note that section 3.2 of UNTAET Regulation 1999/1 also specifically invalidated certain named laws of Indonesia on the basis of their inconsistency with human rights standards.

<sup>28</sup> Section 9 RDTL Constitution.

<sup>29</sup> Sections 2.3 and 9.3 RDTL Constitution.

<sup>30</sup> Section 165 RDTL Constitution and section 1 RDTL Law 2002/2.

### **1.6.2. The law required to be applied by the Special Panels**

As the arm of the DDC (a domestic court of East Timor), the SPSC was subject to this hierarchy of laws in exercising its jurisdiction. More specifically, UNTAET Regulation 2000/15 stated that in exercising their jurisdiction, the SPSC must apply the law of East Timor (as set out above), and additionally any applicable treaties or principles of international law (including principles of humanitarian law).<sup>32</sup>

The law applied by, and required to be interpreted by, the SPSC included a complex combination of Indonesian law, UNTEAT Regulations, international law, and later potentially also RDTL laws.

### **1.6.3. Some specific laws of particular relevance to the Special Panels**

Much of the SPSC's jurisprudence concerns the interpretation of a small number of key legal instrument. These most significant of these are:

- UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences;
- the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Acara Pidana* or "KUHP"); and
- UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure.

UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET Regulation 2000/11 on the Organization of the Courts in East Timor, and UNTAET Regulation 2000/16 on the Organization of the Public Prosecution Service in East Timor are also relevant but not discussed in detail here.

#### UNTAET Regulation 2000/15

UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences sets out the SPSC's composition<sup>33</sup> and jurisdiction<sup>34</sup> as well as prescribing the applicable legal regime.<sup>35</sup> Additionally, it provides a substantial amount of the applicable substantive law, including definitions of the crimes within the jurisdiction of the SPSC, principles of responsibility and grounds for exculpation.

Detailed definitions of genocide, crimes against humanity, war crimes and torture are provided under the Regulation.<sup>36</sup> The definitions provided of genocide, crimes against humanity and war crimes are based on (though they are not identical to) the definitions of those crimes under the Rome Statute of the ICC.<sup>37</sup> The definition of torture is based on that

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<sup>31</sup> Section 3 UNTAET Regulation 1999/1, section 165 RDTL Constitution and section 1 RDTL Law 2002/2

<sup>32</sup> Section 3 UNTAET Regulation 2000/15.

<sup>33</sup> Sections 22 and 23 UNTAET Regulation 2000/15.

<sup>34</sup> Sections 1 and 2 UNTAET Regulation 2000/15.

<sup>35</sup> Section 3 UNTAET Regulation 2000/15.

<sup>36</sup> Sections 4 to 7 UNTAET Regulation 2000/15.

<sup>37</sup> Articles 6 to 8 Rome Statute of the International Criminal Court. One difference between the definitions contained in UNTAET Regulation 2000/15 and the Rome Statute is that the former's definition of a crime against humanity does not include the specific definition of "attack directed against any civilian population" that is given in article 7(2)(a) of the Rome Statute and which imports additional substantive requirements into the chapeau elements of that crime.

contained in the United Nations Convention Against Torture,<sup>38</sup> although it is broader than the latter in that it is not restricted to acts inflicted by or with involvement of a public official or other person acting in official capacity. The Regulation also refers to the definitions of the other crimes within the jurisdictions of the SPSC: namely murder and sexual offenses. With respect to these the Regulation states that the applicable Penal Code in East Timor shall apply.<sup>39</sup> The applicable Penal Code has at all times been the Indonesian Penal Code.<sup>40</sup>

Finally, the Regulation also enunciates the relevant general principles of international criminal law dealing with criminal responsibility and defences. These include, *inter alia*, the rules relating to the forms of participation in crimes which attract liability,<sup>41</sup> the circumstances which do and do not exclude responsibility,<sup>42</sup> the rules for ascertaining the *mens rea* requirements of a crime,<sup>43</sup> and other general principles of criminal law such as *ne bis in idem*,<sup>44</sup> *nullum crimen sine lege* and *nulla poena sine lege*.<sup>45</sup>

#### The Indonesian Penal Code

As explained above, Indonesian law has continued to apply in East Timor to the extent that it has not been replaced with inconsistent subsequent legislation. The Indonesian Penal Code is particularly significant in that it contains the relevant definitions of some of the crimes within the jurisdiction of the SPSC: murder and sexual offenses.<sup>46</sup> Additionally, it was held in some cases that the SPSC was capable of convicting defendants on other crimes under the Indonesian Penal Code where the conduct in question was found not to amount to a more serious crime falling within the usual jurisdiction of the SPSC.<sup>47</sup>

It is perhaps not surprising that a number of difficult questions arose in the use of Indonesian Penal Code provisions by the SPSC, given that the legal system within which these provisions were intended to operate is so different from that created by UNTAET. These issues will be discussed in the sections of this report concerning murder, rape, and sentencing.

#### UNTAET Regulation 2000/30

UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure provided the criminal procedural law under which Timorese courts, including the SPSC, operated.<sup>48</sup>

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<sup>38</sup> Article 1.1 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>39</sup> Sections 8 and 9 UNTAET Regulation 2000/15.

<sup>40</sup> Although JSMP notes that to the extent that the SPSC continue to function presently and into the future, the definition of these crimes may change with the introduction of a new RDTL Penal Code.

<sup>41</sup> Section 14 UNTAET Regulation 2000/15 and in respect of command responsibility section 16 UNTAET Regulation 2000/15.

<sup>42</sup> Grounds for excluding criminal responsibility are set out in section 19. Mistake of fact and law and superior orders are dealt with in sections 20 and 21 respectively.

<sup>43</sup> Section 18 UNTAET Regulation 2000/15.

<sup>44</sup> Section 11 UNTAET Regulation 2000/15. Also referred to as the prohibition on double jeopardy, this rule prevents multiple trials of a single person in respect of particular conduct. This section in UNTAET Regulation 2000/15 was later replaced by section 4 of UNTAET Regulation 2000/30.

<sup>45</sup> Sections 12 and 13 UNTAET Regulation 2000/15. These refer respectively to the rules that there shall be no criminal responsibility and no punishment for conduct without pre-existing legal provision to that effect.

<sup>46</sup> Sections 8 and 9 UNTAET Regulation 2000/15.

<sup>47</sup> See JSMP Justice Update, "Recent Decisions from the Special Panels For Serious Crimes" (Issue 11/2005).

<sup>48</sup> UNTAET Regulation 2000/30 was amended by UNTAET Regulation 2000/25. It has more recently been replaced by RDTL Decree Law 13/2005 Approving the Criminal Procedure Code.

The Regulation contained 12 parts, the principal of which address: general provisions (primarily fair trial and due process rights) (Part I), criminal jurisdiction (Part II), investigations (Part III), arrest and detention (Part IV), indictment (Part V), public trial (Part VI), appeals (Part VII), and execution of orders and decisions (Part VIII). Regulation 2000/30 is “a hybrid UNTAET document drawing mainly from the continental [European] law tradition, with influence from common-law jurisdictions, as well as some of the provisions for the international tribunals and the ICC”.<sup>49</sup> This reflects the mixture of backgrounds of those responsible for its drafting.

The fusion of civil law and common law approaches found in Regulation 2000/30 is not a problem *per se*. After all, it is widely acknowledged that the procedural law of international criminal trials in general derives from both civil and common law systems.<sup>50</sup> Nevertheless, the difference in emphasis of each system influencing the procedural regime clearly has implications for the nature of trials conducted by the SPSC. The critical issue is ‘whether the unique hybrid approach of the international criminal trial is successful in both ensuring a fair trial and in establishing the truth.’<sup>51</sup> This must be borne in mind when assessing and analysing the SPSC jurisprudence contained in this report.

The Transitional Rules of Criminal Procedure (TRCP) contain a number of noteworthy provisions. These include among others, the following:

- Section 34 provides for the relevant rules of evidence. According to section 34.1, “[t]he Court may admit and consider any evidence that it deems is relevant and has probative value with regard to issues in dispute.”<sup>52</sup> This reflects the flexible, discretionary approach to evidence that characterises civil law proceedings as well as, increasingly, international criminal proceedings.
- More specifically, section 34.3 addresses the role of victim testimony in cases of sexual assault. It abolishes any requirement for the corroboration of a victim’s testimony. In

<sup>49</sup> Suzannah Linton, “Cambodia, East Timor and Sierra Leone: Experiments in International Justice” (2001) 12 *Criminal Law Forum* 185, at 211. In response to the proliferation of differing hybrid procedural regimes in East Timor, Kosovo, Cambodia, and Sierra Leone, it has been suggested that the UN develop a ‘start-up kit’ of standardized criminal procedures in situations containing a legal vacuum (as existed in East Timor when INTERFET arrived, for example): Friman & Hakan, “Procedural Law of Internationalized Criminal Courts”, in Romano, Cesare; Nollkaemper, Andre; & Kleffner, Jann (eds), *Internationalized Criminal Courts*, Oxford, Oxford University Press, 2004, at 356–8.

<sup>50</sup> According to Cassese, the common law adversarial system initially prevailed, but there has been an increased recognition of the need to expedite proceedings and a greater emphasis on “truth-seeking”. Accordingly, the basic adversarial structure has evolved, with the Statutes and jurisprudence of the ICTs and with the drafting of the ICC Statute, to a point at which it is now significantly influenced by elements of the civil law inquisitorial system: Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, at 384–7.

<sup>51</sup> May & Wierda at 327. Furthermore, it has been suggested that “it may even be the hybrid nature of the tribunal that encourages a trial heavily biased toward ‘securing convictions’”: Christensen, “Getting to Peace by reconciling notions of justice: the importance of considering discrepancies between civil and common legal systems in the formation of the International Criminal Court”, *UCLA Journal J. Int’l L. & Foreign Aff.* (2002) 6:391, at 404.

<sup>52</sup> Though note that this is subject to section 34.2 which provides that:

“The Court may exclude any evidence if its probative value is substantially outweighed by its prejudicial effect, or is unnecessarily cumulative with other evidence. No evidence shall be admitted if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings, including without limitation evidence obtained through torture, coercion or threats to moral or physical integrity.”

other words, the testimony of a victim can of itself support a conviction.<sup>53</sup> The same provision also restricts the extent to which consent may be raised as a defence in rape cases.<sup>54</sup> These provisions almost exactly mirror the equivalent provisions set forth in the Rules of Procedure and Evidence (RPE) established by the ICTY and ICTR.<sup>55</sup>

- Finally, section 29A sets out the procedure for admission of guilty pleas. It replicates, almost identically, the equivalent provision in the Rome Statute of the ICC.<sup>56</sup> The acceptance of guilty pleas is conditional on satisfaction of all of the conditions prescribed in section 29A. The correct application of these criteria by the SPSC was of critical importance given the high number of guilty pleas submitted by the defendants who came before it.

## **1.7. Strengths and Weaknesses of the serious crimes process**

As explained above, the aim of this report is to summarise the jurisprudence of the SPSC, thereby providing a guide to the substantive content the SPSC's numerous interlocutory and final decisions. An exhaustive analysis of the SPSC's success in fulfilling its mandate is therefore beyond the scope of the report and in any event has already been provided by numerous other commentators.<sup>57</sup> Nevertheless, a brief outline of some of the SPSC's strengths and weaknesses is provided here by way of background.

### **1.7.1. Strengths of the serious crimes process**

- The SCU was able to issue indictments in respect of 572 of the approximately 1400 murders committed in 1999.<sup>58</sup> Additionally, although many investigations never led to indictments, they ensured nonetheless that important evidence that might otherwise have been lost or destroyed was collected, analysed, and stored away. Furthermore, in the case of the many indictees who have to date evaded trial, the case files that formed the basis of their indictments are ready for use in future prosecutions. Provided that these case files are kept secure and protected, it remains possible that untried indictees will be brought to justice.<sup>59</sup>

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<sup>53</sup> The ICTR and ICTY have similarly overturned the maxim unus testis, nemo testis (one witness is no witness) in order to allow victims of sexual assault to testify without corroboration: Prosecutor v. Tadic (Case No. IT-94-1, T.Ch. II), (14 Nov. 1995) at [535]–[537], confirmed by Prosecutor v. Jean-Paul Akayesu (Case No.: ICTR-96-4-T) 132–136.

<sup>54</sup> Section 34.3(b) and (c).

<sup>55</sup> Rule 96 ICTY Rules of Procedure and Evidence and rule 96 ICTR Rules of Procedure and Evidence.

<sup>56</sup> Article 65 Rome Statute of the ICC.

<sup>57</sup> See for example *Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor*, Coalition for International Justice – Open Society Justice Initiative Joint Report, 24 November 2004; Megan Hirst & Howard Varney, *Justice Abandoned: An Assessment of the Serious Crimes Process in East Timor*, International Centre for Transitional Justice, Occasional Papers Series, June 2005, New York; and David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, East-West Centre Special Report No. 9, June 2006.

<sup>58</sup> Carl de Faria, “ET’s Quest for Justice: The Serious Crimes File”, paper presented at the UNMISET International Symposium on UN Peacekeeping Operations in Post-conflict Timor-Leste: Accomplishments and Lessons Learned (2005) 1, at 5.

<sup>59</sup> JSMP notes that during unrest in mid-2006 some evidence and files were removed from the Office of the General-Prosecutor, including it has been alleged, some relating to serious crimes cases. However JSMP is unaware of the extent of the theft or destruction of these materials.

- In all, 97 suspects were eventually brought to trial, 94 of whom were convicted. The SPSC was therefore able to operate and to exercise its mandate at least in part. Trials also contributed to the historical record by facilitating open-court eyewitness testimony to and the collection of other evidence of atrocities committed in 1999.
- One of the stated functions of hybrid criminal tribunals is to develop an effective judicial system and to encourage respect for the rule of law in post-conflict societies.<sup>60</sup> Additionally, it has been said that '[i]n a sense, the hybrid courts themselves create a network of international and domestic legal professionals, providing a setting in which they can interact, share experiences, and discuss the relevant norms, both in and out of the courtroom.'<sup>61</sup> In practice, the ability of the serious crimes process to achieve the goals has fallen short of expectations in East Timor. Nevertheless, it is clear that the SPSC and its attendant institutions have helped to spearhead the development of the local judicial system by providing an example – albeit a less than ideal one – of the role of a court. This is particularly significant in the context of a country previously subjected to an almost totally politicised judicial system. A strong argument can also be made that the SPSC has raised awareness in East Timor, and particularly within the local legal community, of the existence and significance of binding international legal standards.

### **1.7.2. Weaknesses of the serious crimes process**

- A large proportion of the many crimes within the SCU's mandate have not been investigated adequately or at all, in large part due to time and resource constraints which in turn limited indictment policy.<sup>62</sup> Although jurisdiction extended to all crimes committed since the Indonesian invasion and occupation in 1975, the SCU confined investigations and consequent indictments to 1999.<sup>63</sup> Furthermore, a large number of the crimes committed in 1999 have not been investigated. As a result only a very small proportion of the total number of crimes have been investigated and indicted, and in several districts (for example Covalima, Manufahi and Ermera) crimes have barely been investigated at all.
- Of those crimes that have been investigated and indicted, the vast majority of the primary perpetrators remain beyond jurisdiction of the Timorese courts and are therefore yet to face justice. This is arguably the single greatest failing of the SPSC. It can be attributed in large part to Indonesia's refusal to cooperate in the process by extraditing suspects. This was despite Indonesia's signing on 6 April 2000 of a Memorandum of Understanding with UNTAET which required Indonesia to grant 'the widest possible measure of mutual assistance in investigations or court proceedings', including the "transfer [of] all persons whom the competent authorities of the requesting Party are prosecuting for a criminal offence.'<sup>64</sup> (However JSMP notes that Indonesia was to some extent encouraged in its refusal to cooperate by a lack of political will on the part of the UN, and later the Government of East Timor, to push for international measures to

<sup>60</sup> Laura Dickinson, "The Promise of Hybrid Courts", 97 *American Journal of International Law* 295, at 306–7.

<sup>61</sup> Laura Dickinson, "The Promise of Hybrid Courts", at 307.

<sup>62</sup> Megan Hirst & Howard Varney, *Justice Abandoned: An Assessment of the Serious Crimes Process in East Timor*, International Centre for Transitional Justice, Occasional Papers Series, June 2005, New York, at 17.

<sup>63</sup> *ibid*, at 18.

<sup>64</sup> Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor regarding cooperation in Legal, Judicial and Human Rights related matters, 6 April 2000.

address this problem.<sup>65</sup>) Indonesia's failure to assist the SCU in its investigations had significant implications for the quality and number of indictments that the SCU was able to issue. As a result, the SPSC was able to convict only low-level Timorese offenders, and was never able to try the senior military officers alleged to bear command responsibility. At the closure of the SCU in May 2005, 339 of the 440 persons indicted by the SCU remained beyond Timorese jurisdiction.<sup>66</sup>

- One of the most significant concerns arising from the serious crimes process was the paucity of legal services provided to defendants. Initially UNTAET made no provision for defence counsel and as a result suspects had to rely for representation on a very small pool of NGO-funded international lawyers, assisted by an equally small pool of inexperienced Timorese lawyers. As the International Centre for Transitional Justice explained, 'the quality of the defence that these lawyers were able to supply is reflected in the complete absence of defence witnesses in the first 14 trials that took place before the special panels.' Defence services improved following the creation of the DLU and the attendant increase in available defence counsel. However it was widely felt that many DLU lawyers were insufficiently experienced particularly given the complexity and gravity of the cases coming before the SPSC.
- One of the stated aims of the serious crimes process was to contribute to the development of local judicial and legal capacity. In this regard the process fell short of expectations. The SCU embarked on a training program for Timorese prosecutors in 2002. However, although this was a positive step, it provided only brief training to only a small number of persons and did not include vital in-court advocacy experience.<sup>67</sup> There were also a number of Timorese judges who participated in the SPSC and gained valuable experience through their court work as well as the receipt of mentoring from international judges. However this program was largely unstructured and the judges appear to have received very little formal training. The most significant failure in the area of capacity building was, unsurprisingly, in relation to defence lawyers. Overall it is clear that while some small steps were taken to develop local capacity, none were sustained or comprehensive. This is particularly evident given that since the completion of the serious crimes process all local court actors (other than those working in the court of appeal) have been required to undergo a new training program before being permitted to undertake work on a probationary basis.<sup>68</sup>

It must be stressed that the principal cause of its failures was the inadequacy of funding.<sup>69</sup>

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<sup>65</sup> See *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violation of Human Rights in Timor-Leste (then East Timor) in 1999*, 26 May 2005, Annex II to UN Doc S/2005/458, paras 69–76.

<sup>66</sup> See JSMP Justice Update, "The Special Panels for Serious Crimes Hear Their Final Case" (Issue 12/2005).

<sup>67</sup> Megan Hirst & Howard Varney, *Justice Abandoned: An Assessment of the Serious Crimes Process in East Timor*, International Centre for Transitional Justice, Occasional Papers Series, June 2005, New York, at 24.

<sup>68</sup> See RDTL Decree Law 15/2004 on Recruitment and Training for the Professionals of the Judiciary and for the Office of the Public Defender.

<sup>69</sup> For example, for 2001 the budget was \$6,300,000 whereas the ICT's the annual budget is approximately \$100 million and the SCSL's \$20 million: David Cohen, 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?', *Asia Pacific Issues*, No. 61, East-West Center, August 2002, 1, at 5; see also *Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor*, Coalition for International Justice – Open Society Justice Initiative Joint Report, 24 November 2004. According to the Commission of Experts, this had a significant impact on prosecutorial strategy: see *Report to the Secretary-General of the*

## 1.8. Serious crimes prosecutions after May 2005

In May 2005 with the end of UNMISET (United Nations Mission in Support of East Timor), the Serious Crimes Unit was closed. This effectively resulted in the active prosecution of serious crimes in Timor.

However the legislative framework for the Special Panels regime largely remains in place. Neither *UNTAET Regulation 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, nor the transitional provisions in the Timorese Constitution requiring the ongoing prosecution of serious crimes, has been repealed. (The most significant legislative change in this area since May 2005 has been the replacement of the Transitional Rules of Criminal Procedure with a new Criminal Procedure Code for East Timor,<sup>70</sup> as well as the creation of a –still yet to be passed – new Criminal Code.)

Since a small number of accused persons indicted by the Serious Crimes Unit before May 2005 have been apprehended and tried. Such trials have been heard before “Special Panels” of the Dili District Court constituted, as before, by two international judges and one Timorese judge. However, to JSMP’s knowledge no new indictments charging serious crimes committed before 25 October 1999 are being prepared.

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*Commission of Experts to Review the Prosecution of Serious Violation of Human Rights in Timor-Leste (then East Timor) in 1999*, 26 May 2005, Annex II to UN Doc S/2005/458, paras 60–63.

<sup>70</sup> Decree Law 13/2005.



## 2. JURISDICTION

### 2.1. Generally

(i) *Applicable law*

UNTAET Regulation 2000/15, s 2:

2.1 With regard to the serious criminal offences listed under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.

2.2 For the purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether:

(a) the serious criminal offence at issue was committed within the territory of East Timor;

(b) the serious criminal offence was committed by an East Timorese citizen; or

(c) the victim of the serious criminal offence was an East Timorese citizen.

2.3 With regard to the serious criminal offences listed under Section 10.1(d) to (e) of UNTAET Regulation No. 2000/11 as specified in Sections 8 to 9 of the present regulation, the panels established within the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.

2.4 The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET Regulation.

2.5 In accordance with Section 7.3 of UNTAET Regulation No. 2000/11, the panels established by the present regulation shall have jurisdiction (*ratione loci*) throughout the entire territory of East Timor.

### 2.2. Territorial jurisdiction

***The SPSC does not have jurisdiction to hear charges of murder and rape that are not charged as crimes against humanity if they were committed outside East Timor***

*Anastacio Martins and Domingos Goncalves*, 11/2001, Judgment, 13 November 2003, at p16:

...the crime is a simple murder (according to Section 8 of UNTAET Reg. 2000/15 and Section 338 of the IPC), which could fall within the jurisdiction of the Special Panels (if the murder is committed between 1/1/99 and 25/10/99) only if the crime were committed in the territory of East Timor. In fact, pursuant to Section 2 of UNTAET Regulation 2000/15 the universal jurisdiction of the Special Panel (i.e., jurisdiction irrespective of territorial location of the crime of citizenship of victim or author) doesn't extend to murder and to sexual offences, being limited to the crimes of genocide, war crimes, crimes against humanity and torture.

Since the crime was committed in Atambua, West Timor, the Special Panels have no territorial jurisdiction and hereby decline their jurisdiction on the case of murder.

See also *Leonardus Kasa*, 11/2000, Judgment, 9 May 2001, at pp6-7.

## 2.3. Subject matter jurisdiction

### ***SPSC has jurisdiction over attempted crimes***

*Mateus Tilman*, 8/2000, Judgment, 24 August 2001, at [60],[62]:

The Defense submitted also that the Special Panel does not have jurisdiction to deal with the attempted murder...

...

Concerning the charge of attempted murder, the law does not provide particular jurisdiction for attempted crimes different to the jurisdiction for the same completed crimes. Whether attempted or completed, it is still a crime of the same nature. Article 53 IPC only says that the maximum of the basic punishment imposed on the crime in case of attempt shall be mitigated by one third, and that the additional punishments for attempts are the same as for the completed crimes. Therefore, the Special Panel shall exercise jurisdiction to the crime of murder, whether attempted or completed, insofar as the crime was committed in the period between 1 January 1999 and 25 October 1999.

### ***Motive is irrelevant to question of whether a crime is a “serious crime”***

*Carlos Soares Carmona*, 3/2000, Judgment, 25 April 2001, at p2:

...The defence submitted... that it was inappropriate for the Special Panel to hear this case, as the Defendant murdered the victim without any political motive (could not therefore be classified as a Serious Crime), then requested for the Special Panel to decide that it did not have jurisdiction and to hand over this case to the Panel for Ordinary Crimes. The Special Panel, “considering that, pursuant UNTAET Regulations nn. 2000/11, sect.10 and 2000/16, sect. 1.2 the Special Panel for Serious Crimes of Dili District Court has exclusive jurisdiction to deal with the following serious criminal offences committed in the period between 1.01.99 and 35.10.99: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as described in the sections 4-9 of UNTAET Regulations n.2000/15” rejected the motion.

## 2.4. Time limitations on the operation of the Special Panels’ jurisdiction

### *(i) Applicable law*

*Constitution*, s 163.1

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

### *(ii) Treatment by SPSC*

*Francisco Pereira*, 34/2003, Judgment, 27 April 2005, at p9:

Accepting the will of the Constitutional Assembly, expressed in unequivocal terms, the Court feels itself bound, despite literal uncertainties, to read the provisions within Section 163.1 as permitting the Special Panel to have jurisdiction over all investigated cases until the eventual replacement of the Panel within the context of the new judicial structure.

See also Separate Opinion of Judge Phillip Rapoza.

### **3. PROCEDURE**

#### **3.1. Generally**

##### ***Rules of procedure must be followed consistently and applied to all defendants***

*Wiranto et al*, 5/2003, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, 18 February 2004, at pp14-15:

The rule of law lies at the heart of organized society and supplies the foundation for social peace, public order and justice for all. The cornerstone of that foundation is the principle that all persons are equal before the law and that the rules that govern us are the same for everyone.

It is fundamental that “[c]riminal justice shall be administered by the Courts according to the law” (TRCP Sec. 2.2). The guiding principle of the Special Panels thus has been a strict adherence to the law. This has included close attention to the Transitional Rules of Criminal Procedure which apply to all proceedings before the Court, even those involving serious human rights violations. The Court has always followed the law, knowing that without the law there can be no justice.

In the words of Judge Wald of the International Criminal Tribunal for the Former Yugoslavia,

The rule of law... requires that courts acknowledge the statutes and rules that bind them in the exercise of their powers, even when those restraints interfere with understandable aspirations to maximize human rights norms. Courts must lead the way in following the law if there is to be a rule of law.<sup>14</sup>

There can be no legitimacy in a process where the rules change according to the identity of the defendant. The rules are the same for everyone and they cannot be selectively applied without jeopardizing basic principles of legal fairness. The law, especially the criminal law, shall treat all persons the same, with no person being treated either more or less favourably than any other.

Difficult cases provide a temptation to depart from established legal procedures in order to achieve a particular result. It is a temptation that will be resisted by any judicial tribunal that respects the rule of law and the impartial administration of justice.

<sup>14</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A-R77, ‘Separate Opinion of Judge Wald Dissenting From the Finding of Jurisdiction’ (27 February 2001), p. 5.

#### **3.2. Arrest & Pre-trial detention**

##### **3.2.1. Warrant of arrest**

###### *(i) Applicable law*

*UNTAET Regulation 2000/30 s19.1 (or s19A.<sup>1i</sup>)*

19.1 If there are reasonable grounds to believe that a person has committed a crime, the public prosecutor may request the Investigating Judge to issue a warrant for the arrest of that person in accordance with the rules established in the present section.

<sup>i</sup> Following the amendment of the Transitional Rules of Criminal Procedure, section 19 on Arrest Warrants became section 19A.

....

(ii) *Treatment by SPSC*

For a good discussion of the procedure for the issuing of arrest warrants see: *Wiranto et al*, 5/2003, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, 18 February 2004.

***Principle of ne bis in idem is not applicable at the arrest warrant stage of proceedings***

*Wiranto et al*, 5/2003, Legal Ruling Concerning the Applicability of *Ne Bis In Idem* at the Arrest Warrant Stage of the Proceedings, 5 May 2005, at [18]–[19], [29]–[31], [34]:

The fact that the principle of *ne bis in idem* applies before the Special Panels for Serious Crimes does not automatically require that it attach at the arrest warrant stage of the proceedings. Indeed, the Court has been unable to identify any case either in East Timor or in the realm of international jurisprudence in which *ne bis in idem* was considered at the arrest warrant stage rather than at some point following arrest.

Every one of the sources of law... refers to the stage of the proceedings at which the concept of *ne bis in idem* shall apply. Without exception, they all refer to the principles attaching at the time of trial, and not before. Accordingly, the earliest stage at which *ne bis in idem* can be raised is after the issuance of the warrant of arrest.

...

Whether or not the principle of *ne bis in idem* bars a particular prosecution is not always readily apparent. The resolution of the issue requires a judicial determination as to both whether the two proceedings relate to the same conduct and whether the party has been previously tried or convicted for the same criminal offence. The complexity of the matter is enhanced by the need to determine whether previous proceedings were for the purpose of shielding the accused from criminal responsibility. Similarly, it must be decided whether the earlier proceedings were conducted independently and impartially, in accordance with international norms of due process and consistent with an intent to bring the person concerned to justice. In the present case, the process is rendered more difficult to the extent that such an evaluation must be applied to five different defendants who were tried in different proceedings.

For a judge to resolve the application of *ne bis in idem* in a particular case without an adversarial hearing would thus be impractical, if not inappropriate. The issue is a complex one requiring the input of all interested parties and necessitating a full hearing. It is not a matter to be resolved by a judge following a mere *in camera* review of the case. Moreover, fundamental fairness requires that the prosecutor, and especially the defendant, have the opportunity to be heard on such a significant issue.

Accordingly, it is not surprising that the prevailing international norm is that the issue of *ne bis in idem* attaches at the trial stage when all parties are present and where the issue can be fully joined. Moreover at the time of trial, unlike at the arrest warrant stage, there is no issue of secrecy to be taken into account, permitting a thorough consideration of the matter. The secrecy of arrest warrant proceedings must be protected in order to preserve the Prosecutor's ability to gather evidence, to protect potential witnesses and to avoid endangering the results of investigations.

...

Thus, there are sound reasons of judicial policy not to consider the issue of *ne bis in idem* at the arrest warrant stage of these proceedings. Absent a clear statutory imperative to proceed otherwise, the issue should be addressed after a defendant is brought before the Court and before his case goes to trial.

### **3.2.2. Pre-trial detention**

#### *(i) Applicable law*

*UNTAET Regulation 2000/30, s 20:*

20.1 Within 72 hours of arrest, the Investigating Judge shall hold a hearing to review the lawfulness of the arrest and detention of the suspect. At this hearing the suspect must be present, along with his or her legal representative, if such a legal representative has been retained or appointed.

...

20.7 The Investigating Judge may confirm the arrest and order the detention of the suspect when:

- (a) there are reasons to believe that a crime has been committed; and
- (b) there is sufficient evidence to support a reasonable belief that the suspect was the perpetrator; and
- (c) there are reasonable grounds to believe that such detention is necessary.

20.8 Reasonable grounds for detention exist when:

- (a) there are reasons to believe that the suspect will flee to avoid criminal proceedings; or
- (b) there is the risk that evidence may be tainted, lost, destroyed or falsified; or
- (c) there are reasons to believe that witnesses or victims may be pressured, manipulated or their safety endangered; or
- (d) there are reasons to believe that the suspect will continue to commit offences or poses a danger to public safety or security.

20.9 The Investigating Judge shall review the detention of a suspect every thirty days and issue orders for the further detention, substitute restrictive measures or for the release of the suspect.

20.10 Unless otherwise provided in UNTAET regulations, a suspect may be kept in pretrial detention for a period of no more than six months from the date of arrest

20.11 Taking into consideration the prevailing circumstances in East Timor, in the case of a crime carrying imprisonment for more than five years under the law, the Investigating Judge or the Judge to whom the matter has been referred upon the filing of the indictment may, at the request of the public prosecutor, and if the interest of justice so requires, based on compelling grounds, extend the maximum period of pretrial detention by an additional three months

20.12 On exceptional grounds, and taking into account the prevailing circumstances in East Timor, for particularly complex cases of crimes carrying imprisonment of ten years or more under the law, the Investigating Judge or the Judge to whom the matter has been referred upon the filing of the indictment may, at the request of the public prosecutor, order the continued detention of a suspect, if the interest of justice so requires, and as long as the length of pretrial detention is reasonable in the circumstances, and having due regard to international standards of fair trial

Note also that according to article 9(3) of the International Covenant on Civil and Political Rights 'anyone arrested and detained on a criminal charge... shall be entitled to trial within a reasonable time or to release'. Section 6 of UNTAET Regulation 2000/30 stated that defendants had the right to be tried without undue delay.

*(ii) Treatment by the SPSC*

However despite the mechanisms of pre-trial release provided for in the TRCP, one area of grave concern during the operation of the SPSC was the extremely long pre-trial detention served by defendants.

An idea of the problem is given by the following statistics compiled by JSMP:

Average time spent in pre-trial detention <sup>ii</sup>	362 days
Average number of days for those who have time in pre-trial detention recorded (63 cases)	477 days
Longest time spent in pre-trial detention	1275 days (3 years, 6 months)
Number of accused who spent:	
1-2 years in pre-trial detention	16
2-3 years in pre-trial detention	15
>3 years in pre-trial detention	4

Whilst there was, particularly in the first few years of the SPSC's operation, a reluctance on the part of judges to release accused on application by defense counsel, this was only one of the factors hampering release. Other organizational and logistical difficulties, including the unavailability of panels to hear applications, also contributed to the problem. For example, in the case of *Lino de Carvalho*, (10/2001, Decision on the Application for the Release of the Accused Lino de Carvahlo, 28 October 2002, at [10]) the Prosecutor requested the release of the accused, but the application was not heard until nearly six months later, 'since no Special Panel could be assembled at that time'.

One defendant who was ultimately acquitted of all charges, Carlos Ena, spent 503 days in pre-trial detention. The rules provide for no form of recompense for those held for long periods in pre-trial detention who are later acquitted.

***Where pre-trial detention has been ordered it can only be reviewed if new grounds for release are brought before the panel***

*Benjamin Sarmiento*, 18/2001, Decision on the Application for the release of the Accused Benjamin Sarmiento, 7 February 2003, at [15], [19]–[20]:

As already decided in the case the Prosecution v Jose Cardoso, it is the opinion of this Court that decisions relating to detention can be revisited only with the presentation of new grounds. It would be a waste of time and useless to issue a decision which immediately thereafter can be revisited without presenting any new grounds. The right of the Accused to have his detention reviewed at regular interval does not mean that a party can bring before the Court the same reasons upon which the Court initially decided, only that new grounds have to be submitted.

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<sup>ii</sup> This probably represents lower than the actual average: where information as to time spent in pre-trial detention was not available from the judgment (12 cases), the "total days" score was marked as zero. This average only includes cases that proceeded to trial and counts defendants indicted in more than two cases simultaneously only once.

...

Both the Prosecution and the Defense agree that pursuant to Section 6.3(k) of UNTAET Regulation 2001/25, the Accused has a right to have the grounds of his detention reviewed at regular intervals.

As already decided in Jose Cardoso case, this Court considers that this right arises in two times: (1) when the previous period of detention expires or (2) where there are some changes affecting any one of the grounds upon which the Accused's detention is based.

***Further delay can amount to a new ground for release, and length of pre-trial detention may constitute an exceptional circumstance***

*Lino de Carvalho*, 10/2001, Decision on the Application for the Release of the Accused Lino de Carvalho, 28 October 2002, at [13]–[16]:

As already decided in the Case the Public Prosecutor v. Jose Cardoso, the Court finds relevant in the present case the submissions of the defense that the additional time passed by the accused in jail since the last order of detention, can be considered as a change in the circumstances of the case. Only the further delay gives the defendant the right to have his custody reviewed under Section 6.3 (k) UNTAET Regulation 2000/30. In Jose Cardoso's case, the Court says:

In the present case the defense has raised the same grounds as it raised in its previous applications. Only the new delay in the proceedings, the issue of length of time, which is still on going, could be considered as a new ground submitted by the defence. ...

Also in the present case, the length of the pre-trial detention constitutes an exceptional ground to release the accused.

...

The issue of length of detention as an exceptional circumstance warranting release, and the issue of the right of the accused to be tried without undue delay is to be evaluated on a case-by-case basis and in light of several factors that may account for the length of detention.

In the present case, it is true that the accused has been detained for 2 years, and that the trial of case has been postponed many times for many reasons. Even now, the Court is not sure, considering the caseload of cases pending before the Court, and the fact that only one panel is functioning, the trial hearing of the case will be held very soon. However, considering all the factors enumerated in the previous decisions of the case, which did not change, this Court still has the opinion that there are reasonable grounds for detention under Section 20.8.

The court will then order substitute restrictive measures as an alternative to an order for detention, in order to comply with international standards regarding length of detention, while the Court is satisfying itself that the accused will not flee the jurisdiction of the Court, and the integrity of evidence relating to the alleged crime or the safety or security of victims, witnesses and other persons related to the proceedings are protected.

However contrast *Benjamin Sarmento*, 18/2001, Decision on the Application for the release of the Accused Benjamin Sarmento, 7 February 2003, at [41]–[43]:

It is true also that in the present case the Accused has been detained two years. However, considering the nature and the seriousness of the charges, the Court deems that the length of detention of the Accused is still reasonable, notwithstanding the duty of the Special Panel to expedite proceedings within the following months. And as



decided in the case the Prosecution v Umbertus Ena and Carlos Ena, there is an expectation that the Special Panel will expedite proceedings considering the recent ruling of this Court to allow a single judge to hold a preliminary hearing, and the plan of establishing two full panels to deal with serious crimes.

The Court realizes that the trial of the Accused has been postponed several times, however none of the postponements have been at the request of the Accused or caused by him and the Court also agrees with the Defence that it is not due to failure on behalf of the Prosecution, the Defence or the Court itself.

...

In light of all those reasons, the length of Benjamin Sarmiento's detention remains within acceptable limits in accordance with the interest of justice and international standards of fair trial.

### **3.3. Indictments**

#### **3.3.1. Requirements of indictments**

##### *(i) Applicable law*

*UNTAET Regulation 2000/30, s24.1:*

24.1 Upon completion of the investigation, if the result so warrants, the public prosecutor shall present a written indictment of the suspect to the competent Panel of Judges or District Court. The indictment shall include:

- (a) the name and particulars of the accused;
- (b) a complete and accurate description of the crime imputed to the accused;
- (c) a concise statement of the facts upon which the accusation is made;
- (d) a statement identifying the provisions of law alleged to have been violated by the accused;
- (e) the identification of the victims, unless measures to protect the identity of the victims are being sought; and
- (f) a request for the trial of the accused.

#### ***SPSC looks to substance rather than form***

*Sisto Barros and Cesar Mendonca, 1/2004, Judgment, 12 May 2005, at p8:*

The fact that the contextual element of the offence of crime against humanity is described in a preliminary section entitled 'Introductory Statement of Facts' that is separate from the section styled "Statement of Facts" is without significance. It remains that the indictment sets out in detail the facts upon which both the contextual and specific elements of the charges against the defendants are based. To suggest that the presence of the contextual allegations in a separate section somehow puts them outside of consideration is to exalt form over substance.

#### ***Specificity in indictments – use of the phrase 'on or about'***

*Sisto Barros and Cesar Mendonca, 1/2004, Judgment, 12 May 2005, at pp9–10:*

The term 'on or about' to describe the date of a particular event is widely used in legal drafting, especially in the context of formal criminal charges. Its purpose is to avoid any issues that could arise from a variance between the proof at trial and a specific date contained in an indictment. The date of a crime does constitute an element of the

offence itself and, to that extent, is irrelevant. Nonetheless, it is significant in that it serves to provide the defendant notice of the facts underlying the charges against him. Similarly, the date of the offence limits the Prosecutor to proof of a particular event and prevents him from establishing the defendant's guilt on some other set of circumstances.

Neither the notice given to the defendant nor the restriction imposed on the Prosecutor is measurably diminished by the locution "on or about" when used with respect to a date contained in an indictment. Indeed, the term has been routinely used in the indictments brought before the Special Panels and it has been accepted as a form of routine pleading in this Court.

### ***Level of particularity required in indictment***

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at p10:

...The Prosecutor is not bound to insert in the indictment every fact that he reasonably anticipates to prove at trial. Nonetheless, he must plead with sufficient specificity all the facts necessary to establish the elements of the offences charged. ...

*Rudolfo Alves Correia*, 27/2003, Decision on the Defense Motion to Dismiss the Indictment dated 23 January 2004, 2 March 2004, at [28]:

Section 24.1 states that the indictment shall include a complete and accurate description of the crime imputed to the accused and a concise statement of the facts upon which the accusation is made. The Court believes that the very same nature of a criminal investigation suggests that for a description of the facts to be considered complete, it cannot be expected that it covers all the possible aspects of the case. In every criminal case, witnesses do not necessarily know all the particulars and identity of the participants of the crime and therefore the identity of some of these participants can remain unknown.

### ***Indictment may plead attempted crimes***

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at p11:

An indictment must allege that the purpose of a defendant's action was the commission of a crime within the jurisdiction of the Special Panels. Nonetheless, it need not allege that the accused was successful in the commission of the offense. Individual criminal responsibility and liability for punishment attach equally to "attempts to commit such a crime" so long as an accused takes "action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions." Section 14.3(f) of UNTAET Regulation 2000/15. This is equally true if the attempt was to commit a crime against humanity in the form of murder. ...

### ***Indictment must specify whether the accused is charged as an individual or superior***

*Anton Lelan Sufa*, 4a/2003, Judgment, 25 November 2004, at [8]:

...the accused cannot be charged with being responsible as an individual "or" as a superior; due to the fundamental rule of fair trial (Sec. 2.1 Reg. 2000/130) this requirement has to be interpreted in such a way that the accused must be informed of the alleged form of responsibility (whether as an individual or as a superior); if this requirement were to be interpreted otherwise, it would not only violate the right of the accused to be informed in detail of the nature of the charges against him (Sec. 6.3 (b) Reg. 2000/130), but also hamper his right to an effective defence (Sec. 34.3 Constitution of the Democratic Republic of East Timor); if for example the prosecution

alleged responsibility as a superior, and would therefore have to prove the requirement "failure to punish subordinates" stipulated in Sec. 16 Reg. 2000130, the defence must be able to search and find possible witnesses who could testify to the contrary, which under the prevailing conditions in this country could be time consuming.

***Not permissible to plead both responsibility as a principle and responsibility as an accessory in an indictment***

*Francisco Pedro*, 1/2001, Interlocutory Decision to Dismiss Amended Indictment, 22 May 2001, at pp5-6:

In accordance to the jurisprudence of the ICTY (International Criminal Tribunal for the former Yugoslavia), the verbs *to assist*, *to commit*, *to abet* or *otherwise to assist* a crime are not all compatible. In fact, an individual can be said to have committed a crime when he physically perpetrates the relevant criminal action. As opposite, to the commission of a crime, *aiding*, *abetting* and *assisting* is a form of accessory liability. "The act of assistance needs not to have been caused the act of the principle".<sup>1</sup>

The distinction between *participation in a common criminal plan or enterprise*, on one hand, and *aiding and abetting a crime*, on the other, is also supported by the Rome Statute for an International Criminal Court. Its Article 25 distinguishes between a person who "contributes to the commission or attempted commission of (...) a crime", where the contribution is intentional and done with the purpose of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime; from a person who, "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".

Therefore the action of one perpetrator who *commits* or of more co-perpetrators who participate in the commission stands separate from the conduct of abettors and aiders. So different that they cannot belong to the same person when committing the same crime. They are antithetical.

1. Prosecutor v. Anto Furundzija, case n. IT-95-17/1-T, Judgement May, 10 dec 1998; Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, case no. IT-96-23-T & IT-96/23/I-T, Judgement 22 February 2001.

***Indictments are not required to specify the form of individual criminal responsibility charged***

An issue repeatedly raised by defense counsel before the Special Panels was the Prosecution practice of not specifying in indictments which form of individual criminal responsibility was relied upon.<sup>iii</sup> However, despite repeated complaints from defendants that indictments without this information gave insufficient information to allow the preparation of a defense case, the Panels consistently permitted the Prosecution to issue indictments without pleading specific forms of individual criminal responsibility.

*Lino de Carvalho*, 10/2001, Interlocutory Decision on Indictment, at [15]-[16]:

Section 24 of UNTAET Regulation 2000/30 requires only that the indictment includes a complete and accurate description of the crime imputed to the accused and a concise statement of the fact upon which the accusation is made.

The law does not require that the PP specify in the indictment the mode of the responsibility for the crime. The Defence was not able to submit to the Court the

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<sup>iii</sup> For the Special Panels' treatment of forms of criminal responsibility, see below at section 0.

grounds of such specification. It only referred to some decisions of International Criminal Tribunal for the former Yugoslavia to define the concepts of aiding, assisting and committing a crime. It was advanced by the PP and appeared to the Court that even in those cases cited by the Defence like in some other indictments of the ICTY, it is not specified the mode of responsibility of the crime.

*Abilio Mendes Correia*, 19/2001, Decision on Defendant's Second Challenge to the Indictment: Motion to Dismiss Indictment as Insufficient, 2 March 2004, at pp2-3:

... An "insufficient" indictment would be one that fails to indicate whether a person's criminal responsibility is individual (TRCP Sec. 14) or as a commander or superior (TRCP Sec. 16). In the present case, the defendant is informed in each count that he is alleged to be individually responsible as described in Sec. 14 of UNTAET Reg. 2000/15. That is the crucial allegation that must be made. Although the Prosecutor could have chosen to further specify the basis for the defendant's individual criminal responsibility with reference to a particular subsection of the regulation, it is not required that he do so.

The subsections of TRCP Sec. 14.3 are not elements of an offense that must be specifically articulated. Rather, they merely describe the forms of conduct that are incorporated within the concept of individual criminal responsibility set out in TRCP Sec. 14. An indictment is not defective should it fail to specify a particular subsection of TRCP Sec. 14, and individual criminal responsibility can be demonstrated by evidence satisfying any of the subsections in TRCP Sec. 14.3. Consequently, proof that a person conducted himself as described in any one of the subsections in TRCP Sec. 14.3 will be sufficient to establish individual criminal responsibility on the count involved.

*Domingos Amati and Francisco Matos*, 12/2003, Decision on the Defendants' Motion on Defects in the Indictment, 11 November 2004 at pp4-5:

The Defendants claim that the indictment is defective because it fails to specify the particular subsection of Sec. 14.3 of UNTAET Reg. 2000/15 that describes their individual criminal responsibility. Their motion contents that "the prosecution must specify exactly what conduct the accused is being charged with under Section 14 of the Regulation 2000/15."

The Special Panel previously considered this claim in the case of Deputy General Prosecutor v. Abilio Mendes Correia (Case No. 19/2001). In that case a single justice of the court denied the defendant's request to dismiss the indictment against him. ...

...

The Special Panels have recently ruled on the issue in the case of Deputy General Prosecutor v. Anton Lelan Sufa, et al. (Case No. 4/2003). In that the defendants moved the court to reject the indictment on the ground that it failed to provide them adequate notice of the charges. The Court, in denying that request, concluded that it was not necessary for the indictment to specify upon which category of individual responsibility the prosecution intended to rely: "[T]he panel in its present composition and its majority does not regard this as compulsory, rather as a voluntary requirement." The decision went on to state that "it will often be difficult to ascertain at the investigational stage the precise category of individual responsibility to be taken into account, and will often only be possible to clarify this during the taking of evidence before the Court."

The facts giving rise to the charges against the Defendants in the present case are contained in the indictment at Section III, "Statement of Facts." Those facts are related in sufficient detail to allow the Defendants to identify the basis for the criminal charges against them. Section IV of the indictment assets the defendants' criminal responsibility

to have been individual, as opposed to command, responsibility and the relevant provisions of Sec. 14.3 of UNTAET Reg. 2000/15 are set out.

...

The indictment in its present form is sufficient and provides the Defendants with adequate factual and legal notice of the charges against them.

*Januario Da Costa and Mateus Punef*, 22/2003, Judgment, 27 April 2005, at pp13-14:

It must be noticed that the duties of the Prosecutor in writing the indictment, as specified in Section 24.1 TRCP (or UNTEAT Reg. 2000/30, as amended by UNTAET Reg. 20001/25), include, *inter alia*:

- (b) a complete and accurate description of the crime imputed to the accused;
- (c) a concise statement of the facts upon which the accusation is made;
- (d) a statement identifying the provisions of law alleged to have been violated by the accused: ....

What is required by the Prosecutor, in other words, is a description of the facts and an identification of the violation alleged to have occurred (i.e. of the legal provision forbidding the criminal behaviour). The indication of the source of the criminal responsibility (practically speaking, of the point in Section 14 or 16 UNTAET Reg.2000/15 which says why the accused is to be held responsible) is not required and has always been added *ad abundantiam* in the indictments. In fact, one thing is the provision violated (e.g., for an ordinary murder Section 338 Indonesian Penal Code), which is a source of substantive law stating the behaviour that must be avoided (e.g. don't kill a person) and furnishing the sanction in case of violation of the behaviour (e.g., in section 338 ICP the maximum sanction of fifteen years in jail is provided). Another thing is the source of the criminal responsibility, ie. the reason for which the violation of the substantive norm is relevant and appreciable in Court. The first indication is the one that is required by the Prosecutor and to this indication (as well as to the description of the facts) the rules of Section 32 TRCP apply: the function of which is to make the accused aware of the possible consequences of his/her alleged behaviour in order to better prepare his/her defense. In relation to the source of the responsibility, the same need does not arise since the factual description must be *per se* enough to exhaust the defensive need of the accused (indicating, for example, if the fact to him/her attributed saw him/her act giving orders or directly stabbing the victim). Accordingly, the Prosecutor is not burdened with the need to provide legal specifications in the indictment.

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at pp13-15:

The defendants claim that the indictment is defective because it fails to identify the particular subsection of Sect. 14.3 of UNTAET Reg. 2000/15 that describes their individual criminal responsibility. They assert that the prosecution must specify exactly what mode of responsibility is being charged under Section 14.

The Special Panel previously considered this claim in the case of Deputy Prosecutor v. Abilio Mendes Correia (Case No. 19/2001). In that case a single justice of the court denied the defendant's request to dismiss the indictment against him based on similar grounds. ...

The Special Panels also ruled on the issue in the case of Deputy General Prosecutor v. Anton Lelan Sufa, et al. (Case No. 4/2003). In that case the defendants moved the Court to reject the indictment on the ground that it failed to provide them adequate notice of the charges. The Court, in denying that request, concluded that it was not necessary for the indictment to specify upon which category of individual responsibility the prosecution intended to rely: "[T]he panel in its present composition and its majority does not regard this as compulsory, rather as a voluntary requirement." The decision went on to state that "it will often be difficult to ascertain at the investigational stage the

precise category of individual responsibility to be taken into account, and will often only be possible to clarify this during the taking of evidence before the Court.”

Another panel of this Court in the case of *Prosecutor v. Rudolfo Alves Correia*<sup>7</sup> recently ruled that a defendant is “not prejudiced in any way by the form of the indictment because it contained a description of each category of conduct by which a defendant could be considered individually responsible for an offence.” Moreover, the indictment provided a thorough description of the facts underlying the defendant’s criminal responsibility. “As those facts were disclosed in the indictment and referred to in Count One, it was not considered significant that the indictment set out the entirety of Section 14.3 of UNTAET Regulation 2000/15 with respect to the Defendant’s individual criminal responsibility. On the other hand, the Court did consider significant the fact that the recitation contained Section 14.3(b) under which the defendant was later convicted.”<sup>8</sup>

In the present case, the facts giving rise to the charges against the defendants are contained in the indictment at Section III, “Statement of Facts.” Those facts are related in sufficient detail to allow the Defendants to identify the basis for the criminal charges against them. Section IV of the indictment asserts the defendants’ criminal responsibility to have been individual, as opposed to command, responsibility and the relevant provisions of Sec. 14.3 of UNTAET Reg. 2000/15 are set out. Moreover, the indictment specifically contains and recites the provisions of Section 14.3(d)(i) under which the panel has found each defendant guilty on each count.

In light of the foregoing, the indictment in its present form is sufficient and provides the Defendants with adequate factual and legal notice of the charges against them.

<sup>7</sup> *Correia*, *supra* at n.3. See par. 12.

<sup>8</sup> *Id.*

### ***Indictment must be sufficient in itself – supporting documents cannot fill gaps***

*Domingos Amati and Francisco Matos*, 12/2003, Decision on the Defense Motion to Dismiss Count 1 of the Indictment for Failure to Establish a Prima Facie case, 11 July 2003, at [18]:

...Annex A – a list of evidence – has been appended to the Indictment. This Court wishes to clarify that these documents do not form part of the Indictment. The indictment has to be sufficient itself. As was decided in ICTY in the case *The Prosecutor v. Dragoljub Kunarac and Radomir Kovac*<sup>1</sup>, neither the supporting material nor the witness statements can be used to fill in any gaps in the indictment.

<sup>1</sup> ICTY, Case No. IT-96-23-PT, the *Prosecutor v. Dragoljub Kunarac and Radomir Kovac*, Decision on the form of the indictment, decision of 4 November 1999.

### ***3.3.2. Motions and dismissals in respect of defective indictments***

#### ***(i) Applicable law***

*UNTAET Regulation 2000/30, s27:*

27.1 Preliminary motions may be raised prior to the commencement of the trial. Such motions are those which:

- (a) allege defects in the form of the indictment;
- (b) seek severance of counts joined in one indictment or separate trials in cases of coaccused; or
- (c) raise objections based upon refusal of a request for assignment of counsel

27.2 After the case is assigned to a panel or judge, any party may at any time lodge a motion with the court, other than a preliminary motion as described in the preceding subsection, for appropriate relief. Motions for appropriate relief may be oral or written at the discretion of the Court

27.3 Decisions on motions, except as provided in Sections 23 and 27.4 of the present regulation, are not subject to interlocutory appeal. The granting of a motion to dismiss the case for any reason shall be deemed a final decision in the case and shall be subject to appeal as provided in Part VII of the present regulation.

....

***Motion alleging defect in the indictment is a preliminary motion and cannot be brought after the commencement of the trial***

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [10]–[12]:

...Immediately after the trial began, counsel for the Defendant presented a written Motion Requiring the Prosecutor to Specify the Precise Category of Individual Criminal Responsibility upon which the prosecution intended to rely. The motion was filed pursuant to TRCP s 27.2.

After consideration, the panel declined to hear the motion, essentially on the ground that it alleged a defect in the form of the indictment, which rendered it a preliminary motion pursuant to TRCP s 27.1(a). Accordingly, the panel concluded that the motion had not been timely filed. Although TRCP Sec. 27.2 allows a party to file a motion 'at any time,' the rule contains an exception in the case of preliminary motions, which must be heard "prior to the commencement of the trial." As the motion was filed after trial had already commenced, it was thus filed late and could not be considered.

... [T]he Defendant was not prejudiced in any way by the form of the indictment because it contained a description of each category of conduct by which a defendant could be considered individually responsible for an offence.

***Dismissal of indictments***

*Domingos Amati and Francisco Matos*, 12/2003, Decision on the Defense Motion to Dismiss Count 1 of the Indictment for Failure to Establish a Prima Facie case, 11 July 2003, at [19]–[23]:

The ability for the Special Panel for Serious Crimes to review the prima facie sufficiency of the indictment derives from the provision in Section 27.1 of UNTAET Regulation 2000/30 (as amended), which provides for preliminary motions that may allege defects in the indictment. As this Article expressly provides for preliminary motions, this forms the basis of an initial consideration of whether the indictment can be considered sufficient. When performing this review, this Court notes the requirements of the indictment established by Section 24.1 of UNTAET Regulation 2000/30.

...

As has been held by the ICTY in relation to the interpretation of pre-trial motions exercising the right to object to the form of an indictment, "A *prima facie* case on any particular charge exists in this situation where the material facts pleaded in the indictment constitute a credible case which would (if not contradicted by the accused) be a sufficient basis to convict him of that charge."<sup>2</sup>

The possibility of dismissing a case before the trial can be found in s 27.3 of UNTAET Regulation 2000/30 (as amended)...

<sup>2</sup> *Prosecutor v. Kordic*, Case IT-95-14-1, Decision on the Review of the Indictment, 10 Nov 1995, at 95.

In *Francisco Pedro*, 1/2001, Interlocutory Decision to Dismiss Amended Indictment, 22 May 2001, at pp4-5l:

At this time one can make a single question: Is it possible to dismiss a case before the trial?

The answer is committed to the judges as provided in Section 27.3:

Decisions on motions, except as provided in ss 23 and 27.4 of the present regulation, are not subject to interlocutory appeal. **The granting of a motion to dismiss the case for any reason shall be deemed a final decision in the case and shall be subject to appeal as provided in Part VII of the present regulation.**

...

The last conclusion:

A Court shall dismiss the case before the trial in event of granting a motion grounded on defects in the indictment that jeopardizes and constrains the right to a fair trial of the accused....

The panel ordered that the case be dismissed. The prosecution submitted further indictments on the same case, however, and a later panel held that this was legitimate. According to the panel, the previous panel had dismissed the *indictment* only, not the case:

*Fransico Pedro*, 1/2001, Court Decision on Defense Motion to Partially Dismiss the Indictment, 11 February 2005, at p2:

Since the Court could have dismissed the case only if the Prosecution had failed to make a *prima facie* case for the alleged crime (i.e. failed to present sufficient evidence to prove the crime, barring any defense), but since the reasoning of the decision does not discuss any evidentiary matters, the decision has to be interpreted in such a way, that only the indictment dated 13 January 2001 was dismissed (because of its defects), but not the whole case.

The Panel did not give any authority for the proposition that the SPSC could only dismiss the case for failure to make a *prima facie* case. This finding was not consistent with the decision of the previous panel, nor with s 27.3 UNTAET Regulation 2000/30 which refers to the granting of a motion to dismiss a case "for any reason".

### **3.3.3. Amendment of indictments**

#### *(i) Applicable law*

UNTAET Regulation 2000/30, s32:

32.1 After the indictment has been presented and prior to the commencement of the trial, the Public Prosecutor may amend the indictment only with leave of the Court.

32.2 After the trial has begun and prior to final decision in the case, the Court may, at the request of the prosecutor, allow amendment of the indictment if the Court determines that the evidence at trial establishes qualification of the crime or crimes which is different than that which appears in the indictment. The accused and his or her legal representative have the right to be immediately informed by the Court of the new qualification of the criminal offence for which he or she may be convicted.

32.3 In circumstances defined in Sections 32.1 or 32.2 of the present regulation, the accused, if he or she so requests, must be granted a delay in the proceedings to prepare his or her defence with respect to any new matters alleged, and to propose and examine new evidence.

...

#### *(ii) Treatment by the SPSC*

*Wiranto et al*, 5/2003, Decision on the Motion of the Prosecutor General to Review and Amend the Indictment, 17 May 2004, at p4:



...when the Public Prosecutor presents a written indictment to the Court, his discretion with respect to the charges passes to the Court itself, which alone is vested with the authority to approve the amendment of an indictment. ...

### ***Amendment to clarify facts but not add new charges will generally be allowed***

*Joao Franca da Silva et al*, 4/2001, Decision on the Request of the Prosecutor for Leave to Further Amend the Indictment, 27 March 2002, at [17]–[20]:

...the amendments sought by the Prosecutors are minor amendments and do not have any material effect on the substance of the present indictment. They do not affect the nature of the charges against the accused. The Court is of the opinion that such an amendment seeking an expansion of facts in order to support the existing charges is not really an amendment but a clarification of facts. The Court refers to the case relied upon by both parties where the Trial Chamber in its decision on the first amendment of the Musema<sup>1</sup> indictment found that: “an expansion of the facts adduced in support of existing counts does not in the opinion of the Tribunal represent an amendment of the indictment but rather a further particulars which emerge during various stages of the trial against the accused.”

...

The Court is of the opinion that such an amendment seeking to further articulate and provide better particulars regarding the manner in which the crimes already charged in the indictment were committed, cannot be refused to the prosecution. They can be contradicted by the defence and analysed by the Court in its final findings.

<sup>1</sup> ICTR, *Prosecutor v. Alfred MUSEMA*, Decision of 18 November 1998.

### ***3.3.4. Withdrawal of indictments***

#### ***Withdrawal of an indictment requires approval of the Court***

*Aprecio Guterres*, 18a/2003, Decision on the Motion to withdraw the indictment against Aprecio Guterres without prejudice pursuant to Section 27.2 of UNTAET Reg. 30/2000 and the Motion to cause the Court to refrain from conducting a Preliminary HEaring, 19 November 2004, at pp4-5:

...after the written indictment is presented to the Court, only the Court has the authority with respect to the charges to approve the amendment of an indictment.

The Regulations are silent in relation to the procedure in relation of a withdrawal of an indictment. Yet, when an even less substantive action the mere amendment of an indictment requires the approval of the Court, the more so the withdrawal of an entire indictment necessarily must require the approval of the Court.

...

Given, the defendant's guilt in the pending case cannot be proven, he could claim the right to be acquitted. This very right would be violated by an approved withdrawal of the indictment.

### ***Indictments may not be withdrawn after the hearing of witnesses***

*Florindo Morreira*, 29/2003, Judgment, 19 May 2004, at pp2–3:

After receiving the testimonies of two witnesses, it is clear that the Prosecution's case could not lead to a conviction (even if uncontested by the Defence). As mentioned above, the Prosecutor moved to withdraw the indictment.

While, as said before, no problem is raised, to state, in keeping with the view of the Parties, that there is no sufficient evidence upon which a Court could ground a decision of conviction, the Court thinks that the withdrawal of the indictment is not the proper way to conclude the case.

Indeed, after the filing of the indictment, the Prosecutor, in most jurisdictions, no longer has the exclusive control of the charges against the defendant and, in general, of the trial.

This framework becomes crucial when the decision to prematurely end a trial is taken in the middle of the trial itself, after some witnesses have been heard. Indeed, when the examination of some witnesses has turned out to be unsatisfactory for the Prosecutor, a purely procedural solution, like the withdrawal of the indictment, would leave the door open (and the accused exposed) to further investigation by the Prosecutor and to a fresh inquiry, possibly resulting in a new indictment in the case of the acquisition of new evidentiary material. This would be in violation of the principle of the double jeopardy that finds application in the transitional rules of criminal procedure with the traditional formula of *ne bis in idem* (section 4 UNTAET Regulation 2000/30). If the Prosecutor were left free to end a case that she or he thinks is doomed, at her or his own discretion, simply by withdrawing the indictment before the Court makes a decision on the merit, there is no doubt the guarantee against double jeopardy would be weakened.

If, in the opposite case and as this Court is inclined to uphold, a decision is made on the merits of the case, the trial is brought to its natural end (the final decision) and, in the case of acquittal, the legal mechanism to prevent double jeopardy is maintained.

### **3.3.5. Inclusion of lesser offenses in indictments**

#### *(i) Applicable law*

UNTAET Regulation 2000/30, s 32.4:

“The accused shall not be convicted of a crime that was not included in the indictment, as it may have been amended, or of which the accused was not informed by the judge. For purposes of the present subsection, a crime which is a lesser included offense of an offense which is stated in the indictment shall be deemed to be included in the indictment.”

#### *(ii) Treatment by SPSC*

#### **Scope of “lesser included offense”**

Despite relying on TRCP s 32.4 in a number of cases, the SPSC did not formulate a coherent understanding of what would constitute a lesser included offense. The clearest formulation is found in *Victor Manuel Alves*, 1/2002, Judgment, 8 July 2004, at [18], where the Court defines a “lesser included offense” as one having the same material elements as that in the indictment, and differing only in its mental elements:

...Art. 359 IPC is a lesser offense included in Art. 338 IPC, as the material elements of the crime, namely causing death of the victim, is the same, and only the mental element is reduced from intent to negligence.

However contrast the statement made later in the same paragraph that:

This means that only if the proven facts do not constitute any offense at all, shall the charges be dismissed. It follows that, if the proven facts do constitute an offense, the charge shall not be dismissed, and the accused has to be convicted of that (lesser) offense.

The latter statement appears to suggest that where the proven facts constituted an offense which has material elements different from those offenses contained in the indictment, it would still be permissible to convict the defendant of that offense. Such an outcome occurred in *Rusdin Maubere* (23/2003, Judgment (Unofficial Translation from Portuguese), 5 July 2004) where an accused indicted with the crime against humanity of enforced disappearance was convicted of the crime against humanity of murder, notwithstanding that the material elements of these two crimes differ. The Court did not refer to TRCP s 32.4, but justified its decision as follows (at pp15-16):

All those facts constitute a crime of murder consummated, and because all of them are in the indictment of the Public Prosecution, nothing says that within that context we cannot do a new juridical-criminal qualification of those same facts, for this legal type of crime, changing the crime of enforced disappearance to the crime of murder, both qualified as crimes against humanity under s 5.1(a) and (f) of the relevant UNTAET Regulation.

### ***Application of the principle in the SPSC caselaw***

Examples of the application of the principle by the Special Panels include:

Cases where indictments charging premeditated murder were deemed to include the charge of negligently causing death under the Indonesian Penal Code art 159:

- *Gaspar Leki*, 5/2001, Judgment, 14 September 2002, at [46]-[48];
- *Victor Manuel Alves*, 1/2002, Judgment, 8 July 2004, at [16]-[18].

Cases where indictments charging the crime against humanity of murder were deemed to include the charge of murder under domestic law:

- *Inacio Olivera et al*, 12a/2002, Judgment, 23 February 2004, at p13.

Cases where indictments charging the crime against humanity of persecution were deemed to include the charge of committing violence against property or persons under article 170 of the Indonesian Penal Code:

- *Inacio Olivera et al*, 12a/2002, Judgment, 23 February 2004, at p13.
- *Julio Fernandes*, 25/2003, Judgment, 19 April 2005. check Portuguese to see whether this is correct

### ***SPSC may convict defendants of lesser included offenses even if they would not usually fall within the SPSC's jurisdiction***

*Victor Manuel Alves*, 1/2002, Judgment, 8 July 2004, at [18]:

...where an indictment charges an offense within the original jurisdiction of the Special Panels, the Court is competent to render a verdict on lesser included offenses of that crime, even though initially such offenses could not have been brought before the Special Panels. Thus, although an indictment charging the crime of Causing Death by Negligence (Art. 359 IPC) could not have been filed with the Special Panels, the Court is nonetheless competent to render a verdict on such crime as it constitutes a lesser included offense of a serious crime within the original jurisdiction of the Special Panels.

...

Also, in view of the requirement for overall economy and efficiency of the judicial process, it would be a waste of time and resources if the Special Panels, having heard all the witnesses, would have to refer the case to a Judge of the Dili District Court who would then have to hear the same witnesses again, although the Special Panel itself is a panel within the Dili District Court.

### 3.4. Disclosure of Evidence

#### *(i) Applicable Law*

Constitution s 132.3:

In performing their duties, Public Prosecutors shall be subject to legality, objectivity and impartiality criteria, and obedience toward directives and orders as established by law

TRCP s 6.3:

At every stage of the proceedings, the suspect and the accused shall be informed by the public prosecutor that he or she has the following rights:

...

(e) the right to request the Public Prosecutor or Investigating Judge to order or conduct specific investigations in order to establish his or her innocence...

...

(g) the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as adverse witnesses

TRCP s 7.2:

The Public Prosecutor shall direct criminal investigations in order to establish the truth of the facts under investigation. In doing so, the public prosecutor shall investigate incriminating and exonerating circumstances equally.

TRCP s 24.4:

Upon presentation of the indictment to the court, the following must be made available by the prosecutor to the accused and his or her legal representative:

- (a) Copies of all documentary evidence intended to be offered by the prosecution at trial;
- (b) All statements in the possession of the prosecution of any witness whose testimony is intended to be offered by the prosecution at trial;
- (c) All information in any form in the possession of the prosecution which tends to negate the guilt of the accused or to mitigate the gravity of the offenses charged in the indictment.

See also ss 24.5 and 24.7 of the TRCP.

#### *(ii) Treatment by the SPSC*

JSMP was informed by a number of defense counsel that, in general terms, there was a disparity between prosecution and defense in availability of and access to evidence, and that this was exacerbated by the amalgamation of civil and common law systems in the practice and procedure of the SPSC.<sup>iv</sup> For example, according to one international lawyer with DLU:

The defence team suffers since it has no access to the totality of the evidence or to the common law powers and remedies if the prosecution has spoiled or hidden evidence. Furthermore, in the practice of the SPSC the defence had no opportunity or resources to conduct independent professional investigations. In the end in front of the SPSC the defence does not get the disclosure it would get under civil law or even under the common law.<sup>v</sup>

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<sup>iv</sup> See also above at 12.

<sup>v</sup> Contained in an email written to a JSMP staff member dated 28 July 2005.

There were nevertheless few interlocutory motions launched in respect of disclosure. The principal written interlocutory decision on the subject was that issued in the case of *Mateus Lao* (10/2003, Interlocutory Decision, undated). Another important interlocutory decision on the subject was that issued in the case of *Umbertus Ena and Carlos Ena* (5/2002) on 30 January 2004. It is, however, difficult to glean anything other than a general appreciation of the approach to discovery from these cases; hence the absence of noteworthy extracts.

### 3.5. Fitness to Stand Trial

Only twice were the Special Panels asked to consider the psychological competency of an accused person to stand trial. First, in its judgment in the case of *Florencio Tacaqui* (20/2001, Judgment, 9 December 2004) the Panel considered whether the defendant's refusal to speak a word since receiving his indictment in late 2001 and whether this indicated his lack of fitness to stand trial (pp8-10). During proceedings the Court appointed two experts to carry out examinations of the accused. Although the Panels did not expressly specify the legal principles by which it was guided, it concluded that he was fit to stand trial.

Later, in the case of *Joseph Nahak* (1a/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005) the Court held that the defendant was incompetent to stand trial, and adjourned the proceedings *sine die*. In doing so the Panel stated at length the relevant principles to be considered in such a case.

#### (i) Applicable laws

No specific provisions existed under any Indonesian, UNTAET or Timorese laws which referred to the question of the accused's mental competence to stand trial. For this reason in *Joseph Nahak* (1a/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005) the Court referred instead to international sources, especially the Rules of Procedure and Evidence of the International Criminal Court, rule 135 (Medical Examination of the Accused)

The Trial Chamber may, for the purpose of discharging its obligations under article 64, paragraph 8(a), or for any other reasons, or at the request of a party, order a medical, psychiatric or psychological examination of the accused, under the conditions set forth in rule 113.

...

4. Where the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned. The Trial Chamber may, on its own motion or at the request of the prosecution or the defence, review the case of the accused... When the Trial Chamber is satisfied that the accused has become fit to stand trial, it shall proceed in accordance with rule 132.

The Court also referred to precedents from other judicial sources: the International Military Tribunals at Nuremberg and for the Far East, and the ICTY (especially the latter's decision in *Prosecutor v Strugar*<sup>vi</sup>)

Relevant principles were also derived from laws applicable in East Timor which granted certain fair trial rights to accused persons. The provision of rights implies a requirement that

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<sup>vi</sup> *Prosecutor v Strugar* Case No. IT-01-42-T, Decision re the Defense Motion to Terminate Proceedings, 26 May 2004.

that the defendant must be able to understand their content sufficiently to exercise them (see *Josep Nahak*, 1a/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, at [32]-[48]).

***Special hearing only to be held where there is significant concern for the defendant's competency***

*Josep Nahak*, 1a/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, at [50]:

A hearing need not be held in every case involving claims of abnormal behaviour or some form of mental disorder. Rather, the level of concern on the part of the Court relative to the defendant's competence must be significant. See *Prosecutor v. Strugar*, supra, at par. 25 stating that there must be "adequate reason" to question a defendant's fitness to stand trial; *Pate v. Robinson*, 383 U.S. 375, 385 (1966) citing "bona fide doubt" about the defendant's competence; *Commonwealth v. Hill*, 375 Mass. 50, 54 (1978) describing the test as whether there exists "a substantial question of possible doubt about the defendant's competence to stand trial".

Note that in the case of *Florencio Tacaqui* no special hearing was held for this purpose, and the matter was merely considered as a part of the Panel's final judgment (20/2001, Judgment, 9 December 2004, pp8-10).

***Standard of proof and mental competence to stand trial***

*Josep Nahak*, 01a/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, at [59]-[60]:

Accordingly, it is not required that a defendant's competence be proved by "a higher standard as is required of the prosecutor when proving guilt in criminal cases."<sup>48</sup> As stated in *Strugar*, the test should be whether the defendant's competence has been established by "the balance of probabilities," which is a lower evidentiary threshold than proof beyond a reasonable doubt.<sup>49</sup> Essentially, this standard requires proof that it is more probable than not that the matter in issue, here the defendant's competence, has been demonstrated. This standard, or others similar to it, have been employed in jurisdictions adhering to the competence criteria adopted by this Court.

There is a customary international norm on this point reflected in the jurisprudence of those states that have directly addressed the issue. Thus, the United States Supreme Court has held that the standard to determine competency to stand trial is not "proof beyond a reasonable doubt" or even "clear and convincing evidence." Rather, the standard of proof need only be by a "preponderance of the evidence." *Cooper v. Oklahoma*, 517 U.S. 348 (1996). See also, United States Federal Code, Title 18, Part III, Chapter 313 Sec. 4241(d) (defendant's competence determined by a preponderance of the evidence). In England, whether or not a defendant is under such a disability of mind as to not be fit for trial shall be determined on the basis of whether it is "more likely than not" that he is not competent by reason of a mental disorder. See Criminal Procedure Act (Insanity and Unfitness to Plead) 1991 (Chapter 25). See also the questions put to the jury as to fitness in the case of *R. vs Young* (13 June 2000). Finally, the Criminal Code of Canada provides that the court must be satisfied "on the balance of probabilities that the accused is unfit to stand trial." Section 672.22.

<sup>48</sup> Id. [*Strugar*] at par. 38.

<sup>49</sup> Id.

## ***Burden of Proof and Mental Competence to Stand Trial***

Josep Nahak, 1a/2004, Findings and order on defendant Nahak's competence to stand trial, 1 March 2005, at [63]:

The Court in Strugar stated, "In the view of the Trial Chamber the burden of proving that the Accused is not fit to stand trial should be on the Defence."<sup>53</sup> It is worthy of note that the Court did not claim that its "view" was a reflection of general or international criminal law on the matter. Indeed, in its citation of authority for its "view" of where the burden of proof "should" lie, the Trial Chamber did not cite international doctrine or jurisprudence on the issue of allocation of the burden of proof in cases concerning competence to stand trial. Rather, the authorities it cited related to the issue of diminished or lack of criminal responsibility in which international law clearly puts the burden on the defendant. Perhaps recognizing that criminal responsibility and competence to stand trial were comparable but not identical issues, the Court noted that its citation of authority was "*mutatis mutandis*."<sup>54</sup>

By the end of its decision, the Trial Chamber had distanced itself from its initial indication that the defendant has the burden to prove he was not fit to stand trial. In its conclusion, the Court stated that it "finds the Accused is fit to stand trial." It then immediately added: "It should be noted that this finding does not depend on the onus of proof."<sup>55</sup> (All emphasis supplied).

By implication, it appears that the Trial Chamber considered all the evidence before it and decided that it was more probable than not that the defendant was competent to stand trial. Consistent with its original allocation of the burden of proof to the defendant, the Court would have been expected to rule simply that the accused had failed to prove his own unfitness and, therefore, the trial would go forward. Rather, in the final instance the Court affirmatively found that he defendant was fit to stand trial, without "depend[ing] on the onus of proof" it had originally required. Essentially, the Court in Strugar concluded that the prosecutor had satisfied a burden of proof that the Court had not actually imposed.

If the reasoning of the Trial Chamber in Strugar appears somewhat opaque, it is likely due to the fact that it appears to be the only reported case at the international level in which the issue of burden of proof on the question of fitness for trial has been raised. In light of this fact, it can hardly be said that the view adopted by Strugar on the question of the burden of proof reflects general and customary international practice that is binding in East Timor. Indeed, even in national jurisdictions that assign a burden of proof on the issue of competence to stand trial such as England and the United States, "there remains no settled view of where the burden of proof should lie." Medina v. California, 505 U.S. 437, 447 (1992).

This Court shall decide the present matter as did Strugar, by evaluating the evidence without depending on any "onus of proof" that might otherwise be imposed on the Defendant.<sup>56</sup> In so doing, the question the Court must address is whether the evidence demonstrates that it is more probable than not that the defendant is fit to stand trial.<sup>57</sup>

<sup>53</sup> Strugar, *supra* at par.38.

<sup>54</sup> "With respective differences taken into account."

<sup>55</sup> *Id.* at par. 52.

<sup>56</sup> This Court notes that the applicable law in East Timor does not appear to impose any burden on a defendant who claims the defense of lack of criminal responsibility by reason of a mental disease or defect under TRCP Se. 19.1(a). The sole guidance provided under the Transitional Rules is the statement that "[t]he panel shall determine the applicability of the grounds for excluding criminal responsibility provided for in the present regulation to the case before it." TRCP Sec. 19.2.

<sup>57</sup> Such an assessment of the evidence, as was performed in Strugar, nonetheless operates as the functional equivalent of placing the burden on the Prosecutor to prove the defendant's

fitness for trial. If so, assigning that burden to the Prosecutor is especially fitting in the present case where it has already been determined that there is sufficient doubt about the Defendant's competence to warrant an evaluation and hearing. Accordingly, even if there exists a "presumption of competence to stand trial" that is akin to the "presumption of sanity," see Delalic, supra at n.52, at this stage and in these circumstances it is appropriate to shift any resulting burden of proof from the Defendant to the Prosecutor. Nor should the allocation of the burden be resolved against the Defendant merely because he filed a motion requesting an evaluation and hearing. In so doing he was not the party who first raised the issue of competence, as even prior to the Defendant's indictment the Prosecutor had concerns about the Defendant's mental condition to the point that had him evaluated. Moreover, it was the Prosecutor who had advised the Investigating Judge at the time of the Defendant's arrest that he was "not normal". In a case where both the Prosecutor and the Defendant have addressed the issue of the Defendant's fitness for trial, there is no reason to impose the burden of proof on the Defendant merely because his lawyer formally filed a motion on the point.

### ***The test for competency***

*Josep Nahak*, 01a/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, at [54]-[56], [131]-[132]:

As stated in the "Interim Order," a defendant is competent to stand trial if he has:

A rational as well as a factual understanding of the charges against him;

A rational as well as a factual understanding of the nature and object of the proceedings against him, and

A present ability to consult with his lawyer and to assist in the preparation of his defense with a reasonable degree of rational understanding.

As noted in the previous "Interim Order," the Defendant in the present case must have both a rational and a factual understanding of the specific charges against him, the process of a trial, the roles of the participants and the consequences of a conviction. This also means that he must have both a rational and a factual understanding of the role of his lawyer in defending him. Additionally, he must have a present ability to consult with his lawyer and to assist in his own defense.

This approach has been adopted in other jurisdictions that employ the competence standards adopted here. Thus, in Strugar, the Trial Chamber concluded that it is necessary "to evaluate the capacity of the accused to exercise his express and implied rights... These capacities identified may be stated shortly as: to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings and to testify."<sup>47</sup> See also Dusky v. United States, 362 U.S. 401 (1960) stating "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as a factual understanding of the proceedings against him"; Drope v. Missouri, 420 U.S. 162 (1975) commenting "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial"; R v. Presser, (1958) VR 45 at 48, stating that a defendant must be able "to understand what he is charged with... to understand generally the nature of the proceeding... to understand what is going on in court in a general sense... to understand... the substantial effect of any evidence against" and "to make his defence... through his counsel." (Smith, J.)

...

This Court concludes that it is not sufficient that a defendant is compliant with the criminal process and in that respect alone is cooperative with counsel. Even the



minimum standard of competence requires that a defendant be able to cooperate with counsel, to inform his attorney concerning the facts of his case and to assist in the preparation of his own defense. Absent the capacity to make rational decisions at trial, a defendant who is simply yielding to the process is likely to do nothing more than to accept the decisions of counsel as being the easiest available alternative.<sup>65</sup> Although a defendant need not be able to go to trial unaided, when a defendant is represented by counsel he must have sufficient present ability to assist his attorney in some meaningful way.

Necessarily, the involvement of counsel will enable a defendant to deal more readily with his limited knowledge of the law and legal formalities. Nonetheless, the major function of counsel is to assist the defendant but not to replace him. "The use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose."<sup>66</sup> Accordingly, the mere fact that a defendant is represented by counsel does not mean, *ipso facto*, that the accused is competent simply because his lawyer is. Moreover, the mere fact that a defendant has the theoretical ability to say yes or no to his attorney does not mean that he has the capacity to make intelligent decisions concerning his own defense. Accordingly, a lawyer's presence in a case, even where he or she serves the best interest of the client, is not a substitute for a defendant being able to instruct his counsel and to actively assist in his own defense. A defendant, who is unable to do more than agree with his attorney because he does not have the capacity to do otherwise, cannot be described as competent, even though represented by counsel.<sup>67</sup>

<sup>47</sup> *Supra* at par.36.

<sup>65</sup> *See*, e.g. *R. v. Miller* [No. 2] No. SCCRM-00-101 [2000] SASC 152 (2 June 2000) at par. 30 (In the course of finding the defendant mentally unfit to stand trial, the Court noted "The accused is capable of exercising a choice as to whether to give evidence by saying yes or no. However he does not have the capacity to grasp the rationale behind making such a decision. The accused would be likely to follow the advice of his solicitor because he is suggestible and it would be the easiest option for him.")

<sup>66</sup> *Strugar, supra* at par. 22.

<sup>67</sup> *See*, e.g. *Regina v. Miller, supra* at par. 30.

*See also Florencio Tacaqui* (20/2001, Judgment, 9 December 2004) in which the Panels did not state the legal test, but in the course of its reasoning concluded that the defendant was fit to stand trial, *inter alia* because (at p9):

At no time Tacaqui appeared out of context or not *compus sui* and, on the opposite and as far as the observation of the Court allows to draw conclusions, he showed, in any occasion, signs of understanding and proportionate reactions to what was happening in court (when addressed, when requested to stand or, on one occasion, to swap his seat with the Prosecutor's assistant.) Eventually, if also the behaviour of the accused is far from normal and the Court is not included to negate the oddity of the extraordinary life Mr. Tacaqui has been living since three years now, there's as well no room to say that he can not have a full understanding of the reasons why he is being tried or of the basic rules of the trial...

### ***Where defendant found incompetent case to be adjourned sine die***

*Josep Nahak*, 01a/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, at [155]:

As previously noted, a determination that a defendant is not competent to stand trial is not a defense to the charges against him. Rather, it operates as a bar to the commencement or continuation of his trial. As noted in RPE Rule 135.4, "Where the Trial Chamber [of the ICC] is satisfied that he accused is unfit to stand trial, it shall order that the trial be adjourned."

***Where defendant found incompetent prosecutor may request reconsideration in the future***

*Josep Nahak*, 01a/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, at [157]-[158]:

A determination that a defendant is not competent to stand trial is made at a particular point in time based on the facts that are then known. As stated in *Strugar*, "the question of fitness to stand trial is, by the nature of the subject matter, one which may possibly change."<sup>73</sup> Accordingly, a defendant's trial can commence even after a period of suspension, should the defendant's unfitness prove to be temporary.

In the present case, should there be a change in the Defendant's condition or should new evidence become available, the Prosecutor may request that the Court review and reconsider the issue of the Defendant's competence to stand trial...

<sup>73</sup> *Supra* at par.27

### **3.6. Plea bargaining and guilty pleas**

Bargaining for guilty pleas in the context of crimes against humanity trials was subject to different considerations from those applying in relation to national criminal proceedings. An implicit, although unstated, aspect of trying international crimes is pursuit of the broader goals of national reconciliation and documentation of the truth regarding international human rights violations. For that reason there are some concerns as to the appropriateness of plea bargaining in crimes against humanity trials.

Nevertheless, admissions of guilt were a feature of trials before the Special Panels from the very outset. Of the 94 persons convicted by the SPSC to May 2005, 21 had pleaded guilty. The Court was initially cautious in its approach with some admissions being rejected, but by mid 2002 it adopted a seemingly more flexible approach.<sup>vii</sup> The Court faced difficulty as most admissions of guilt were accompanied by claims of coercion.<sup>viii</sup> In such cases, the Court was occasionally unable to effectively distinguish duress from superior orders — a distinction that is vital given that the former is a complete defense and the latter may only mitigate sentence. In light of the limited resources available to the serious crimes process, the policy to actively pursue plea agreements seems entirely justified. This can only be the case, however, if safeguards put in place to ensure that an accused's guilty plea is genuine are strictly adhered to.

#### *(i) Applicable Law*

*UNTAET Regulation 2000/30*, s 29A:

29A.1 Where the accused makes an admission of guilt in any proceedings before the investigating judge, or before a different judge or panel at any time before a final decision in the case, the court or judge before whom the admission is made shall determine whether:

- (a) The accused understands the nature and consequences of the admission of guilt;
- (b) The admission is voluntarily made by the accused after sufficient consultation with defense counsel; and
- (c) The admission of guilt is supported by the facts of the case that are contained in:

<sup>vii</sup> See also Linton S. and Reiger C., "The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders" *Yearbook of International Humanitarian Law*, Volume 4, 2001, 13.

<sup>viii</sup> *ibid.*

- (i) The charges as alleged in the indictment and admitted by the accused;
- (ii) Any materials presented by the prosecutor which support the indictment and which the accused accepts; and
- (iii) Any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused.

29A.2 Where the court is satisfied that the matters referred to in Section 29A.1 of the present regulation are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

29A.3 Where the court is not satisfied that the matters referred to in Section 29A.1 are established, it shall consider the admission of guilt as not having been made, in which event it shall order that the trial be continued under the ordinary trial procedures provided in this Regulation.

Section 29A imposes on the Court a strict duty to ensure that the criteria to determine the genuineness of a plea are satisfied. It is clear, however, that this duty will not be discharged simply by applying each of the criterion as a checklist. Ultimately, the overriding concern in applying the section 29A criteria is to ensure that the proceedings are fair.

#### *(ii) Treatment by the SPSC*

Although guilty pleas were frequently raised, the jurisprudence of the SPSC in this area is notable for its paucity. It appeared to JSMP court monitors that the criteria were often applied as a 'checklist' with inadequate consideration of the genuineness of the plea and other relevant factors which might have warranted greater scrutiny of the plea.<sup>ix</sup> For example, in *Agostinho Cloe et al* (4/2003, Judgment, 16 November 2004) the only reference to the guilty pleas of the accused is as follows (at [9]): "According to the guilty pleas of the accused which in themselves were credible and basically without contradictions, the Court is convinced of the following facts..."

There was consequently little examination or variation in the treatment of guilty pleas in judgments. A common formulation was that provided by the court in *Joao Franca da Silva*, 4a/2001, Judgment, 5 December 2002, at [43]-[44]:

As stated earlier, the accused pleaded guilty to the charge set forth in the indictment against him. In accordance with section 29A.1, the Special Panel sought to verify the validity of the guilty plea. To this end, the Panel asked the accused:

- a) If he understood the nature and the consequences of the admission of guilt;
- b) If his guilty plea was voluntarily made, if he did it freely and knowingly without pressure, or promises;
- c) If his guilty plea was unequivocal, i.e. if he was aware that the said plea could not be refuted by any line of defence;
- d) If he had consulted with his legal representative regarding his guilty plea.

The accused replied in the affirmative to all these questions. He further admitted in order to support his guilt plea all the facts of the case as contained in the materials that were submitted to the Court. The Special Panel accepted the guilty plea of the accused. Furthermore, it was found that all the essential facts required to prove the crime to which the admission of guilt relates have been established as required by section 29A.2 of regulation 2000/30.

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<sup>ix</sup> See also JSMP's Lolotoe Report and Justice Update 12/04.

These criteria were expressed in a somewhat different and, it is submitted, more complete and satisfactory manner in *Lino de Carvalho*, 10/2001 Judgment, 18 March 2004, at [27]:

The Special Panel also asked the defendant:

- (a) If his admission of guilt was made voluntarily and after consulting with his lawyers;
- (b) If he had had sufficient opportunity to discuss the case with his lawyers and if he was satisfied with the legal advice and assistance that his lawyers had provided him;
- (c) If he understood the nature and consequences of his admission of guilt;
- (d) If he understood that by admitting his guilt he was giving up any opportunity to present a defense or to have witnesses testify on his behalf;
- (e) If he understood that any discussions between his lawyer and the prosecutor about the case, including the penalty to be imposed, did not bind the court.
- (f) If he was confused in any way by the proceedings and if he had any questions that he wanted ask either his lawyers or the court.

### 3.7. Burden and Standard of Proof

The burden of proof refers to the obligation to prove facts. The standard of proof fixes the qualitative standard which must be satisfied in order to prove facts and thereby discharge the burden.

The obligation to prove all the facts necessary to establish the guilt of an accused lies with the prosecution and is referred to as the legal, or persuasive, burden of proof.

The standard which must be met in order to satisfy the legal standard of proof differs in common-law and civil-law systems. The common law legal standard of proof requires proof of facts beyond reasonable doubt, whereas in civil law systems the burden of proof is that of the 'intime conviction', as referred to in French Code of Criminal Procedure. (Although there is some dispute as to whether there is, in substance, any difference in the evidentiary threshold imposed by the reasonable doubt standard and that required by the intime conviction.) The 'rather loose'<sup>x</sup> flexibility of the civil standard of proof is said to reflect a less restrained process in which the judge freely considers and assesses each piece of evidence. Having considered this evidence in totality, the judge must then arrive at an inner, deep-seated certainty or 'conviction' of the defendant's guilt or innocence to reach a final verdict. Interestingly – particularly in the context of the high proportion of convictions at the SPSC – it has been suggested that high conviction rates are a common feature of civil law systems and that this may, in turn, reflect the application of a lower standard of proof.<sup>xi</sup>

#### (i) Applicable Law

Section 34.1 of the Constitution:

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<sup>x</sup> Antonio Cassese (2003) *International Criminal Law*, Oxford, Oxford, at p425.

<sup>xi</sup> According to Kevin Clermont, 'Standards of Proof in Japan and the United States', (2003) *Cornell Law School Working Papers Series*, Paper # 5, at 4 (fn 12): "...in trying to explain completely the 99% conviction rate [in Japan], one has to wonder whether judges' having to live with a nominally high standard of proof in civil cases has *caused them by habit to dilute the similar standard of proof in criminal cases*, applying it less rigorously than they would if civil; and criminal standards were clearly distinguished as in the United States" (emphasis added).

Anyone charged with an offence is presumed innocent until convicted.

Section 6.1 of the TRCP:

All persons accused of a crime shall be presumed innocent until proven guilty in accordance with the law, the provisions of this and other UNTAET regulations.

Despite strong protection of the presumption of innocence in East Timor, and imposition of the concomitant obligation on the prosecution to prove their case, these laws are silent as to the *standard* which must be met in order to discharge this burden.<sup>xii</sup>

According to the Human Rights Committee, the presumption of innocence implicitly requires that criminal charges be proven beyond reasonable doubt.<sup>xiii</sup> It might on that basis be said that, although the position is evolving and far from settled, there is an emergent standard of proof beyond reasonable doubt in international criminal law.<sup>xiv</sup> This is reinforced by the treatment of the issue by the SPSC.

*(ii) Treatment by SPSC*

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [671]:

The Panel has applied to the accused the presumption of innocence stated in Sect. 6.1 of UR-2001/30, which is accepted as a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the accused, and the Prosecution must do so beyond reasonable doubt.

*Paulino de Jesus*, 6/2002, Judgment (translation from Portuguese), 26 January 2004, at pp7–8:

It is, however, essential to keep in mind that for a democratic state, which upholds the respect for human rights as one of its constitutional principles, the interest that guides a criminal proceeding is both the verification of the culpability of the accused and the irrefutable proof of the innocence of the same. And, for this reason, in any criminal trial, especially when it comes to sentencing the defendant, everything must be presented with clarity, with certitude, and with absolute transparency. Any doubts that may appear to be insurmountable must be treated in favour of the accused, because it is too risky, if not unlawful and unjust, to base sentencing on evidence that is contradictory, feeble, or uncertain, even if the uncertainties are subtle.

It is indisputable that, at the time of the facts related to this proceeding, atrocities and heinous crimes that destroyed many lives and that violated the most fundamental rights of the Timorese people were committed in Timor Leste. But neither the horror nor the atrocities that victimised this brave people can remove from the judge the duty that the doubt, in a criminal proceeding, must be decided *pro libertate*, for, as it has already been concluded by a Brazilian court: “a punished criminal is an example for the delinquents, whereas a convicted innocent constitutes a concern for all the people of

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<sup>xii</sup> By comparison, the Rules of Procedure and Evidence of the ICTR and the ICTY explicitly provide for proof beyond reasonable doubt.

<sup>xiii</sup> See also Richard May & Marieke Wierda, *International Criminal Evidence* (2003) New York: Transnational Publishers, at 121.

<sup>xiv</sup> Antonio Cassese (2003) *International Criminal Law*, Oxford: Oxford University Press, at 427

good-will” (Decisions of the Criminal Jurisdiction Court, Sao Paulo, Brazil, Jutacrim magazine No. 3/460).

*Josep Nahak*, 1a/2004, Findings and order on defendant Nahak’s competence to stand trial, 1 March 2005, at [62]:

As a matter of general and customary international law, “[t]he persuasive burden of proof remains with the prosecution throughout the international criminal trial”.<sup>50</sup> This principle derives from the presumption of innocence, which is contained in the Statutes of both the ICTY and the ICTR as well as the Rome Statute of the ICC.<sup>51</sup> Accordingly, “[t]he onus thus remains with the prosecution to disprove any defense put forward by the excused. The sole exception in the tribunal jurisprudence is in the case of a defense of insanity in which the accused bears the onus of proving on the balance of probabilities.”<sup>52</sup>

<sup>50</sup> May, *International Criminal Evidence*, supra at p. 121.

<sup>51</sup> See, ICTY Statute Article 21(3), ICTR Statute Article 20(3) and ICC Statute Art. 66(1). As with the reference statutes, the Transitional Rules of Criminal Procedure recognize the presumption of innocence but they do not address the issue of the burden of proof on the issue of guilt. See, TRCP Sec. 6.1 “All persons accused of a crime shall be presumed innocent until proven guilty in accordance with law...” Consistent with the prevailing international jurisprudence, the Special Panels ruled that the burden of proof on the issue of guilt is on the prosecutor. Thus in the case of *Prosecutor v. Joni Marques and Nine Others*, Case No. 9/2000 (Decided 11 December 2001) the Court noted that the Transitional Rules provided “no guidance” as to the burden of proof on the issue of guilt. Nonetheless, the Court concluded that the issue was to be resolved “in such a way as will best favor a fair determination of the case and which is consistent with the spirit of the practices of international tribunals and the general principles of law.” *Joni Marques Decision* at paragraph 670, page 349. The Court went on to observe that in light of the presumption of innocence favoring the defendant, “the Prosecution bears the onus of establishing the guilt of the accused, and the Prosecution must do so beyond reasonable doubt.” *Id.* See also, Article 66 of the Indonesian Code of Criminal Procedure, which states, “A suspect or defendant shall not be burdened with the duty of providing evidence.” The “Elucidation on the Law of the Republic of Indonesia No.8/1981 on the Code of Criminal Procedure” states in the commentary on Article 66, “This provision is a manifestation of the principle of presumption of innocence.”

<sup>52</sup> May, *supra* at p.121. ...

But contrast the finding in the case of *Francisco Soares*, 14/2001, Judgment, 12 September 2002, at [33], that in a rape case where the defendant argues that the victim consented, the burden of proving consent lies on the accused:

...the law does not require, at any time, that the victim needs to voice objection, to shout or object. The accused has to establish that the victim consented, and before evidence of the victim’s consent is admitted, the accused shall satisfy the Court that the evidence is relevant and credible (Sect. 34.3 U.R. no 2000/30)...

See also below at p93.

### **3.8. Witnesses & Rules of Evidence**

#### **3.8.1. General rules of evidence**

(i) *Applicable law*

*UNTAET Regulation 2000/30*, s 34:

34.1 The Court may admit and consider any evidence that it deems is relevant and has probative value with regard to issues in dispute.

34.2 The Court may exclude any evidence if its probative value is substantially outweighed by its prejudicial effect, or is unnecessarily cumulative with other evidence. No evidence shall be admitted if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings, including without limitation evidence obtained through torture, coercion or threats to moral or physical integrity.

...

*(ii) Treatment by the SPSC*

***Inclusive approach***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [291]–[293]:

Section 34.1 of UNTAET Regulation 2001/25 is similar with Rule 89 of the Rules of Procedure & Evidence of the ICTY and ICTR respectively. The effect of Section 34.1 is simply that all evidence is admissible provided 2 conditions are satisfied: (1) it is relevant and (2) it is of probative value.

The question of the applicable rules or law of evidence in cases within the jurisdiction of the Tribunal has been decided by the ICTR in the case of *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T. In that case, the Chamber noted that it is not restricted under the Statute of the Tribunal to apply any particular legal system and is not bound by any national rules of evidence. In accordance with Rule 89 of its Rules of Procedure and Evidence, the Chamber has applied the rules of evidence, which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of law.

From the above provision, the Special Panel considers that the rules of evidence applicable are *inclusionary* as opposed to *exclusionary*. Therefore the exclusionary rules relating to corroboration and hear evidence as applied in common law jurisdiction does not apply in proceedings before the Special Panel for serious crimes.

***Reference to internationally recognized principles***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [301]–[302]:

Section 54.5 regulation 2001/25 provides that:

*“On points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply.”*

Internationally recognized principles would include principles of customary international law, provisions of international treaties, jurisprudence from the International Tribunals — ICTY & ICTR and other international tribunals. In addition to the existing jurisprudence from the Special Panel of East Timor on issues of evidence, reference will be made to conventional and customary international law as well as decisions of the ICTR, ICTY and other international tribunals to determine the applicability and scope of certain rules of evidence in the prosecution of crimes falling within the jurisdiction of the Special Panel.

**3.8.2. Competence and compellability of witnesses**

(i) *Applicable law*

UNTAET Regulation 2000/30, s 35:

...

35.2 The following persons are not required to testify: The spouse or partner, the parents, children or relatives of the accused within the second degree.

35.3 The following categories of persons are able to testify only with the consent of the accused:

(a) A duly ordained priest or monk when summoned to testify in relation to information revealed by the accused during the course of religious duties rendered by that priest or monk to the accused;

(b) A lawyer when summoned to testify in relation to information provided by the accused as his or her client; and

(c) A medical professional when summoned to testify in relation to information obtained from the accused in the delivery of his or her services to the accused. For purposes of the present section, the term "medical professional" includes, without limitation, medical doctors, psychiatrists, psychologists, counsellors, and their professional assistants.

35.4 No witness may be compelled to incriminate himself or herself. If it appears to the Presiding Judge that a question asked of a witness is likely to elicit a response that might incriminate the witness, the Judge shall advise the witness of his or her right not to answer the question.

35.5 No witness may be compelled to incriminate the witness' spouse or partner, parents, children, or relatives within the second degree.

35.6 A minor shall not take a formal oath or affirmation prior to testifying, provided that the court is satisfied that the minor understands his or her obligation to testify truthfully.

...

***Close relatives of the victim or accused are competent witnesses***

Carlos Soares, 9/2002, Judgment, 8 December 2003, at p4:

...the credibility of the Prosecution witnesses could not be challenged by the fact that some of them were related to the victim. They were also related to the accused. In the context of East Timor, this is not a general ground to disqualify a witness.

***Close relatives of other alleged perpetrators are competent witnesses***

In the case of *Francisco dos Santos Laku* (8/2001, Judgment, 25 July 2001) an indictment charging Francisco dos Santos Laku, Mario de Carvalho and a third accused man was severed, and subsequently in the trial of Francisco dos Santos Laku the prosecution sought to call as a witness the brother of Mario de Carvalho. The Court accepted the evidence of this witness (and found that his credibility was not undermined by his close family relationship with a coaccused). See at p8:

The eyewitness' family ties with one of the perpetrators do not disqualify his testimony. The alleged interest he could have to negate his brother's criminal liability cannot be presumed after he made it under an oath.

...

Would the eyewitness Ronaldo de Carvalho be interested in the conviction of Francisco Laku, considering that Mario de Carvalho is his brother? The Panel does not see what kind of interest. If a conviction results, that would not provide acquittal or exemption of



responsibility to the witnesses' brother; on the contrary, such testimony enhances the conduct of one of the perpetrators. The fact that the Court granted the Defence with the severance of counts does not mean at all that Armindo de Carvalho would not be prosecuted for the same charges now attributed to the defendant.

***Witnesses who may have participated in crime are not automatically disqualified***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [289]:

The fact that a witness who testified before the court may himself have been involved in crimes which he could be charged, does not automatically make him an untruthful witness. In this regard the Special Panel for Serious Crimes will follow its jurisprudence in the *Joni Marques* case in which the following findings were made: *"Another issue assessed by the Panel was the fact that, on some occasions, a witness came to testify about a fact in which he or she could be charged. The Court deemed that such circumstances did not harm the reliability of those testimonies if they were in accordance with some facts already admitted by the accused and mentioned by other witnesses."*<sup>24</sup>

<sup>24</sup> at paragraph 678

***Co-accused cannot be witness in his own case***

*Umbertus Ena and Carlos Ena*, 5/2002, Decision on the motion of the Defense of Carlos Ena to call the co-accused Umbertus Ena to declare as a witness, 4 December 2003, at [5], [9]–[12]:

The Court believes that an examination of a witness that, being the witness himself an accused, would suffer continual interruptions to avoid self-incrimination and would add very little to the process of finding out the truth considering that the reliability of the testimony could be questioned for the obvious interest in the result of the case.

...

...the rules provide how an accused can present evidence in his or her case, by making a statement according to the relevant sections of the rules. The rules do not consider a case where an accused can be a witness in his own case.

As long as Carlos Ena and Umbertus Ena are charged of the same counts in the same indictment, and that the Court did not decide any severance of the charges, Carlos Ena and Umbertus Ena are co-accused in the same case. One being a witness of the other would mean that the accused is asked to testify on the facts he himself is charged.

There is no need for the accused to testify on the facts he himself and his co-accused are charged. The rules allow him to make a statement during the proceedings, which is admitted into evidence. The law does not allow him to testify under oath in his own case, and concerning the facts he is charged with.

It would be very difficult to protect the rights of the accused if he was asked to testify concerning the facts he is charged with, especially with respect to the right to remain silent and not to make an admission of guilt, to chose not to speak during the proceedings, the right not to be compelled to testify against himself, the right to be free from any form of coercion, etc...

**3.8.3. Contact with witnesses**

*Salvador Soares*, 7a/2002, Judgment, 9 December 2003, at [11]:

...the parties are allowed to communicate with adverse witnesses in order to verify information relating to a case, before presentation of the testimony of a witness. In

doing so, the parties will avoid to make any suggestion of the nature to induce the witness to suppress or deviate from the truth, or in any degree to affect his free conduct when appearing before the Court. After a witness makes an oath to testify before the Special Panel, the Court will decide any issue relating to the possibilities of contact between a witness and one of the parties.

#### **3.8.4. Identification evidence**

##### ***Identification evidence is to be treated with caution***

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [673], [675]–[676]:

The Panel has made a thorough assessment of the evidence of identification during the trial, exercising particular caution in relation to it. The judges are aware that identification evidence involves inherent uncertainties due to the various intricacies in the identification process, which results from the vagaries of human perception and recollection. In searching for the truth, it is insufficient that the evidence of identification given by the witnesses has been honestly given; its reliability must also be evaluated.

...

The Panel is acutely aware of the possibility of error in making an identification later of a person previously unknown to the witness due to the bewilderment in the last days of Indonesian rule in East Timor. Some of the accused certainly changed their appearance since the facts allegedly related to them and at the time of the events used to wear military fatigues during their operations.

Each of the witnesses was asked whether he or she could identify any of the persons in the courtroom. Since many witnesses were villagers who came from and lived in small communities where the accused had their families, this afforded reliability to those testimonies.

#### **3.8.5. Admissibility of hearsay evidence**

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [677]:

...The Panel has assessed that the testimony given about a fact at which the witness was not present did not have sufficient value to override doubt about the facts raised against an accused. If a witness could only state that an accused was involved in a crime because this witness had heard about it, that does not result in certainty about the conduct of an accused.

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [296]:

Hearsay evidence is admissible in proceedings before the Special Panel for Serious Crimes, as already decided by this Court during the course of this trial, when the issue of admissibility of hearsay evidence was raised. It has been decided that “*The only issue that may arise is the weight to be attached to such evidence*”.<sup>27</sup> By doing so, the Court is following the jurisprudence of international tribunals especially the ICTR in *Akayesu*.<sup>28</sup> The Trial Chamber held that hearsay is not inadmissible. In *Tadic* Trial Chamber concluded that the mere fact that particular testimony was in the nature of hearsay did not operate to exclude it from the category of admissible evidence.

<sup>27</sup> Ruling on Defence Motion of Hearsay and Leading Question — 31 October 2002.

<sup>28</sup> Case No. ICTR-96-4-T

### **3.8.6. Admissibility of accused's pre-trial statements**

The admissibility of accused's pre-trial statements to investigators and the investigating judge was an issue that split the opinions of judges on the SPSC. Generally speaking, civil-law systems tend not to admit such statements, and common-law systems do. The TRCP contain attributes of both the civil-law and the common-law systems. In deciding whether or not to admit previous statements, the main considerations of the SPSC have been to guarantee the accused his right to silence whilst acting in compliance with the Rules of Evidence of the TRCP.

#### **Cases where such statements were held to be inadmissible**

When the Panel decided to exclude from the list of substantive evidence the pre-trial statement of the accused, it invariably considered that admitting the statement would amount to a violation of the right to silence of the accused.

*Anigio de Oliveira*, 7/2001, Judgment, 27 March 2002, at p9:

If we understand that the Court may value the defendant's former declarations, even when he is exercising his "right to remain silent", we would be denying the right itself and transforming the defendant into a subject of proof although if he is exercising the same right mentioned before.

We must not forget that the defendant does not have to prove that he did not commit the crime. The proof is to be presented by the Prosecutor and not by the defendant, because he is not a subject of proof.

Furthermore, if we analyze the different consideration given to the witness' declarations and the defendant's one, we arrive to the same conclusion. (expressed in the previous paragraph).

Witnesses, save for the exceptions established by law (article 35.2 and 3 from the Regulation 2000/3), are obliged to declare. The defendant has the right to remain silent. Witnesses may be confronted with their previous declarations. The defendant can not be confronted, with the exception of extreme situations and provided he is not exercising the right to remain silent, so the Court must accept this situation.

The difference of considerations is one more element to conclude in the same way the Court did, being in synthesis "the right to remain silent" part of the status of defendant incorporated to his essential rights, is necessary to ensure a fair trial.

See also *Francisco Perreira*, 34/2003, Decision on the Defendant's Oral Motion to Exclude Statement of the Accused, 17 September 2004 (Judge Rapoza dissenting), in which it was held that, outside the investigative process, only statements made by the accused were admissible.

In *Agustinho da Costa*, 7/2000, Judgment, 11 July 2001, at [22] the Panel held that the pre-trial statement of the accused could not be considered as evidence but could be used as a memory-refreshing document by the accused.

#### **Cases where such statements were held to be admissible**

In contrast, other Panels considered that, acting according to the discretion given by s 34 of the TRCP, the Court may admit any evidence that it deems relevant and has probative value, and therefore it may admit previous statements if they are found to be reliable (in accordance with s 34.2).

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at [26]–[32]:

...most international criminal tribunals have adopted the practice of permitting the use at trial of statements made by a defendant outside the proceedings. Thus, with respect to the use of out-of-court confessions by a defendant, the practice “has been to admit them as evidence against the accused unless the latter can show that they should be excluded due to their involuntary nature.” Richard May, *International Criminal Evidence* (Transnational Publishers, Inc. 2002), at 292.

Indeed, this has been the practice going back to both the Nuremberg and the Tokyo trials at which transcripts or pretrial affidavits in which defendants admitted wrongdoing were admitted in evidence. See *ibid.* at 289–292.

Nor are we persuaded by the argument raised by the defendant that the application of “civil law principles” inescapably leads to the disqualification of statements by the defendant. We need go no further than to consider the practice in the civil law system of Germany. Under German law, when a defendant has admitted his guilt to a police investigator the police officer is allowed to testify at trial concerning the comments of the accused. The German Supreme Court (BGH) has repeatedly emphasized that if such testimony were not permitted, an importance circumstance bearing on the alleged crime would be ignored. See, e.g. BGH St. 3,149; 22, 170.<sup>10</sup>

Aside from the application of general norms of international criminal practice, the Special Panels are governed by the Transitional Rules of Criminal Procedure, which contain a blend of civil law and common law elements. Turning first to the rules for specific guidance, TRCP Section 34.1 states that “[t]he Court may admit and consider any evidence that it deems is relevant and has probative value with regard to issues in dispute” (emphasis added).

This provision is sufficiently broad to permit the use of a prior statement of a defendant at trial. See, e.g., “Decision on the motion of the Prosecution to admit into evidence the suspect’s statement made on 21 August 2002” in the case of *Prosecutor v. Damiao da Costa Nunes*.<sup>11</sup> In that case another panel of this court decided “to admit the suspect’s statement made on 21 August 2002 into evidence according to Section 34.1 of the Rules of Evidence (Regulation 2000/30).”

TRCP Section 34.2 sets out several restrictions on what may be considered as evidence: “The Court may exclude any evidence if its probative value [1] is substantially outweighed by its prejudicial effect, or [2] is unnecessarily cumulative with other evidence. [3] No evidence shall be admitted if obtained by methods that cast substantial doubt on its reliability or [4] if its admission is antithetical to, and would seriously damage the integrity of the proceedings, including, without limitation, evidence obtained through torture, coercion or threats to moral or physical integrity.”

These restrictions thus do not apply to a prior statement of a defendant except in circumstances where the Court determines that the rights of the defendant were not respected, to the point that either (1) there is substantial doubt as to the reliability of the statement or (2) its admission would seriously damage the integrity of the proceedings.

<sup>10</sup> We note that the defendant also cites in support of his position “Portuguese Criminal Procedure and the general penal law procedure of other democratic civil law countries”. The reference to “democratic civil law countries” is likely out of consideration for the fact that prior to the revolution in 1974, the general practice in Portugal (then, as now, a civil law country) was apparently to permit the use at trial of out-of-court statements by defendants. Shortly after the revolution Decree Law 605/75 and, later, Decree Law 377/77 substantially tightened the process for the use of such statements, no doubt in response to perceived abuses by the police establishment of the prior regime. The Portuguese experience thus derives from the peculiar historical context in which the issue was most recently considered. In light of the German practice cited in the text, it can hardly be said that the current Portuguese model is the only one possible in “democratic civil law countries”.

<sup>11</sup> Case No. 01/2003. Motion decided on 26 November 2003. Case decided on 10 December 2003.

*Francisco Perreira*, 34/2003, Judge Rapoza's Dissenting Opinion on the Defendant's Oral Motion to Exclude Statement of the Accused, 17 September 2004:

In determining whether a statement is "reliable" or would "seriously damage the integrity of the proceedings" within the meaning of TRCP Section 34.2, the Court must consider the provisions of TRCP Section 6, which describes the rights of a defendant upon arrest (TRCP Section 6.2) and the rights of a defendant "at every stage of the proceedings" (TRCP Section 6.3).

Accordingly, the Court must determine whether an investigator who took a statement from a defendant respected his right to remain silent. To do this, the Court must decide whether a defendant made the statement after voluntarily waiving his right to remain silent, understanding the nature of that right. If the defendant's rights were respected in this way, then the statement can be considered 'reliable' and not a danger to the integrity of the proceedings under TRCP Section 34.2. In those circumstances, the statement may be considered as evidence.

...

I do not agree with the majority's view that the introduction in evidence of the Defendant's prior statement would violate his right to remain silent at trial. It is clear that if the Defendant chose voluntarily to speak to an investigator on a previous occasion (which we have not yet determined), that fact would not amount to a waiver of his right to remain silent at trial and he may assert that right despite his previous statement. Nonetheless, a defendant who elects to maintain his silence at trial is not insulated from the consequences of his previous voluntary statement.

...

...at the time that such a statement was made, the defendant waived his right to remain silent and spoke without being forced to do so. The fact that the same defendant may subsequently decide to assert his silence must be respected, but there is no compulsion involved in the use of his previous voluntary statement as evidence at trial.

...

I do not agree with the majority when it asserts that the language of TRCP Section 33.4 serves to exclude from evidence at trial previous statements by a defendant to an investigator. Nor do I read the provision as suggesting that no other statements of the accused may be admitted in evidence other than those made before an Investigating Judge.

See also *Damiao da Costa Nunes*, 1/2003, Decision on the motion of the Prosecution to admit into evidence the suspect's statement made on 21 August 2002, 26 November 2003; *Alarico Mesquita*, 28/3003, Interlocutory decision, 18 October 2004.

In *Marcelino Soares*, 11/2003, Judgment, 11 December 2003, [10], the Panel held that it was not necessary to have resort to the transcript of an interview with the accused in view of the more direct evidence heard (relying on s 33.3 UNTAET Regulation 2000/30). In *Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, the Panel held that the pre-trial statements of one of the accused had not been given voluntarily and were therefore inadmissible.

### **3.8.7. Inconsistencies between oral evidence and prior written statements**

#### **Sworn oral evidence will be given precedence over written witness statements**

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [298]–[300]:

In its considerations with respect to the inconsistencies and contradictions between the witness' testimony in court and their previous written statement on the file, the court takes into account that these pre-trial statements were composed following interviews with witnesses by investigators of the Office of the Prosecution. These interviews were conducted in Bahasa Indonesia, Tetum or Bunak through an interpreter. Neither the court nor the parties have access to transcripts of the interviews, but only translations thereof. Time lapse between the statements and the presentation of evidence at trial, the difficulties of recollecting precise details several years after the occurrence of the events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements. Moreover, the statements were not made under solemn declaration and were not taken by judicial officers. The court takes into account that the witnesses who testified before the court in this case have seen atrocities committed against their family members or close friends, and/or have themselves been the victims of such atrocities. The possible traumatism of these witnesses caused by their painful experience of violence. Inconsistencies or imprecision in the testimonies, accordingly, should be assessed in the light of these circumstances, personal background and the atrocities they have experienced or have been subjected to.

In similar circumstances, the Trial Chamber in *Akayesu* held that 'the probative value attached to the statements is, in the Chamber's view, considerably less than direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination.'

This Court will adopt the same approach, and give precedence to the oral testimony of the witnesses and victims before the court.

See also *Domingos Amati and Francisco Matos*, 12/2003, Judgment, 4 March 2005, at pp14–15, where the SPSC found it likely that a witness's written statement had not been properly translated from the Tetum to English.

But compare *Umbertus Ena and Carlos Ena*, 5/2002, Judgment, 23 March 2004, at [66] and [78] and *Florencio Tacaqui* (20/2001, Judgment, 9 December 2004, at pp26-27) where witnesses' failure to implicate the accused in pre-trial written statements raised doubts as to the latter's participation in events notwithstanding inculpatory evidence given at trial by the same witnesses.

#### **Corroboration not required**

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [293]–[295]:

...the exclusionary rules relating to corroboration and hear evidence as applied in common law jurisdiction does not apply in proceedings before the Special Panel for serious crimes.

The fact that under Section 34.3(a) Regulation 2001/25, which is in pari material with Rule 96 ICTY Rules, corroboration of a sexual victim's testimony is not required does not justify an inference that corroboration of witnesses' testimony for other crimes is required.<sup>25</sup>

The principle reflected in the Latin maxim *unus testis, nullus testis*, which requires testimonial corroboration of a single witness's evidence as to a fact in issue, is not applicable in international criminal law as decided in *Tadic* where the Trial chamber was of the opinion that there is no ground for concluding that the requirement of

corroboration is any part of customary international law and should be required by this International Tribunal. In the ICTY case of Aleksovski<sup>26</sup> the court held that neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact. Similarly, the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration. This Therefore the rule as stated in Section 34.1 Regulation 2001/25 runs throughout ie. That the Special Panel admits any relevant evidence, which it deems to have probative value and the Panel, may only exclude evidence if its probative value is substantially outweighed by its prejudicial effect or the need to ensure a fair trial.

<sup>25</sup> Kittischaree, *International Criminal Law*, 1 ed., page 168

<sup>26</sup> IT-95-14/1 "Lasva Valley"

### **3.8.8. Expert evidence**

#### ***Weight to be given to expert evidence***

*Josep Nahak*, 1a/2004, Findings and order on defendant Nahak's competence to stand trial, 1 March 2005, at [120]:

In cases where an expert witness testifies, the court must decide what weight to give to his or her testimony but is not bound by the expert's opinion concerning competence. This is because a decision with respect to competence is a legal and not a scientific determination. Nonetheless, expert opinions that are relevant to material issues should be given due consideration.

#### ***Points of law are outside the realm of expert testimony***

*Josep Nahak*, 1a/2004, Findings and order on defendant Nahak's competence to stand trial, 1 March 2005, at [130]:

The view taken by Dr. Freeman is essentially a legal conclusion rather than a psychological one. Whether or not a lawyer may substitute his competence for that of his otherwise incompetent client is to be determined as a matter of law and is thus not a fit subject for expert medical testimony.

#### ***Authors of Human Rights Reports need not be called to prove their reports***

*Umbertus Ena and Carlos Ena*, 5/2002, Decision on the Defense Motion to Call Authors of Four Reports on Human Rights Situation in East Timor dated 6 February 2004, 12 February 2004, at [16]–[17]:

The Court admits the right of the defense to examine any person with relevant information pertaining to the case, including expert witness, as far as the information is of relevance to the Court, pursuant to Section 34.1 of the Transitional Rules of criminal Procedure (UNTAET Regulation 2000/30 as amended).

But in this particular case, there is no necessity to call the authors of the reports to come to testify on the facts that there was a widespread or systematic attack on the civilian population of East Timor on or around 9 September 1999. Those facts are now well-known facts, which have already been adjudicated by this court in many other cases. According to Art. 184.2 of the Indonesian Code of Criminal Procedure, matters that are generally known need not be proved.

### **3.8.9. Documentary Evidence**

#### ***Filing of materials from Prosecutor's file does not result in prejudice to the accused even though some documents contained in the file may be inadmissible***

*Abilio Mendes Correia*, 19/2001, Decision on the Defendant's Motion to Exclude Prosecutor's 27 January 2004 "Transfer of Material" from Court File, 1 March 2004, at pp2–3:

The Court notes that the filing of witness statements, reports and other materials has long been a routine practice before the Special Panels.<sup>1</sup> Over the life of the Special Panels almost 50 cases have been adjudicated and the Defendant has not cited one instance in which there is evidence that the panel's possible pretrial exposure to material contained in the court file prejudiced the defendant. Nor has he cited one successful appeal in which the Court of Appeal reversed a conviction in whole or in part based on prejudicial pretrial exposure to materials contained in the court file.

...

There are numerous instances in which the Rules contemplate that the Court will be aware of information unduly prejudicial to the Defendant without that knowledge preventing the panel from deciding the case fairly. For example, in circumstances where a Defendant offers an admission of guilt to the Court as part of a guilty plea pursuant to TRCP Sec. 29A.1, the Court may reject the plea and resume the trial without considering the Defendant's admission. Although aware of the Defendant's acknowledgement of culpability before the Court, the panel "shall consider the admission of guilt as not having been made, in which event it shall order that the trial continue under the ordinary trial procedure provided in this Regulation" (TRCP Sec. 29A.3).

Clearly, if three judges who have heard the defendant admit his guilt can then try him under the Rules as if the admission had never been made, the expectation is that the panel members will only decide the case based on the evidence properly before them and not based on any other information.

Similarly, if at trial the Public Prosecutor begins to offer evidence that the Defendant contends will be unduly prejudicial to him, the Court must be advised as to the nature of the presumably prejudicial evidence in order to rule on the question of its admissibility. In these circumstances, the panel hears the offending information and, even though it may decline to permit its use as evidence, it will be aware of its existence. Nonetheless, the panel will continue to hear the case. It is hardly likely that, following exposure to the offending material the panel would recuse itself out of concern that it may no longer be impartial.

The reason for both these examples is simple. A judge who acts as a factfinder is presumed to deliberate solely on the evidence properly before him. Even in common law systems, when a defendant chooses a bench trial over a jury trial, the judge who sits as a finder of fact is allowed broader latitude in what comes before him because it is presumed that, unlike a lay jury, he knows what evidence he may or may not consider in reaching a final verdict. Suggesting that a judge will decide a case, or even form his controlling impressions, on material that never comes before him as evidence is to misunderstand, in a way that a judge never would, his role in the proceedings and the basis for his decision-making.

<sup>1</sup> The judicial system contemplated by the Transitional Rules for Criminal Procedure is largely of civil law origin, although common law influences are evident. In the civil-law tradition, court files routinely contain the information here objected to by the Defendant. We observe that the Rules, although not specifically addressing the practice, do suggest its application by reference to the Prosecutor filing with the indictment both a concise statement of the facts, TRCP Sec. 24.1(c), and a list "describing the evidence that supports the indictment" TRCP Sec. 24.2. There is no indication as to the extent of detail called for by the description. Nor is there a suggestion that it would be improper to provide a "description of the evidence" in the



form of filed copies of the evidence itself. We also note the provision in TRCP Sec. 36.6 that "witnesses shall be examined first by the court" and then by the parties. This practice presumes a prior familiarity with the facts of the case on the part of the Court which is at least on a par with that of the parties.

***UN Reports of the Human Rights Report Situation in East Timor admissible as evidence of contextual elements***

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [679]:

...the reports on the situation in East Timor at the time of the charges alleged by the Prosecution received no challenges from the Defense and can therefore be assessed as important evidence on the political and social background required in relation to the context element for evaluating the offences as crimes against humanity.

*Umbertus Ena and Carlos Ena*, 5/2002, Decision on the Defense Motion to Call Authors of Four Reports on Human Rights Situation in East Timor dated 6 February 2004, 12 February 2004, at [10]–[15]:

The Court, in its decision of 4 December 2003 admitting the four human rights reports presented by the Prosecutor recalled that its interpretation of the concept of evidence was not strict.

The Court, quoting the ICTY decision in the *Celibici* case said that "the threshold standard for the admission of evidence ... should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence gathered"<sup>1</sup>.

The Court continued by saying that given the fact that "the above-mentioned documents were not created to be used before a Court and they were not supposed to support criminal charges, [...] to guarantee a fair trial the facts described in the documents (the widespread and/or systematic violation of human rights occurred throughout East Timor in 1999) should be supported by other evidence, or, in the case the Court decides to establish the existence of a Crime against Humanity on the solely basis of the reports, at least, their probative value should be weighted by the Court in its final decision."

The decision of the Court also stated that the admission of the documents does not mean that the prosecutor does not have to prove the facts contained in the documents fact at trial, nor that the facts cannot be challenged, refuted or qualified by evidence at trial. In conclusion, the Court concluded that for its mere admission the Court did not consider these facts as proven for the case.

Therefore, the Court has already assured the parties that the probative value of the given reports will be prudently weighted by the Court.

<sup>1</sup> Prosecutor v. DELALIC and Others (IT-96-21) "*Celibici case*", ICTY, decision 19 January 1998, § 20. Where it is also specify that "*while the importance of the rules on admissibility in common law follows from the effect which the admission of a certain piece of evidence might have on a group of lay jurors, the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight. As noted above, it is an implicit requirement of the Rules that the Trial Chamber give due consideration to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility. However, this terminology may leave some room for misunderstanding, and could possibly be misperceived as demanding that a binding determination be made at this stage as to the genuineness, authorship or credibility of evidence. For this reason the Trial Chamber wishes to make clear that the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts. Factors such as the authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces of evidence*".

*Mateus Lao*, 10/2003, Interlocutory Decision, undated, at [17]–[20]:

It has been a common practice for the Prosecutor before the Special Panels to submit documentary evidence to support the “widespread and systematic attack” umbrella requirements for crimes against humanity. Typically this evidence consists in four human rights reports that are systematically attached to the indictment.

It has been discussed in the past whether it is necessary to submit and discuss the given reports for every case or if they could be introduced once for all as “adjudicated facts”.

...

That there was a widespread or systematic attack on the civilian population of East Timor in 1999 cannot be denied. On the contrary, it is now a well-known fact of history, which can be ascertained from history books....

*Rudolfo Alves Correia*, 27/2003, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 19 July 2004, at [8]–[9]:

The Prosecutor has ... made an oral motion to admit in evidence four documents, being the Report of the International Commission of Inquiry on East Timor, the Report of the Indonesian Commission on Human Rights Violations, the Report on the Situation of Human Rights in ET presented to the UNSG and the Report of the High Commissioner for Human Rights on the human rights situation in ET.

The Court concludes that pursuant to TRCP Sec. 34.1 these reports are relevant and have probative value with respect to the charges against the defendant, which include the allegation that the murder... was committed as part of a widespread or systematic attack against a civilian population. What weight to give to the factual assertions in those reports will, of course, be for the Panel to decide when it deliberates in this matter.

*Umbertus Ena and Carlos Ena*, 5/2002, Decision on the Prosecution Motion to Admit Further Evidence dated 30 January 2004, 12 February 2004, at [28]–[31]:

The Special Panels, in previous decisions in this and other cases, have already shown that a certain degree of flexibility is allowed in the admission of documentary evidence. The Court considers that often documents are sought to be admitted into evidence not as ultimate proof of guilt or innocence, but to provide a context. The Court can accept this kind of documents, with an eminently non-legal nature, but by their very same nature, their probative value can be questioned and therefore it will be carefully weighted by the Court.

Also the Special Panels have stated that the admission into evidence of this kind of documentary evidence does not mean that for the Court the content of the report is a proven fact. Therefore, the facts mentioned in the report, the methodology used to produce it or the impartiality of its author can be challenge by the parties.

In the present case it seems that the author of the report is unavailable. The Court regrets that the Prosecutor had waited to submit the document and takes note of the complaints of the defense counsel regarding this aspect.

However, the Court will admit the report as documentary evidence and the value of the given report will be carefully considered by the Court.

### **3.8.10. Judicial notice**

#### ***Judicial notice may be taken of well-known facts***

*Umbertus Ena and Carlos Ena*, 5/2002, Decision on the Defense Motion to Call Authors of Four Reports on Human Rights Situation in East Timor dated 6 February 2004, 12 February 2004, at [17]:

...in this particular case, there is no necessity to call the authors of the reports to come to testify on the facts that there was a widespread or systematic attack on the civilian population of East Timor on or around 9 September 1999. Those facts are now well-known facts, which have already been adjudicated by this court in many other cases. According to Art. 184.2 of the Indonesian Code of Criminal Procedure, matters that are generally known need not be proved.

#### ***Judicial notice may not be taken of previously adjudicated facts***

*Umbertus Ena and Carlos Ena*, 5/2002, Decision on the Defense Motion to Call Authors of Four Reports on Human Rights Situation in East Timor dated 6 February 2004 (Dissenting Opinion of Judge Blunk), 13 February 2004:

That the Court has "adjudicated" in a certain way does not signify that a certain fact is proved. However, that there was a systematic attack on the civilian population of East Timor in September 1999, is now a well known fact of history was such an attack, that can be ascertained from history books (cf. for example James Dunn, *East Timor* 3rd edition 2003 page 350 -352), and according to Art. 184.2 Indonesian Code of Criminal Procedure matters which are generally known need not be proved.

*Rudolfo Alves Correia*, 27/2003, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 19 July 2004, at [1]–[7]:

"There is no specific provision in the TRCP to permit this Panel to take judicial notice of facts previously adjudicated in other proceedings. This is unlike the situation in the International Criminal Tribunal for the Former Yugoslavia (ICTY) where Rule 94 specifically allows such a procedure. Similarly, in other jurisdictions where judicial notice of adjudicated facts is allowed, the practice is permitted pursuant to a rule of court. This is the case, for example, in the United States where Rule 21 of the Federal Rules of Evidence allows such a practice.

There is no rule in the Indonesian Code of Criminal Procedure (ICCP) providing for judicial notice of facts previously adjudicated in another proceeding. To the extent that ICCP Article 184 (2) states that "[m]atters which are generally known need not be proved," we conclude that this provision applies only to facts that require no additional proof beyond common observation or the use of logic. Such generally known facts include the fact that Tuesday follows Monday, that the sun is the brightest object in the daytime sky and that one plus one equals two. The evidence offered by the Prosecutor in the present case is of an entirely different character and is not admissible as a matter that is "generally known".

The Panel is aware that in the case of the Prosecutor v. Damaio da Costa Nunes (No. 1/2003), another panel of this Court admitted in evidence facts separately adjudicated in previous cases pursuant to TRCP Sec. 34.1, which broadly permits the Court to "admit and consider any evidence that it deems relevant and has probative value with regard to issues in dispute".

...

...this Court concludes that the application of TRCP Sec. 34.1 as was done in the Damaio da Costa Nunes case remains discretionary with each panel in the

circumstances of the case before it. In this case, the Court declines to admit in evidence previously adjudicated facts pursuant to TRCP Sec. 34.1, especially where more direct evidence is available for our consideration.

### ***Meaning of “well-known facts”***

The judges of the SPSC were split as to what type of information could be taken on judicial notice pursuant to art 184(2) of the Indonesian Penal Code. In some cases it was held that the existence of the context elements of crimes against humanity were “well-known facts” and could be taken on judicial notice. Compare *Rudolfo Alves Correia*, 27/2003, Decision on the Prosecutor’s Motion for Judicial Notice and Admission of Evidence, 19 July 2004, at [2], quoted above, with:

*Mateus Lao*, 10/2003, Interlocutory Decision, undated, at [19]–[21]:

No reason is apparent why the term “matters which are generally known” should be restricted to scientific truths (like  $2 \times 2 = 4$ ) or facts that are very simple to grasp (like Tuesday follows Monday) wherefore this term has to apply to historical matters as well. For example the ongoing occupation of Iraq is a historical fact and therefore generally known matter, so that it need not be proved.

That there was a widespread or systematic attack on the civilian population of East Timor in 1999 cannot be denied. On the contrary, it is now a well-known fact of history, which can be ascertained from history books....

As the code of procedure for the Special Panels (Reg 2000/30) is silent on this issue, Art 184.3 Indonesian Law of Criminal Procedure is applicable according to Sec. 2.3 (c) law 2003/10 (of Timor Leste).

### ***3.8.11. Special rules of evidence in cases of sexual assault***

#### ***(i) Applicable law***

*UNTAET Regulation 2000/30*, s 34.3, s 36.8:

34.3 In cases of sexual assault:

(a) no corroboration of the victim’s testimony shall be required;

(b) consent shall not be allowed as a defence if the victim:

(1) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

(2) reasonably believed that if the victim did not submit, another person might be so subjected, threatened or put in fear;

(c) before evidence of the victim’s consent is admitted, the accused shall satisfy the court, in camera, that the evidence is relevant and credible;

(d) prior sexual conduct of the victim shall not be admitted as evidence.

....

36.8 The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so, the Court shall have regard to all relevant factors, including age, gender, health, religion, and the nature of the crime, in particular, but not limited to, whether the crime involves sexual or gender violence or violence against children.

### *(ii) Treatment by the SPSC*

A concerning aspect of the decision in *Leonardus Kasa* (11/2000, Judgment, 9 May 2001) was the prominence given in that judgment to the accused's argument that he had not committed rape because the complainant consented and had previously had sexual intercourse with him on a number of occasions. This evidence had no bearing on the issue for determination - the Court's jurisdiction - but was mentioned at two different places in the ruling (at pp2 and 3).

While this might not be described as a legal error, because no evidence was admitted in the trial due to the denial of jurisdiction, it was inappropriate. Under the TRCP s 34.3 evidence of claims of consent would have been inadmissible without an *in camera* hearing, and evidence of the complainants past sexual activity would not have been admissible at all. Additionally, the problem was significant exacerbated by panel's naming of the complainant. The latter issue was later rectified by the SPSC and the name has since been removed from all official versions of the judgment.

It seems likely that the panel's conduct in this case amounted to a failure to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses ... in particular, but not limited to, where the crime involves sexual or gender violence ...", as required by s 36.8 of the TRCP.

In the later case of *Francisco Soares* (14/2001, Judgment, 12 September 2002) greater thought was given to the protection of the complainant, with names of witnesses abbreviated and evidence delivered in closed court.

In the only case to try the crime against humanity of rape, *Jose Cardoso*, (4c/2001, Judgment, 5 April 2003) the complainants were referred to throughout the hearing and in the judgment as "Victim A", "Victim B", and "Victim C". The defense objected to the use of the term "victim" and sought a motion that the complainants be referred to as "witnesses". This motion was denied by the SPSC (see at [33]).

## **3.9. Record of proceedings**

### *(i) Applicable law*

UNTAET Regulation 2000/30, s 31:

The court shall make a record of all the proceedings. It shall contain:

- (a) the time, date and place of the hearing;
- (b) identity of judges, parties, witnesses, experts and interpreters, if any;
- (c) a shorthand, stenographic or audio recording of the proceedings. Recorded media shall be used as necessary during further proceedings to produce transcripts and otherwise facilitate the functions of reviewing authorities. Recorded media shall be preserved until the later of
  - (i) six months following the conclusion of all appeals or expiration of the time within which an appeal may be taken; or
  - (ii) six months following the full release of the accused from post-trial confinement;
- (d) any matter that the court so orders or the parties request to be recorded; and
- (e) the decision of the court and, in case of conviction, the penalties.

*(ii) Treatment by the SPSC*

***Transcript made by rapporteur judge to be authoritative in the absence of transcription service***

*Joseph Leki*, 5/2000, Judgment, 11 June 2001, at p2:

The Court also notified both parties that the record of the hearing would be provided by the rapporteur judge, considering that there is no audio or video recording apparatus, no stenographers and no shorthand writer available to the judicial administration in East Timor. The rapporteur judge made a record after summarizing as accurately as possible on a portable computer the statements made by the parties and the questions, orders and decisions of judges during the hearing. The Special Panel decided that this record was authoritative with regard to the one made by the Court clerk.

## **4. SUBSTANTIVE OFFENSES**

### **4.1. Genocide**

Although jurisdiction over genocide is provided for in UNTAET Regulation 2000/15, no charges of genocide were brought before the SPSC.

### **4.2. Crimes Against Humanity**

#### **4.2.1. Chapeau Requirements**

*(i) Applicable law*

*UNTAET Regulation 2000/15, s 5.1:*

For the purposes of the present regulation, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack...

#### ***Nature of crimes against humanity***

*Inacio Olivera et al, 12a/2002, Judgment, 23 February 2004, at pp10-11:*

The experience in East Timor teaches that the concept of crimes against humanity is extremely flexible and apt to be applied, as an elastic fabric, by progressive stretches of the legal terminology, to facts that, if surely dramatic if seen under the magnifying lens of the shocking details of which they are surrounded or of the grief caused to the victims or to the relatives of the victims, may not deserve such a relevant attention if compared to other, much more relevant in size, bloodsheds.

The Court does not refuse the idea, which derives from a well-settled principle stated in several international Courts' decisions, that even a single act as, for example, a single murder or a single act of persecution, may be a crime against humanity, if the conditions and the legal standards to acknowledge the sense of evil that this class of crime expresses are met in the single case: the Court understands that it is not possible at all to determine and state a given figure of casualties above which the multiple murders become, by force of a legal definition, a crime against humanity. But this Court expresses at least the opinion that the concept of crimes against humanity should be used as a last-resort category, needed to express the censure of the international community for atrocities whose magnitude offends the basic values and the sense of humanity of the whole international community and of each member of it."

#### ***The chapeau elements listed***

*Joni Marques et al, 9/2000, Judgment, 11 December 2001, at [634]-[639]:*

The applicable law for the offences alleged to have been committed by the Defendants are provided for in Sect. 5.1 of UR-2000/15. The acts foreseen in that provision of law are deemed as crimes against humanity insofar as they are committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack. The parties agreed on the applicable law. As specified by the parties, Sect. 5 of UR-2000/15 embodies the words which are contained in Art. 7 of the Finalized Draft Text of the Elements of Crimes, issued by the Preparatory Commission for the International Criminal Court.

In accordance with this view and pursuant to many precedents from the International Tribunals, the contents of the context element are:

The requirement of a widespread attack: an attack as the multiple commission of acts with the requirement of inhumane acts<sup>54</sup> as provided in Sect. 5 of UR-2000/15; or

The requirement of a systematic attack: an attack “carried out pursuant to a preconceived policy or plan”<sup>55</sup>

The concept of “any population” as the victims implies a multiplicity of civilians attacked in a widespread or systematic approach. Those hostilities may entail as victims both the members of a resistance movement and/or former combatants, regardless of whether they were in uniform or not, as well as those who were no longer involved in the fighting at the time the crimes were perpetrated<sup>56</sup>.

In conjunction with the aforementioned context element, a crime against humanity is bound to a policy context, which requires that a widespread or systematic attack results from a state or *de facto* power by means of the policy of that entity. It is required that a State or organization which exercises the highest *de facto* authority in a given territory at the relevant time control all the other holders of power and all individuals<sup>57</sup>.

<sup>54</sup> ICTY: Prosecutor v Blaskic, Judgement, ICTY Case n.IT-95-14-T, TCh. I (,3 Mar. 2000, paragraph 202).

<sup>55</sup> ICTR: The Prosecutor v. Bagilishema, Judgement, Case n. ICTR-95-1A-T, T.Ch.I, 7 June 2001, paragraph 77.

<sup>56</sup> ICTY: Blaskic Trial Judgment, supra, paragraph 214.

<sup>57</sup> ICTY: Tadic Trial Judgment, Case IT-94-I, 27 Feb 2001, para. 655. ICTR: Kayishema Trial Judgment, Case 95-1-T, Ch. I, para. 126; Kupreskic Trial Judgment, Case IT-95-16, TCh. II, 14 Jan 2000, para. 551-552, Blaskic Trial Judgment, supra, para. 205; Bagilishema Trial Judgment, supra, para. 78.

See also *Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [304].

*Lino de Carvahlo*, 10/2001, Judgment, 18 March 2004, at p11:

To qualify as a crime against humanity, an offense designated in Sec. 5.1 of U.R. No. 2000/15 must be committed in the following context:

1. There must be an “attack.”
2. The attack must be “widespread or systematic.”
3. The attack must be “directed against any civilian population.”
4. The designated crime must be committed “as part of” such an attack.
5. The perpetrator of a designated crime must have “knowledge of the attack.”

### ***Requirement for a widespread or Systematic Attack***

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [636]-[637]:

The requirement of a widespread attack: an attack as the multiple commission of acts with the requirement of inhumane acts<sup>54</sup> as provided in Sect. 5 of UR-2000/15; or

The requirement of a systematic attack: an attack “carried out pursuant to a preconceived policy or plan”<sup>55</sup>

<sup>54</sup> ICTY: Prosecutor v Blaskic, Judgement, ICTY Case n.IT-95-14-T, TCh. I (,3 Mar. 2000, paragraph 202).

<sup>55</sup> ICTR: The Prosecutor v. Bagilishema, Judgement, Case n. ICTR-95-1A-T, T.Ch.I, 7 June 2001, paragraph 77.



### ***Act may take place as part of country-wide attack***

In the case of *Marcelino Soares* (11/2003, Judgment, 11 December 2003), the accused was charged with crimes against humanity committed in the town of Hera. He sought to argue that there was no systematic or widespread attack in that town at the relevant time. The Court concluded (at [15]):

The claim by the Defense that there was no systematic or widespread attack in the town of Hera in the month of April 1999 is irrelevant, as it is sufficient that the act is part of a country-wide campaign against civilians (ICTY, *Tadic* Judgement, 7 May 1997, para. 649).

### ***Must be a sufficient nexus between the widespread or systematic attack and the crime***

*Anastacio Martins and Domingos Goncalves*, 11/2001, Judgment, 13 November 2003, at pp15-16:

...the killing of the elderly Celestino Correia came as an act of revenge by a group of militia men for the wound inflicted by Correia on another militia member (and son of one of the avengers) in the course of a row. It was a reaction which followed half an hour after the preliminary action. It was a brutal revenge, which took place in the context of a refugee camp, under the control of the militia group, in the immediate aftermath of the deportation... However it was not at all an element of a wider plan, much less a bit of a widespread or systematic attack. The situation followed while the deportation was surely still in place and constituted the scenario of the murder, but it had, in truth, nothing to do with the reason of the crime. In other words, taken for granted that the attack was still ongoing (the Court accepts the notion of including the detention or the limitation of freedom of the displaced people in the concept of attack, as a part – the very last part – of it, for the reason that the displaced people were not free to leave the camps and go back to East Timor), at most it could be taken as a surrounding circumstance but never an element of a supposed crime against humanity, since the murder was triggered and found its justification in the revenge. How could it form a crime against humanity if there's no relation (apart from the contextuality) between the crime and the attack, if the murder doesn't find its root nor its occasion in the execution of the plan of attack or in the need to bring it to further consequences? The single murder must form part of a widespread or systematic attack to be qualified as a crime against humanity: be it specifically planned as such or be it born spontaneously in the course of the attack, it must find in it a justification, a relation and not only an unrelated happening.

*Inacio Olivera et al*, 12a/2002, Judgment, 23 February 2004, at pp12-13:

...if we accept the idea that attack and the murder were impromptu actions, provoked the same day as a revenge, if we share the opinion that there was no plot or plan for them just the day before, it is impossible to conceive it as a part of a widespread or systematic attack. It was not. It was an act that 'came out of the blue'. It was an autonomous act, simply favoured by the presence of an armed militia group but taken out of the contest of the widespread and systematic attack that notoriously flagellated the population of East Timor in 1999.

...

Commonly speaking – in most national jurisdictions and also in the jurisdiction of international tribunals – the reasons to commit a crime are irrelevant, being a well-settled principle of criminal law that what matters is the will to commit a crime, whichever the reasons for it may be.

The motive of the action does not take in this case a greater relevance than it has in any other case but it explains, from a factual point of view, that the episode can not be

read in keeping with the formulaic scenario constantly adopted before the Special Panels of the Dili district court, of the widespread or systematic attack.

But compare *Francisco Perreira*, 34/2003, Judgment, 27 April 2005, at pp21-22:

[The defence counsel] observes that the crime (now we could say the two crimes...) are random and isolated acts, which can't amount to crimes against humanity "because the murder (and attempted murder, we can now add) in this case was not proven to have been committed on a regular basis, or was part of a systematic occurrence". The argument is correct in fact in the sense that it's true that the death occurred at random and in some term is isolated. Yet this doesn't mean that the crime may be subtracted to a wider scenario which encompasses the detention of supporters of the cause of independence and of members of clandestine. The act must be part of a widespread attack in the sense that it is a foreseeable development of said system of repression, established on wide basis: the target was the general population, by hitting those members of the community who were more active. Further more, it cannot pass unnoticed the obvious consideration that the establishment and operation of a detention camp in Zumalai was only a part of the activity of the Mahidi militia. In various occasions through the hearings, witnesses assessed the amount of militia members in the area of Zumalai by the hundreds and spoke of the many duties that they were required to carry out. Witnesses often related (specifically in relation to the count of persecution) to the linkages between militia with the TNI and other administrative or police officers, confirming the climate of impunity which surrounded the activity of the militia. As in other districts (Oecussi and Dili, just to mention the most relevant) around the middle of the month of April was the time of the onset of the activity of the militias and the moment when the militia focused on the repression of campaigners for independence and clandestine supporters of the armed resistance. The orchestration of this campaign was at a national level, was centralized and was not occasional.

The act of Lino Barreto and Francisco Perreira is embedded in this scheme of repression, representing a by product of the said activity. Murder was not the direct aim of the detention; though, it happened in that as a result of the escape attempt.

### ***Type of evidence used to prove widespread or systematic attack***

See, for example, *Mateus Lao*, 10/2003, Judgment, 3 December 2004, at p4:

The evidence for the systematic attack on the civilian population to intimidate supporters of independence from Indonesia after the announcement of the popular consultation on 4 September 1999 and the Sakunar militia operating within the district of Oecussi is based on historical facts which can be ascertained from history books (cf. for example James Dunn, *East Timor* 3rd edition 2003 page 352).

Supplementary use was made of the Executive Summary Report of the Indonesian Commission on Human Rights Violation in East Timor, January 2000,

Identical Letters dated 31 January 2000, from the Secretary General addressed to the President of the General Assembly – A/54/726, S/2000/59,

Note by the Secretary General on the Situation of Human Right in East Timor – A/54/660,

Commission on Human Rights Fifty-Sixth Session Agenda, Items 9 and 14(c) – E/CN.4/2000/83/Add.3,

Report on Human Rights Violations During 1999 in Oecussi District.

### ***Directed Against Any Civilian Population***

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [638]:

The concept of “any population” as the victims implies a multiplicity of civilians attacked in a widespread or systematic approach. Those hostilities may entail as victims both the members of a resistance movement and/or former combatants, regardless of whether they were in uniform or not, as well as those who were no longer involved in the fighting at the time the crimes were perpetrated<sup>56</sup>.

<sup>56</sup> ICTY: Blaskic Trial Judgment, *supra*, paragraph 214.

### ***With Knowledge of the Attack***

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [640]-[642]:

About the individual act and the context element (widespread or systematic attack), it has already been stated that “it is sufficient to know how the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity”<sup>58</sup>. The perpetrator needs to have knowledge of the attack.

The mental element (*mens rea*) is that the perpetrator, or aider, or abettor or contributor knowingly took the risk of participating in the implementation of that context<sup>59</sup>. The perpetrator *knowingly* performed his acts in the context of a widespread or systematic attack<sup>60</sup>. The perpetrator needs only to be aware of the existence of an attack and the risk of the existence of some circumstances of the attack, regardless of his or her knowledge about the details.

His or her knowledge about the policy behind the attack must exist in the perpetrator's mind, at least taking the risk that he may be performing his conduct in the context of a policy upheld by a State or organization<sup>61</sup>.

<sup>58</sup> ICTY: Kunarac Trial Judgment, Case IT-96-23 and IT-96-23/1, T.Ch II, 22 Feb. 2001, para.419.

<sup>59</sup> ICTY: Blaskic Trial Judgment, *supra*, para 251.

<sup>60</sup> ICTY: Kordic Trial Judgment, IT-95-14/2, TCh.III, 26 Feb. 2001, para. 185-187.

<sup>61</sup> ICTY: Kupreskic Trial Judgment, *supra*, para. 556.

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [451]:

In this regard, it should be remembered that the crime of rape charged as a crime against humanity incorporates into the definition of rape what has been termed as “the chapeau elements” of the definition of crimes against humanity. One of these chapeau elements is that the perpetrator has the appropriate *mens rea*. Thus in addition to being satisfied of the fact that the perpetrator had the requisite *mens rea* of the crime of rape – the Court must also be satisfied that the perpetrator knew there is an attack on the civilian population and that his acts comprise part of that attack. It may be enough that the perpetrator takes the risk that his acts are part of the attack.<sup>73</sup>

<sup>73</sup> Prosecutor v. Kunarac, Case No. IT-96-23, Judgement, (22 February 2001) para 434.

### **4.2.2. Crime against humanity of murder**

#### ***(i) Applicable law***

UNTAET Regulation 2000/15, s 5.1

For the purposes of the present regulation, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

#### **(a) Murder;**

(ii) *Treatment by SPSC*

**Position in customary international law**

Jose Cardoso, 4c/2001, Judgment, 25 May 2001, at [273]:

The crime against humanity of murder was included in the IMT Charter, the Tokyo Charter, Control Council Law No. 10, and is also mentioned as such in the ICTY and ICTR Statute.<sup>15</sup> This crime is without a doubt part of customary international law.

<sup>15</sup> Darryl Robinson, *The Elements of Crimes Against Humanity*, in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Roy S. Lee, ed., 2001)... at 80-86.

**Elements of murder listed**

Joni Marques et al, 9/2000, Judgment, 11 December 2001, at [643]-[648]:

The Panel, having assessed the shortcomings in the definition of murder as a crime against the humanity in Sect. 5.I(a) of UR-2000/15, is persuaded of the benefit of the guidance provided by the Preparatory Committee for the Rome Statute of the International Court<sup>62</sup> and the precedents from the International Tribunals,<sup>63</sup> with the remarks foreseen in Sect. 18 of UR-2000/15.

The Panel accepts the opinion of the parties in relation to the general *mens rea* provided by Sect. 18 of UR-2000/15. For this reason, an accused charged with murder as a crime against humanity shall have his or her *mens rea* deemed by this Panel insofar as he or she has shown intent to cause the death of the victim or be aware that it will occur in the ordinary course of events. Accordingly, the Panel lists the four requisite elements of murder as a crime against humanity:

The victim is dead.

The death of the victim is the result of the perpetrator's act.

The act must be a substantial cause of the death of the victim.

At the time of the killing, the accused must have meant to cause the death of the victim or was aware that it would occur in the ordinary course of events.

<sup>62</sup> Under (Sect. 7.1.a) of ICC Statute under the explanation by the Preparatory Commission, these are the elements of murder as a crime against humanity: (a) the perpetrator killed one or more persons; (b) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; (c) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."

<sup>63</sup> ICTR, in the Rutaganda Trial Judgement (*Case ICTR-96-3-T, T.Ch. I, 6 Dec. 1999, para.80*), *inter alia*, established the following elements: (a) the victim is dead; (b) the death resulted from an unlawful act or omission of the accused or a subordinate; (c) at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.

Lino de Carvalho, 10/2001, Judgment, 18 March 2004, at pp12-13:

This definition of murder as a crime against humanity described in *The Public Prosecutor v. Joni Marques* is adopted in this case as well. Although there is some redundancy between paragraphs 646 and 647 of the decision, each deals with a different aspect of the same issue. Paragraph 646 asserts that there must be a causal relationship between the perpetrator's act and the victim's death. Paragraph 647, on the other hand, states that the perpetrator's act must be a "substantial" cause of the victim's

death. We take this to mean that the perpetrator's act may not be too remote as a cause, but must be one that proximately caused the victim's demise.

Thus, the requirements for murder as a crime against humanity have been satisfied in the present case, as:

- a. The victim is dead;
- b. The perpetrator's act was a substantial cause of the victim's death; and
- c. The perpetrator intended to cause the death of the victim or reasonably knew that his act was likely to result in the victim's death.

### ***No requirement of premeditation***

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [649]:

...in a murder, as a crime against humanity, there is no requirement of premeditation as the mental element for murder as a crime pursuant to Sect. 340 of Penal Code of Indonesia (KUHP). The *mens rea* is restricted to the deliberate intent to cause the death of the victim or that such result would occur in the ordinary course of events.

*Agostinho Cloe et al*, 4/2003, Judgment, 16 November 2004, at [15]:

"Unlike the crime of Murder under the national law of most countries, the Crime against Humanity of Murder under international law does not require deliberate intent or premeditation (ICTR, *Akayesu*, Judgement 2 Sept. 1998, para. 589-590; ICTY, *Blaskic*, Judgement, 3 March 2000 para. 217; Special Panels, *Marques* Judgement, 11 Dec. 2001 para. 649). It is sufficient that the perpetrator intended to cause grievous bodily harm with the knowledge that it was likely to cause death, which in this case each accused was aware of."

See also *Francisco Pedro*, 1/2001, Judgment, 14 April 2005, at [14].

But note also the approach in *Anastacio Martins and Domingos Gonsalves*, 11/2001, Judgment, 13 November 2003, at p15 where the Court held that because the motivation for the killing of the victim was personal revenge, there was insufficient relationship with the concurrent widespread or systematic attack against a civilian population.

### ***Where there is more than one possible cause of death***

*Marcelino Soares*, 11/2003, Judgment, 11 December 2003, at [12]-[13]:

...the Court is convinced that Luis died during the night after the arrest due to the severe wounds inflicted by the Indonesian TNI and by the Timorese TNI under the command of the accused. Since the amount and the severity of wounds inflicted by the Timorese TNI were a substantial cause for the death, the wounds inflicted by the Indonesian TNI are not in the nature to sever the chain of cause and effect.

Thus the death resulted from an omission by the accused to take measures against his subordinates to prevent them from inflicting severe wounds on the victim. Even if he had reason to assume that the Indonesian TNI were intent on inflicting severe wounds, and if he had reason to respect these soldiers (because they unlike his subordinates were armed), he could have ordered his men not to inflict wounds of such severe nature that they were likely to cause death.

### ***Where two independent actions without common design breaks chain of causation***

*Francisco Pereira*, 34/2003, Judgment, 27 April 2005, at pp20-21:

It has to be underlined that the two wills (in Lino Barreto and in Francisco Perreira) arose independently, with no relation between each other: the deliberation to kill immediately followed the words of Paulino and the execution of the deliberation followed suit.

Again, no shared intention, no accession of the will of one to the action of the other.

The two independent wills prompted two independent actions aimed at the same end, the death of the victim.

As said before, the first one to strike and the only one to cause the death of Alvaro Tilman was the gunshot.

...

On the face of this judicial reconstruction of the facts, the issue of the anteriority or posteriority of the sword strike to the gunshot becomes almost irrelevant: since the strikes stemmed from two independent actions of which the gunshot was the deadly one, if also we admit that the sword swing hit the body of Alvaro Tilman first and the gunshot second, we necessarily have to conclude that the surpassing causality of the gunshot has stopped the action of Francisco Perreira at the level of attempt of murder. If vice versa, the action actuated by Francisco Perreira ended in *corpore vili* and was therefore unable to change the chain of causality, of the action that had preceded it.

In the end Francisco Perreira's action is to be qualified as an attempted murder. A second crime, different from the homicide committed by Lino Barreto: two different chain of causality, one object, one crime accomplished and the other attempted.

#### **4.2.3. Crime against humanity of extermination**

Five defendants were charged with the crime against humanity of extermination before the SPSC, but none were convicted. Each was charged in relation to the systematic murder of at least 47 young civilian men at Teolassi on 10 September 1999. In two cases, the charges were dropped as part of a plea bargain. (See X, 4/2002, Judgment, 2 December 2002, and *Miguel Mau*, 8/2003, Judgment, 23 February 2004.) In *Florencio Tacaqui* (20/2001, Judgment, 9 December 2004) the panel held that the accused had not been present at the scene of the massacre. In the final case, *Januario da Costa and Mateus Punef* (22/2003, Judgment, 27 April 2005) it was held that the crime committed by the accused did not amount to extermination.

##### *(i) Applicable law*

*UNTAET Regulation 2000/15*, s 5.1(b), 5.2(a):

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

...

(b) Extermination;

...

5.2 For the purposes of Section 5.1 of the present regulation:

(a) Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population...

(ii) *Treatment by the SPSC*

**Magnitude of the crime**

*Januario da Costa and Mateus Punef*, 22/2003, Judgment, 27 April 2005, at p7:

What happened in Teolassi was an enterprise which deserves a different qualification, in the opinion of the Court, than that chosen by the Prosecutor: the charge of extermination appears to be an excessive label for the criminal activity committed by the militia on the 10<sup>th</sup> September 1999. Of course, it's not intention of the Court to downsize the responsibility of the accused or negate that the crime was of a magnitude that does not allow parallels with ordinary criminal activity; however, keeping in mind that the accused can only be blamed in part in relation to criminal activity, the Court thinks that it is more appropriate to maintain it in within more modest and traditional boundaries.

**4.2.4. Crime against humanity of deportation or forcible transfer**

Forcible transfer of large sectors of the population within East Timor and to neighbouring West Timor was a feature of the violence of 1999. Twelve defendants were brought to trial on charges under this section, including four defendants in the *Los Palos* case. Eight were convicted, charges were withdrawn against one defendant, and three were acquitted for lack of evidence.

(i) *Applicable law*

*UNTAET Regulation 2000/15*, s 5.1(d), s 5.2(c)

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

...

(d) Deportation or forcible transfer of population;

....

5.2 For the purposes of Section 5.1 of the present regulation:

(c) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

(ii) *Treatment by the SPSC*

**Position in customary international law**

*Benjamin Sarmiento and Romeiro Tilman*, 18/2001, Judgment, 16 July 2003, at [59]:

The Special Panel therefore has to decide whether the specific Crimes Against Humanity enumerated in the paragraph above (and with which the accused are charged) are considered to be customary international law. Both offences are included in the IMT Charter, in the Statutes of the ICTR and the ICTY and in the Statute of the ICC. It is therefore clear that Murder as a Crime against Humanity and Deportation or Forcible Transfer of population as a Crime against Humanity, are part of customary international law.

See also *Joao Sarmento*, 18a/2001, Judgment 12 August 2001, at [45].

### ***Elements of forcible deportation or transfer listed***

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [650]-[655]:

The Panel reiterates the shortcomings in UR-2000/15 about the definition of the requisite elements for the crime of deportation or forcible transfer. Accordingly, the Panel accepts the rules of the draft of the ICC Statute, which are substantially grounded on the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts), as follows:

The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

Such person or persons were lawfully present in the area from which they were so deported or transferred.

The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

*Benjamin Sarmento and Romeiro Tilman*, 18/2001, Judgment, 16 July 2003, at [133]:

The same ICTY sentence, when examining the facts, establishes what are the elements of the crime common to both the deportation and the transfer of population. The two elements are

- a) the unlawfulness of the transfer
- b) the compulsory nature of the transfer.

### ***Difference between deportation and forcible transfer of population***

*Benjamin Sarmento and Romeiro Tilman*, 18/2001, Judgment, 16 July 2003, at [127]:

...The double formulation of the criminal action refers only to the international or national character of the displacement: deportation is the forced removal of people from one country to another, while population transfer applies to compulsory movement of people from one area to another within the same state. Under international humanitarian law the main consequence of the distinction refers to the status that the moved persons obtained: victims of deportation qualify as refugees while victims of transfix of population are called "internally displaced persons" or IDPs.

### ***Forced movement of population to West Timor in 1999 was deportation***

*Benjamin Sarmento and Romeiro Tilman*, 18/2001, Judgment, 16 July 2003, at [138]:

Since East Timor became independent on 28<sup>th</sup> November 1975 according to the Preamble and Sect. 1.2 Timorese Constitution, that part of the population which was transferred to Indonesia was moved to a different country and therefore suffered Deportation.



### **Requirement that the transfer be 'unlawful'**

*Benjamin Sarmiento and Romeiro Tilman*, 18/2001, Judgment, 16 July 2003, at [134]:

The requisite of the "unlawfulness of the transfer" refers to the fact that not every transfer of population can be considered illegal. As already mentioned, Article 49 of the Fourth Geneva Convention and Article 17 of Protocol II allow total or partial evacuation of the population " *if the security of the population or imperative military reasons so demand*". Therefore the Panel, when facing a deportation or a forcible transfer of population must assess if the motif of the transfer was to protect the population or there was an imperative military reason.

### **Compulsory nature of the transfer**

*Benjamin Sarmiento and Romeiro Tilman*, 18/2001, Judgment, 16 July 2003, at [135]-[136]:

The element of the "compulsory nature of the transfer" implies the need for the Panel to determine whether the population was obliged to move or not. It is important to bear in mind that, as explained by the Preparatory Commission for the International Criminal Court, *the term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment*<sup>13</sup>.

It is worth noticing that the definition of Deportation or Forcible Transfer of population used in the UNTAET Regulation 2000/15 is the same contained in the Statute of the International Criminal Court (the ICTY and ICTR Statutes did not contain such a definition).

<sup>13</sup> Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p.11.

### **Where forced transfer of population is a step in the execution of a crime**

*Januario da Costa and Mateus Punef*, 22/2003, Judgment, 27 April 2005, at pp14-15:

...if it were proved that the flow of people from the villages target of the attack had be a forced one: we shouldn't run to the conclusion that it constituted an autonomous crime. If, as stated before, the murders which took place in Teolassi were the epilogue of a program which had been planned in advance, it should rather be concluded that the forced movement of population from the villages was a step in the execution of the final crime. The beating of the prisoners in Imbate or their tying up or their forced march do not amount to autonomous sources of criminalization (respectively for maltreatments and deprivations of liberty) because these crimes are lost in the murder which ultimately finished the act. As such, in relation to the forcible transfer of people from one place to the other, the violation vanishes in the greater evil of the murders, which followed. The alleged deportation was not such an extreme and barbaric factor and didn't last so long to amount to a further violation of criminal law.

#### **4.2.5. Crime against humanity of imprisonment**

The cases of six defendants charged under this section reached trial. Two defendants pleaded guilty to the charges against them (*Joao Franca da Silva*, 4a/2001, Judgment, 5 December 2002, and *Sabino Gouveia Leite*, 4b/2001, Judgment, 7 December 2002), and two defendants had the charges withdrawn as part of a plea bargain (*Benjamin Sarmiento and Romeiro Tilman*, 18/2001, Judgment, 16 July 2003). One accused was acquitted of one of the charges against him and convicted of the other three (*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003), while the other accused was convicted of the one charge against him (*Florencio Tacaqui*, 20/2001, Judgment, 9 December 2004). The section was also

discussed in cases involving persecution charges based on acts of imprisonment or other severe deprivation of physical liberty (see *Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004; *Francisco Perreira*, 34/2003, Judgment, 27 April 2005, at pp27-28; *Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at [150]-[153]).

*(i) Applicable law*

*UNTAET Regulation 2000/15*, s 5.1 (e):

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

...

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

Torture;

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels;

Enforced disappearance of persons;

The crime of apartheid;

Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

***Position in customary international law***

*Joao Franca da Silva*, 4a/2001, Judgment, 5 December 2002, at [90]-[92]:

The IMT Charter and Tokyo Charter do not enumerate imprisonment among the crimes against humanity that can be prosecuted, but Control Council Law No. 10 as well as the ICTY and ICTR Statutes do.... Although the customary international law character of imprisonment seems to be undisputed, this might not be true for "other severe deprivation of physical liberty in violation of fundamental rules of international law."

The 1998 Diplomatic Conference in Rome, which concluded the ICC Statute, added the term "other severe deprivation of physical liberty, "for greater certainty."...

In *Krnjelac*, the ICTY Trial Chamber noted that the right of an individual not to be deprived of his or her liberty arbitrarily is also enshrined in a number of human rights instruments, both international and regional.... However, the Chamber noted that as these instruments show, this right does not constitute an "absolute right", and it can be restricted by procedures established by law.

***Elements of imprisonment or severe deprivation of liberty listed***

*Joao Franca da Silva*, 4a/2001, Judgment, 5 December 2002, at [133]:

...the PCNICC's Elements of Crimes provides the following elements for the Crime Against Humanity of ... imprisonment or other severe deprivation of physical liberty:

1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Followed in *Sabino Gouveia Leite*, 4b/2001, Judgment, 7 December 2002, at [152] and *Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [356].

### ***Assessing the gravity of the conduct***

*Sabino Gouveia Leite*, 4b/2001, Judgment, 7 December 2002, at [153]:

...taking into account the length of the detention, the numbers of people detained and other factors accompanying the detention such as torture or beatings of some of the detainees.

*Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004, at [87]-[88]:

...the Court does not conclude that every abduction can necessarily be considered as a form of severe deprivation of liberty within the terms of Section 5.1(e). The severity of the deprivation is a matter that has to be evaluated in each case in order to assess if the given conduct falls within the concept of severe deprivation of liberty.

...the severity of the deprivation of liberty should be measured, not only by the length of time of the said deprivation (in this case relatively short) but also by the conditions in which this deprivation of liberty takes place.

### ***Relevance of other international norms regarding imprisonment***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [362]:

*The gravity of the conduct was such that it was in violation of fundamental rules of international law.* Section 5.1(e) requires that the imprisonment or severe deprivation of liberty be in violation of fundamental rules of international law to constitute an enumerated offence. The Court agrees with the prosecutor that the accused violated the following fundamental rules of international law:

International Covenant on Civil and Political Rights<sup>43</sup>, particularly in its Articles 9 and 10...

...

Universal Declaration of Human Rights... [Articles 3, 7, 9, 12, 30]

<sup>43</sup> G.A. res. 2200A(XXI), 21 U.N. GAOR.Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar.23, 1976.

### ***Factors taken into account in assessing gravity***

- Length of detention

Detention for six days in relatively good conditions was not enough to constitute crime – *Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [358], [359]:

“...deprivation of physical liberty for no more that a couple of days in generally good conditions of detention would not be severe.”

- Conditions in which deprivation of liberty takes place  
Illegality of roadblock and extreme violence with which detention executed qualified the detention as severe – *Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004, at [88].
- Conditions of detention  
Locking victims in a small room in unhygienic conditions, without proper sanitation facilities or food and water – *Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [360], [361].  
The infliction of severe beatings was relevant in determining that imprisonment was severe – *Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at [152]- [153].
- The number of victims are relevant to the gravity of the deprivation of liberty: *Florencio Tacaqui*, 20/2001, Judgment, 9 December 2004, at p22:

On the severity of the deprivation of liberty the main element in order to evaluate the behaviour of the perpetrators of the crime in this case is the number of the victims.

The Court acknowledges that, compared with other events qualified as crimes against humanity brought before international tribunals or even previous cases judged by the Special Panels of the Dili District Court (e.g. in the “Lolotoe Case”), the illegality described in count 1 appear to be modest and not largely extended in time (in the so called “Lolotoe Case” the detention of the victims had lasted around one month and an half); though what matters and is enough to bring the deprivation of personal liberty to such a degree of hardship to meet the standard of “severe” required by the norm is the width of the behaviour which affected a vast number of CNRT members or sympathizers in Passabe and surroundings. ...

***Severe deprivation of liberty can be enforced by threat of violence rather than physical bonds***

*Florencio Tacaqui*, 20/2001, Judgment, 9 December 2004, at pp21-22:

From the description of facts received by the Court, it's fully evident that no imprisonment took place at any stage. The word itself brings etymologically the unavoidable idea of seclusion in jail or in a detention camp, with some sort of physical hurdle to be overcome to regain freedom, which, naturally didn't occur or at least was never proven nor alleged in the case. On the other hand, the condition of constant restriction and limitation of movement of a relevant number of opponents obtained through violence and fear must be held to amount to a form of severe deprivation of liberty included in the relevant norm, as one of the two way to commit the crime described in Section 5 letter e. The conditions, in which the victims were held under the impending menace of physical grief, deprived them for almost a week of their autonomy of movement.

**4.2.6. Crimes against humanity of torture<sup>i</sup>**

Torture was widespread in East Timor prior to and during 1999, amongst other things, as a tool of state terror, to coerce co-operation from victims, to punish, to gather information, to

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<sup>i</sup> For a more comprehensive analysis of the treatment of torture by the SPSC, see *JSMP Report*, ‘Torture and Transitional Justice in Timor Leste’, April 2005.

conceal evidence and to undermine political opposition. Accordingly, 25 of the 95 indictments issued by the SCU contained charges of torture. In total, 10 of these indictments were brought to trial which led to the conviction of 17 defendants for the offense of torture.

Under UNTAET Regulation No. 2000/15 there are potentially three separate crimes of torture prosecutable before the Special Panels: autonomous torture per se (*UNTAET Regulation 2000/15*, s 7.1), torture as a war crime (*UNTAET Regulation 2000/15*, s 6.1(a)(ii)), and torture as a crime against humanity (*UNTAET Regulation 2000/15*, s 5.1(f)). All counts of torture brought before the SPSC were charged as a crime against humanity.

Before considering the Special Panels' treatment of torture as a crime against humanity, it is worth noting the legislative definition of torture as an autonomous crime under the serious crimes legislation. Section 7.1 of UNTAET Regulation 2000/15 establishes torture as an autonomous offense in the following terms:

...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Unlike the Torture Convention definition, s 7.1 does not require that torture be linked to an official or a person acting with official approval. This is consistent with the jurisprudence of the ICTY.<sup>ii</sup>

*(i) Applicable law*

Torture as a crime against humanity has an even broader definition in that it does not require the act to be conducted for a specific purpose, or that the perpetrator has official standing or support, although the chapeau requirements must still be satisfied of course:

*UNTAET Regulation 2000/15*, s 5.1 (f), s 5.2

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

...

(f) Torture;

...

5.2 For the purposes of Section 5.1 of the present regulation:

(d) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

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<sup>ii</sup> ICTY: *Prosecutor v Kunarak, Kovac & Vukovic*, Trial Judgment, IT-96-23&23/1, (22 February 2001), at [148].

### ***Elements of torture listed***

The SPSC “does not require that there be a specific purpose, or that the offense be committed by or at the acquiescence of [one]”. Under Section 5, the constituent elements of torture as a crime against humanity, in addition to the chapeau requirements, are as follows:

- The infliction, by act or omission, of severe pain or suffering, whether physical or mental;
- The act is inflicted on a person under the control of the accused; and
- The act or omission is intentional.

### ***Acts held to amount to torture***

- Severe beating of victim with a stick and an iron rod: (*Rusdin Maubere*, 23/2003, Judgment, 5 July 2004).
- Victim was stabbed and his head battered with a rock. He subsequently died from severe injuries (*Salvador Soares*, 7a/2002, Judgment, 9 December 2003).
- Psychological violence (Cutting the victim’s hair or by physical maltreatment). The accused beat the victim which resulted in psychological or physically suffering. The victim was also stabbed in his mouth, punched and hit with iron bar. The existence of *mens rea* was satisfied by evidence that the accused engaged *deliberately in* torture: *Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [707]:

...The cutting of hair as an isolated act can not itself be considered as torture, but, under the victim’s circumstances and together with other maltreatments inflicted to obtain information from the victim, the cutting must be assessed as an act of torture, since it was a way to humiliate the victim and also to threaten him. Joni used a knife, an instrument generally applied not to cut hair, but to harm and to kill.

### ***Acts aimed at causing death do not amount to torture***

*Salvador Soares*, 7a/2002, Judgment, 9 December 2003, at [223]:

The Court believes that torture and murder can appear together in certain cases (for example when the victim dies as a result of the pain or suffering provoked by the torture, or when the victim is first tortured and secondly executed) but considers that an action primarily aimed at causing the death of a person cannot be regarded as torture for the mere reason of being painful or unnecessarily painful. If such an idea would be admitted almost every murder could be considered torture.

Similarly, in the case of *Rusdin Maubere* (23/2003, Judgment, 5 July 2004), the defendant was indicted for the torture and forced disappearance of Andre de Oliveira. It was proven in the court that Oliveira sustained serious injuries and consequently he died on the night of the attack. It was clear from the manner of Oliveira’s death, according to the Panel, that the defendant intended to kill, rather than torture him. Although the Panel did not expressly follow the reasoning of the *Savador Soares* precedent – in which the determinative factor was the intention of the accused – the same result was effectively reached, with the torture charge not considered by the court (see pp16-17).

That approach should be contrasted with the comments of the Panel in *Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004, at [103]-[104]:

The Special Panels, following the interpretation of the ICTs believe that no specific intention is needed for the crime of torture as a crime against humanity. Under Section 5, the only elements of the crime, beyond the umbrella requirements for every crime against humanity would be:

- i) *The infliction, by act or omission, of severe pain or suffering, whether physical or mental.*
- ii) *The act is upon a person under the control of the accused.*
- iii) *The act or omission must be intentional.*

Therefore it is enough to demonstrate that the accused have willingly participated in the severe beating of the victims, in the case a beating of such severity as to provoke them to bleed, to faint and probably die, being restrain by ligatures for part of the time, therefore causing an intentional physical suffering for their conducts qualify as a torture under the meaning of the term in the context of crimes against humanity”.

However in this case the Panel was not required to apply this view in the context of acts intended to cause death.

#### **4.2.7. Crimes against humanity of rape and sexual violence**

The wording of this section follows that of the *Statute of the ICC*. While rape has long been recognized as a crime against humanity, *the Statute* specifically encompasses other forms of sexual violence, and was the first international treaty to refer to the crimes of forced pregnancy and sexual slavery.

Six indictments charging under this section were filed before the SPSC, although these included charges of rape as a crime against humanity only.<sup>iii</sup> One of those indictments resulted in a trial, and the conviction of the accused for rape as a crime against humanity.<sup>iv</sup>

##### *(i) Applicable law*

UNTAET Regulation 2000/15, s 5.1(g), 5.2(e):

UNTAET Regulation 2000/15, s 5.1 (e):

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

...

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

...

5.2 For the purposes of Section 5.1 of the present regulation:

...

(e) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

#### **Recognition in customary international law**

Jose Cardoso, 4c/2001, Judgment, 5 April 2003, at [274]:

Rape and other forms of sexual violence were not explicitly listed as crimes against humanity in Article 6(c) of the London Charter nor in Article 5(c) of the Tokyo Charter. However, both charter contained the term “other inhumane acts”, and rape and other

<sup>iii</sup> See indictments *Lolotoe* 4/2001, *Atabae* 8/2002, *Manek et al* 9/2003, *Soares et al* 15/2003, *Buti& Mascimento* 8/2004, *Muhamad Nur et al* 12/2004.

<sup>iv</sup> For further information see JSMP Report, *The Lolotoe Case: A small step forward*, July 2004, available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

forms of sexual violence clearly constitute other inhumane acts, under general principle of law<sup>16</sup>. Rape and sexual violence is included in article 5 of the ICTY Statute, Article 3 of the ICTR Statute and Article 7 of the ICC Statute. It is therefore clear that rape is part of customary international law.

<sup>16</sup> Bassiouni, Cherif, Crimes against humanity in international criminal law, Kluwer Law International, the Hague, p.344

### ***Elements of rape listed***

Despite explicitly adopting the elements of rape as formulated in the *ICC Elements of Crimes*, the SPSC, following the ICTY judgment in *Kunarac*,<sup>v</sup> emphasized lack of consent as the central element of rape. The SPSC did not, however, address how this element relates to the element of the use of 'force or ... threat of force' as referred to in the *ICC Elements of Crimes* (the very distinction drawn by the trial and appeals chambers in *Kunarac*, where it was held that use of force was not an element of rape per se<sup>vi</sup>).

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [441], [449], [452]:

The Elements of Crimes in the Report of the Preparatory Commission for the International court defines the crime in the following manner:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

...

This Court considers as persuasive the absence of consent as the central element of the definition of the crime of rape. This position is particularly relevant in the case of rape charged as a crime against humanity. Force need not require the demonstration of the perpetrator physically overpowering the victim. It may be possible to derive from the context in which the rape occurred, a sufficiently coercive or threatening situation, which would render the act nonconsensual. In this regard, guidance as to the circumstances that tend to negate consent can be drawn from Section 34.3 of UNTAET Regulation 2000/15, which provides for the status of evidence in cases of sexual assault.

...

The Special Panel for Serious Crimes ... sees no reason to depart from the formulation of rape in The Elements of Crimes in the Report of the Preparatory Commission for the International Court. The Special Panel considers as central to the formulation of the crime the observation by Trial Chamber II in *Prosecutor v. Kunarac*, that "Consent for

<sup>v</sup> *Prosecutor v Kunarac*, Trial Judgment, IT-96-23-T, (22 February 2001); *Prosecutor v Kunarac et al*, Appeal Judgment, IT-96-23&23/1-A, (12 June 2002).

<sup>vi</sup> *Ibid*, [458].



this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."

### ***Mental element of rape***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [452]:

...As noted in *Prosecutor v. Kunarac*, the *mens rea* for rape is "the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim"<sup>75</sup>.

<sup>75</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23, Judgement, (22 February 2001) para 460.

### **4.2.8. Crime against humanity of persecution**

Despite the long recognition of persecution as a form of crime against humanity in international criminal law, the ICC Statute is the first international instrument to define the crime of persecution. This definition was adopted by the drafters of UNTAET Regulation 2000/15 and the trials before the SPSC were the first time that these issues were addressed in practice.

#### ***(i) Applicable Law***

*UNTAET Regulation 2000/15*, s 5.1(h), s 5.2(f):

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

...

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels.

...

5.2 For the purposes of Section 5.1 of the present regulation:

...

(f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

### ***Elements of persecution listed***

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [662]-[668]:

Lastly, the Panel is also satisfied with the definition of persecution as a crime against humanity provided by Sect. 5.1 (h) and 5.2 (f) of UR-2000/15, which is the same as Art. 7.1 (e) and (2)(g) of the ICC Statute. These are the elements:

The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

The perpetrator targeted such person or persons by reason of identity of a group or collectivity or targeted the group or collectivity as such.

Such targeting was based on political, racial, national, ethnic, cultural, religious, gender (as defined in article 7, paragraph 3, of the Statute), or other grounds that are universally recognized as impermissible under international law.

The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Affirmed in *Damiao da Costa Nunes*, 1/2003, Judgment, 10 December 2003, at [73].

These elements are taken directly from the *ICC Elements of Crimes*.

### ***Actus reus – the persecutory act***

The jurisprudence of the SPSC on persecution can be divided into earlier cases which did not explicitly require a persecutory act to be an act specified within UNTAET Regulation 2000/15 and within the jurisdiction of the panels, and later cases which did.

#### ***The early approach***

Earlier cases, while not addressing the issue specifically, seemed to find the “connection” requirement fulfilled where the persecutory act was connected in time and space to a single act that was a crime within the panel’s jurisdiction. This was certainly the Prosecutor’s view in *Joni Marques et al* (9/2000, Judgment, 5 December 2002). In his submissions to the panel, which were reproduced in the judgment (at [45]), he stated that:

...a multiplicity of grave human rights violations (which are not, as such, enumerated among the inhumane acts), like, for instance severe attacks on personal property or widespread arsons, can be transformed into the crime of persecution by a single connected murder or forcible transfer of population.

#### ***Acts found to be persecutory under the early approach***

- Burning of houses and possessions of independence supporters – *Joni Marques et al*, 9/2000, Judgment, 11 December 2000, at [1049]:

It was proved that the villagers had their houses burned, sometimes also with all of their possessions inside, which also resulted in the deprivation of their fundamental rights of property and shelter.
- Terrorisation of villagers, by forcing them to drink a mixture of human and animal blood, beatings, threats of death and the destruction of all houses – *Domingos Mendonça*, 18b/2001, Judgment, 13 October 2003, at [105]:

The acts committed against the villagers ...were inhumane and cruel. The act of forcing almost 200 villagers including women and children to drink a mixture of human and animal blood, and the destruction of all the houses, leaving 275 villagers homeless, is barbarous. The rounding up of villagers and forcing them to cook under the threat of death and the beating of men and women in villages, the intimidation of villagers are acts which caused severe mental and physical suffering on the villagers.

### ***The later approach***

Later cases explicitly addressed the requirement that the act be “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels” and held that this meant the act or acts basing the charge of persecution had to be one enumerated within UNTAET Regulation 2000/15. This follows the finding in the case of *Alarico Mesquita et al* (28/2003, Judgment, 6 December 2004 at [78]) that the Special Panels should not follow the jurisprudence of the ICTY and ICTR as regards persecution, since the statutes of those tribunals define the crime differently than did UNTAET Regulation 2000/15:

...it is important to remark that the jurisprudence of the ICTs is not applicable to the Special Panels because the crime of persecution as regulated in UNTAET Regulation 2000/15 has a particularity (shared with the ICC Statute): it requires the connection of the persecutory intent with another crime against humanity or with another crime within the jurisdiction of the court.

### ***The “connection” requirement***

*Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004, at [80]:

This necessary link to another crime, that didn't appear in the ICTs (but appeared in the Tokyo Charter) was directly copied from the definition of persecution contained in the ICC Statute, which included this extra requirement because several delegations at the Rome Conference considered that the notion of persecution was too vague and potentially elastic. The existence of another crime as a *conditio sine qua non* ensures that only serious violations of rights will appear before the Court.

*Julio Fernandes*, 25/2003, Judgment, 19 April 2005, at p24 (unofficial translation Portuguese):

...it is necessary that the persecutory and discriminative act is itself included as one of the crimes set out in the other subsections of section 5.1. This persecutory and discriminative act should also be able to be incorporated (1) either in any of the crimes set out in other subsections of s 5.1; or (2) in any other crime within the jurisdiction of the SPSC.

### ***Where persecution charged in connection with an act which is not described as a crime within the jurisdiction of the panels – to be considered on case by case basis***

*Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004, at [81], [89]:

In the present case the Prosecutor defines persecution in connection with the crime of abduction. However, abduction is neither a crime against humanity nor a crime within the jurisdiction of the Panels.

...

... the Court believes that, as defined by UNTAET Regulations, the Crime against Humanity of Persecution requires to be committed in connection with another crime within the jurisdiction of the Panels. The jurisdiction of the Special Panels doesn't include the crime of abduction *per se*. The obvious option of considering the abduction as an offence included within the concept of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law cannot apply automatically. The Court has to decide in a case-by-case basis if the deprivation of liberty implicit to the concept of abduction reaches a level of sufficient severity as to qualify within the limits of Section 5.1(e).

See also *Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at [150].

### **Acts found to be persecutory where the “connection” requirement applied**

- Arrest and abduction of independence supporter in connection with imprisonment – *Damiao da Costa Nunes*, 1/2003, Judgment, 10 December 2003, at [75].
- Illegal detention of independence supporters in connection with the crime of torture – *Marcelino Soares*, 11/2003, Judgment, 11 December 2003, at [21].
- Abduction and detention of independence supporters in connection with severe deprivation of physical liberty – *Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004.
- Unlawful detention and assault and torture of independence supporters– in connection with severe deprivation of physical liberty, torture and inhumane acts *Francisco Pereira*, 34/2003, Judgment, 27 April 2005, at pp27-28.
- Arrest and beating in connection with imprisonment or other severe deprivation of physical liberty and other inhumane acts; murder and attempted murder, arrest, forcible deportation and illegal detention of civilians – *Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005 [149]-[154].

### **Acts found not to fulfil connection requirement**

- Destruction of property – *Julio Fernandes*, 25/2003, Judgment, 19 April 2005, but compare *Miguel Mau*, 8/2003, Judgment, 23 February 2004 – convicted on guilty plea.

### **Discriminatory Intent**

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [669]:

...the mental element of a discriminatory intent, which is assessed as that the reason for singling out the victim, has to be grounded on a particular characteristic of the identity of the group or collectivity.

### **Where act affects those outside identifiable group**

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [771]:

The testimonies suggested that some of the houses burned indeed belonged to independence supporters. Nevertheless, they do not deny the possibility that some of the others belonged to pro-autonomy oriented villagers. ... The alleged circumstance that the fire in one house could extend to other houses in a row is irrelevant: the multiplicity of the victims is related to the results, not the number of acts. The fact that persons other than independence supporters also had their houses burned does not exclude the fact that houses of the independence supporters were especially targeted....

### **Where intent to commit act arises on the spur of the moment**

*Francisco Pereira*, 34/2003, Judgment, 27 April 2005, at p23:

Alvaro Tilman was detained because he was a member of the clandestine organization supporting the guerrilla against the Indonesian forces and because in April 1999 the campaign of repression of the activity of these groups intensified, in sight of the coming consultation planned for the end of August (ie. he was detained on discriminatory bases). But he was murdered in the Mola river because of his attempted escape and because the flight ended in the unfortunate way that has been previously illustrated.

The same fact that the determination to act arose *ex abruptu*, as a consequence of the words of Paulino, is incompatible with discriminatory intent.

### ***Acts based on revenge cannot be characterised as persecution***

*Florencio Tacaqui*, 20/2001, Judgment, 9 December 2004, at p49:

... it is credible that what prompted the furious acts which too, place after the popular consultation was another kind of resolution, specifically revenge. Having lost the battle, the discriminatory intent didn't make sense any more: the motivation of the Indonesia-fied militia become to quash the population of those villages which had supported the fighters or had oppose[d] the campaign by the integrationists. The will to punish, rather than discriminate, was then the motive for the cluster of crimes which occurred between the 8<sup>th</sup> and the 10<sup>th</sup> September 1999...

In this line of argument, it is easy to draw the conclusion that only [the counts relating to acts before the popular consultation] can be pictured as episodes of discrimination on political grounds, ie. Persecution. The other two counts for which Tacaqui is held responsible can't be requalified in such a manner.

See also *Januario da Costa and Mateus Punef*, 22/2003, Judgment, 27 April 2005 at pp15-16, where the approach in *Florencio Tacaqui* (20/2001, Judgment, 9 December 2004) was followed.

It appears that the panels in these cases required in order to prove discriminatory intent in these cases was that the accused intended to deprive the victims of the right to exercise their political rights. It is not clear what the basis of such a requirement might be. These cases also appear to be inconsistent with other SPSC decisions in which acts committed after the popular consultation were held to amount to persecution: see *Sisto Barros and Cesar Mendonca* (1/2004, Judgment, 12 May 2005); *Damiao da Costa Nunes*, 1/2003, Judgment, 10 December 2003; *Domingos Mendonça*, 18b/2001, Judgment, 13 October 2003; and *Joni Marques et al* (9/2000, Judgment, 11 December 2001).

### ***4.2.9. Crime against humanity of enforced disappearance***

The crime against humanity of enforced disappearance was included in the ICC Statute and is enumerated under s 5.1 of the Regulation. The SPSC was in a unique position as the first judicial body to try defendants on charges under this formulation of the crime against humanity. However, only two cases involved such charges, one where the accused was acquitted and one where a charge of the crime against humanity of murder was reduced by plea bargain to one of enforced disappearance. Unfortunately the jurisprudence to arise from those two cases did little to explore the issues behind this complex crime.

#### ***(i) Applicable law***

*UNTAET Regulation 2000/15*, s 5.1(i), s 5.2(h):

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

...

(i) Enforced disappearance of persons;

...

5.2 For the purposes of Section 5.1 of the present regulation:

...

(h) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

### ***Elements of enforced disappearance listed***

*Rusdin Maubere*, 23/2003, Judgment (Unofficial translation from Portuguese), 5 July 2004, at p14:

To state that we are before a crime of enforced disappearance of a person, the following constitutive elements must be verified:

- a) the illegal detention or abduction of that person;
- b) that the illegal arrest, detention or abduction of that person was carried out by a State or a political organization, or other, but with their authorization, support or acquiescence;
- c) that that State or political organization or whoever carried out the arrest, detention or abduction with their authorization, support or acquiescence refuses to acknowledge that arrest, detention or abduction;
- d) that this State or political organization or whoever carried out the arrest, detention or abduction with their authorization, support or acquiescence refuses give information on the fate or whereabouts of that person;
- e) that this refusal has an intention to remove him from the protection of the law for a prolonged period of time.

These elements diverge from those agreed upon in the *ICC Elements of Crimes* in significant respects. Firstly, it is recognised by the elements of crimes that the arrest or detention preceding the refusal of information, may, in certain circumstances, have been lawful. (See reference to the latter point in *Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004, at [85]). In the elements of crimes the refusal may be in relation to acknowledging the arrest, detention or abduction, or in relation to giving information on the fate or whereabouts of the person, not both, as seems to have been required by the panel. Furthermore, the intention to remove the victim from the protection of the law may be tied either to the arrest or detention (where the perpetrator was aware that in the ordinary course of events there would be a refusal to give information) or to the refusal to acknowledge or give information.

### ***Arrest and detention need not be illegal to constitute factual elements of the crime***

*Alarico Mesquita et al*, 28/2003, Judgment, 6 December 2004, at [85]:

From the text appears evident that "abduction" is a factual element of the crime, not the crime itself. In the formulation of the crime of enforced disappearance it is the refusal to give the information and the mental element that qualify the action. Indeed arrest and detention, the other conducts that together with abduction constitute the factual element of the enforced disappearance, are not even illegal acts (for example, from a legal arrest can then derive a crime against humanity of enforced disappearance if the authorities refuse to communicate the arrest and the whereabouts of the prisoner).

### ***Fate of the victim after arrest or detention***

In the case of *Rusdin Maubere* (23/2003, Judgment (Unofficial translation from Portuguese), 5 July 2004, at pp14-15) the Court appears to have concluded that it is an element of enforced disappearance that the victim continued to be alive and was not killed following his or her arrest:

In the crime of enforced disappearance it is believed that the person illegally arrested, detained or abducted is, and continues alive, and not knowing about him because whoever arrested, detained or abducted him, refuses to give information on his fate or whereabouts, with the intention of removing him from the protection of his most basic rights, like, for instance, claim for his freedom before the Court or the assistance of a lawyer.

In this criminal type of crime, the person victim of the crime is considered as disappeared and unreachable, against his willing, because was arrested, detained or abducted for someone who keeps him in that situation, hides him and prevents him to contact the authorities or someone he trusts, and also refuses to give information on his whereabouts, with the intention to prevent him to have access to his basic and fundamental rights, according to the protection that the law gives to any citizen.

In the present case, André de Oliveira was in fact arrested by a political organization, the BMP militias, but did not disappeared nor was hidden by anyone while alive. What happened to him was that, after being arrested, was severely beaten until he died, by the same group of militias members that arrested him. After being beaten till he died, in result of the hits, his body, already dead, was taken to the Village of Aipelo and buried there in a shallow grave. When the exhumation was carried out that body was not found in the place where buried, for reasons not yet clarified.

It is easy to conclude that what disappeared was the corpse of André de Oliveira and not him while alive. ...

### ***Intent to murder cannot amount to intent to commit enforced disappearance***

*Rusdin Maubere*, 23/2003, Judgment (Unofficial translation from Portuguese), 5 July 2004, at p15):

The militia members did not arrest him to keep him detained in a hidden place, making it impossible for him, in that situation, to look for the authorities or someone he would trust, namely the courts or relatives, to claim his rights. The militias arrested him with the purpose of inflicting severe and violent corporal punishments on him, ill-treating him and beating him to death, as in fact they did and happened.

...

Therefore, we have to conclude that the facts proved do not meet what is provided under s 5.2(h) of UNTAET Regulation 2000/15, as it is defined there the crime of enforced disappearance. What happened was something different....

### ***4.2.10. Crime against humanity of other inhumane acts***

#### ***(i) Applicable law***

UNTAET Regulation 2000/15, s 5.1 (k):

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

...

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

*(ii) Treatment by SPSC*

***Elements of other inhumane acts listed***

*Sabino Gouveia Leite*, 4b/2001, Judgment, 7 December 2002, at [160]:

...the Special Panel deems that the following elements of inhumane acts intentionally causing great suffering, or serious injury to body or to mental or physical health have been satisfied:

The victim have suffered serious bodily or mental harm (the degree of severity must be assessed on a case by case basis with due regard for the individual circumstances);

The suffering was the result of an act of the accused or his subordinate;

When the offences were committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population..

See also *Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [415]- [420]; *Abilio Mendes Correia*, 19/2001, Judgment, 9 March 2004, at pp11-12; *Umberto Ena and Carlos Ena*, 5/2002, Judgment, 23 March 2004, at [91].

***Nature of the crime***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [412]:

This Court believes that for the accused to be found guilty of crimes against humanity for other inhumane acts he must, inter alia, commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act. The category of other inhumane acts demands a crime distinct from the other crimes against humanity, with its own culpable conduct and *mens rea*. The crime of other inhumane acts is not a lesser-included offence of the other enumerated crimes.

*Abilio Mendes Correia*, 19/2001, Judgment, 9 March 2004, at pp10-11:

In *Tadic*, the ICTY Trial Chamber held that, at a minimum, "other inhumane acts" must consist of acts inflicted on a human being and must be of a serious nature. The phrase "other inhumane acts" thus covers a broad range of criminal activity. The breadth of the term is intentional. The ICTY Trial Chamber in *Kupreskic* stated that the phrase "other inhumane acts" "was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.

Nonetheless, statutes defining criminal offenses must be strictly construed in order to conform to principles of legality. Accordingly, international courts have circumscribed the phrase "inhumane acts" by applying it only in circumstances manifesting the same degree of seriousness and gravity as other offenses that can be qualified as crimes against humanity.

...



It has been stated that whether a particular act rises to the level of inhumane acts “should be determined on a case-by-case basis”.

*Francisco Pedro*, 1/2001, Judgment, 14 April 2005, at [11]:

For this criminal offense it is sufficient to deliberately cause serious physical suffering of comparable gravity to the other crimes against humanity (ICTR, *Kayishema and Ruzindana*, Sentencing Judgement, 21 May 1999, para. 585) thus committing acts that are similar in gravity to the enumerated acts (ICTY, *Tadic*, Judgement, 7 May 1997, para. 729).

#### ***Types of acts held to constitute crime against humanity of other inhumane acts***

- Holding victims in a small room without proper sanitation facilities, subjecting them to extremely unhygienic conditions and not given food or water regularly – *Sabino Gouveia Leite*, 4b/2001, Judgment, 7 December 2002, at [161] (same facts taken into account in severe deprivation of physical liberty conviction) – but compare *Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [421] where the same facts were held not to constitute the crime.
- Cutting off a man’s ear and forcing him to eat it - *Jose Cardoso*, 4c/2001, Judgment, 5 April 2003.
- Holding victims at house for four days and repeatedly punching, kicking and beating them with sticks and rifle butts – *Francisco Pedro*, 1/2001, Judgment, 14 April 2005, at [8], [11].
- Severe beating of CNRT leader – *Abilio Mendes Correia*, 19/2001, Judgment, 9 March 2004.
- Victim struck by machetes and stones and left for dead – *Umbertus Ena and Carlos Ena*, 5/2002, Judgment, 23 March 2004.
- Slashing of the victim’s body with a machete – held by SPSC to have been attempted murder – *Florencio Tacaqui*, 20/2001, Judgment, 9 December 2004.
- Causing serious injuries to victims during a massacre of civilians – *Januario da Costa and Mateus Punef*, 22/2003, Judgment, 27 April 2005.
- Beating and kicking for half an hour of victim tied to a clump of bamboo – *Lino Beno*, 4b/2003, Judgment, 16 November 2004, at [18].

### **4.3. War Crimes**

Although jurisdiction over war crimes is provided for in UNTAET Regulation 2000/15, no charges of war crimes were brought before the SPSC.

### **4.4. Domestic Offenses**

Like other hybrid tribunals, the SPSC had jurisdiction to try both international and domestic criminal offenses. The SPSC’s exclusive domestic jurisdiction was confined to crimes of murder and sexual offenses committed between 1 January 1999 and 25 October 1999 (See *UNTAET Regulation 2000/15*, s 1.3 (d) and (e), s 2.3 and *UNTAET Regulation 2000/11*, s 10.1 (d) and (e)).

The law applied to try suspects on these charges was that applied in East Timor at the time of the commission of the crimes, namely the Indonesian Penal Code (see *UNTAET Regulation 2000/15*, s 8 and s 9).

Many of the early cases brought before the SPSC involved the prosecution of these crimes. Only one of the 12 indictments filed in 2000 charged crimes other than domestic crimes. Later prosecutorial policy focused on indicting those accused of crimes against humanity.

#### **4.4.1. Murder**

##### *(i) Applicable law*

UNTAET Regulation 2000/15, s 8:

“For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.”

*Indonesian Penal Code*, Art 340:

“The person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished ...”.

*Indonesian Penal Code*, Art 53:

“An attempt to commit a crime is punishable if the intention of the offender has revealed itself by a commencement of the performance and the performance is not completed only because of circumstances independent of his will.”

#### **Elements of murder listed**

*Julio Fernandes*, 2/2000, Judgment, 1 March 2001, at p7:

...the essential elements of murder are met: the perpetrator, the deliberate intent, the premeditation and take somebody's life.

#### **The intent requirement**

*Agustinho da Costa*, 7/2000, Judgment, 11 July 2001, at pp16-17:

The mental element for murder is deliberate intent and premeditation. A deliberate intent is that in law, a person intent the consequences of his voluntary act when he desires the consequences to happen, whether or not he foresees that it probably will happen, or when he foresees it probably will happen, whether he desires it or not.

*Gaspar Leki*, 5/2001, Judgment, 14 September 2002, at [41]:

In the present case, it is clear that the accused had deliberate intent to shoot, but there is no evidence that he wanted the result, the consequences of his act, which is the requisite of the law. And the ICTR considers that *"the result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events"*<sup>1</sup>.

<sup>1</sup> ICTR, the PP versus Clement Kayishema and Obed Ruzindana, case No. ICTR-95-1-T, par.139.

#### **Deliberate intent also required for conviction under Art 338 IPC**

*Gaspar Leki*, 5/2001, Judgment, 14 September 2002, at [41]:

Deliberate intent is a fundamental part of the notion of unlawful killing, as it is not just a requisite part of the crime of murder in article 340 IPC but is also a requisite part of a lesser offence of manslaughter, which is contained in article 338 of the same code, which says that: *"the person who with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum of fifteen years"*.

### ***Requirement of Premeditation***

*Julio Fernandes*, 2/2000, Judgment, 1 March 2001, at p7:

Premeditation, according to Indonesian jurisprudence and the interpretation of murder in different countries, does not necessarily imply a long-term planning of the conduct. It's enough to have thought about acting and to have decided whether to take the life of the victim or to withdraw from that intention. The time for the decision can be very short (i.e. minutes or seconds), but what is important is that nothing exceptional interferes with the decision.

*Carlos Soares Carmona*, 3/2000, Judgment, 19 April 2001, at p6:

Premeditation means that there is time between when the intent to murder arises and when the intent is actually realized for the perpetrator/accused to calmly think about how the murder is to be committed. The time should not be too short, however nor should it be too long, the important issue is if there is time for the perpetrator/accused to think calmly and organize the murder.

*Anigio de Oliveira*, 7/2001, Judgment, 27 March 2002, at pp21-22 (unofficial translation from Portuguese):

The Indonesia penal code (KUHP) does not define the concept of "premeditation". The concept has to be elucidated by reference to similar concepts existing in other legal systems and to the plain meaning of the word. The word in its literal expression means *pre-meditation*, thus thinking, meditating, before completing an action.

Within the penal code and putting the concept in a legal world, the word means to *persist in the realization of a criminal act*. This persistence is especially censured since the agent, after taking the resolution of committing the crime, persists in its realization for a determined period of time.<sup>17</sup> There exists in these circumstances a sort of previous reflection, calmness and coldness in the undertaking of the crime. There is also an "un-revocability" in the decision taken.

It is also in our opinion, in this sense that the Indonesian Penal Code uses the expression "premeditation".

<sup>17</sup> As an example in the Portuguese Penal Code premeditation is defined as "...having persisted in the intention of killing for more than 24 hours".

### ***Joining the militia is evidence of premeditation***

*Joseph Leki*, 5/2000, Judgment, 11 June 2001, at p9:

Premeditation means that there is a time between when the intent to murder arises and when the intent is actually realized. Leki knew and could calmly think about how the murder is to be committed. For him, it was sufficient to be aware he was contributing to all the results he had undertaken by joining the group. The time between when the decision arose to join and participate in the militia campaigns and operations to kill can be assessed as the element of *premeditation*.

See also *Augusto Asameta Tavares*, 2/2001, Judgment, 28 September 2001, at p14.

*Jose Valente*, 3/2001, Judgment, 19 June 2001, at p9:

Jose Valente knew and could calmly think about how the murder is to be committed. Evidence shows that since the beginning of September 1999, the Defendant was following a command to kill pro-independence supports and destroy East Timor. The Defendant calmly followed this large-scale well known plan. Specifically on the 25

September 1999, the Defendant had knowledge of and was with certainty and calmly following a plan to kill pro-independence supporters/CNRT who were taking rice...

### ***Facts taken as proving premeditation***

- The accused went to house of militia leader where he was provided with a samurai sword and painted his face black before going to house of victim: *Joao Fernandes*, 1/2000, Judgment, 25 January 2001, at [18].
- The accused questioned victim as to whether he was a militia member and, after hearing the response, decided to kill the victim: *Julio Fernandes*, 2/2000, Judgment, 1 March 2001, at p7.
- The accused had joined the militia and was aware of the purposes of the group: *Joseph Leki*, 5/2000, Judgment, 11 June 2001, at p9; *Augusto Asameta Tavares*, 2/2001, Judgment, 28 September 2001, at p14.
- From the time the accused received the order to execute the victim he was in control of the victim – “he set on the car with him in the front seat, he pulled him out of the car, he escort him toward Nunura river and, finally, he stabbed him with his sword”: *Manuel Goncalves Leto Bere*, 10/2000, Judgment, 15 May 2001, at p10.
- The accused attending a meeting at which members of a militia group were ordered to attack a village, burn its houses and kill its population: *Gaspar Leki*, 5/2001, Judgment, 14 September 2002, at [41].

#### ***4.4.2. Simple Homicide***

##### *(i) Applicable law*

*Indonesian Penal Code*, art 338:

The person who with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum imprisonment of fifteen years.

##### ***Mens Rea for simple homicide***

*Carlos Soares*, 9/2002, Judgment, 8 December 2003, at p6:

While it appear superfluous to analyze the material elements of the act, the mental element can be briefly identified as a *dolus impetus* which is a form of the will characterized by the rapid insurgence of the determination to act, immediately followed by the execution of the deliberation. It is a state of mind in which the will to act, having arisen, does not find a psychological counterthrust nor resistance; the drive which prompts the will is then immediately and violently satisfied only by the execution of the action.

In the given case there was will and there was intention, which supported the unfolding of all the action, from the onset to the end.

For this reason the Court can not follow the suggestion of the Defence Counsel ... of the qualification of the facts as maltreatment followed by death. ...With such a weapon and having struck the victim in such a manner, the Court cannot conclude that his intention was simply to wound.

#### **4.4.3. Rape**

Only two cases were heard before the SPSC involving charges of sexual offenses under s 9 of the Regulation. Both of these cases charged rape, contrary to Art 285 of the Indonesian Penal Code. In the first of these, *Leonardus Kasa* (11/2000, Judgment, 9 May 2001) the panel held that it did not have jurisdiction to hear the case as the alleged rape took place outside East Timor.<sup>vii</sup> There was therefore only one case in which the SPSC proceeded to consider the substantive offense.

##### *(i) Applicable Law*

*Indonesian Penal Code*, Art 285:

Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years.

##### *(ii) Treatment by SPSC*

#### ***The use of force need not be physical force***

*Francisco Soares*, 14/2001, Judgment, 12 September 2002, at [42]-[44]:

Although it has been said by X that Francisco Soares physically held her on the motorbike as they rode out of Dili, the Court could not say that there was or not physical force to oblige X to have sexual intercourse with Francisco Soares. Anyway, the law does not require physical force.

...

The Court is of the opinion that X was forced by the circumstances which Francisco Soares created and by the actions and threats he made into having sexual intercourse with him. The use of force or threat of force to oblige X to have sexual intercourse have to be considered within the circumstances prevailing in East Timor at that period."

The panel did not make it clear whether or not a burden lies on the prosecution to prove that "force or threat of force" was used by the accused, as is required by Art 285. When Art 285 is read with s 34.3 it seems that, regardless of the position in Indonesian law, there cannot be a requirement to prove use or threat of force. Section 34.3(b) of the TRCP states that consent cannot be a defense where force or threat of force was used. If force was an element of the crime such a provision would be redundant.

#### ***The burden of proof for establishing consent lies on the accused***

*Francisco Soares*, 14/2001, Judgment, 12 September 2002, at [33]:

...the law does not require, at any time, that the victim needs to voice objection, to shout or object. The accused has to establish that the victim consented, and before evidence of the victim's consent is admitted, the accused shall satisfy the Court that the evidence is relevant and credible (Sect. 34.3 U.R. no 2000/30)...

(In respect of the burden of proof more generally see above at section 3.7)

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<sup>vii</sup> See section 2 of this report on Jurisdiction.

***Evidence of distressed condition is admissible***

*Francisco Soares*, 14/2001, Judgment, 12 September 2002, at [50]-[51]:

The Court found also clear, from the testimonies of the witnesses, that X was not happy with respect to what happened, when she returned to the barracks after having sexual intercourse. She appeared distressed. It is true that, as underlined by the defense, the witnesses were not present at the time the facts occurred between X and Francisco Soares. However it is undisputed that they saw both of them returning in the afternoon. Therefore, the Court will rely only of what they saw to check how was X when she came back with Francisco Soares, after they had sexual intercourse. ...

***Article 285, to the extent that it allows marital rape, does not apply in East Timor***

*Francisco Soares*, 14/2001, Judgment (Partly Dissenting Opinion of Judge Ramos), 12 September 2002, at pp16-17:

If the present Court applies indiscriminately the entire provision of article 285 PCI it will create marital rape as an exception inside the crime of rape in East Timor: this position, according with my point of view, conflicts with internationally recognized Human Rights standards.

...

Since Indonesian Law shall be applied in East Timor only if it does not conflict with internationally recognized Human Rights standards and the East Timorese Constitution, I understand that the above mentioned article 285, to the extent that it allows marital rape, does not apply in East Timor.

## **5. FORMS OF CRIMINAL RESPONSIBILITY**

In this section JSMP outlines the approach taken by the Special Panels for the various forms of criminal responsibility. This refers to the way in which a person participates in a crime: for example, whether by committing the crime him or herself, by aiding another who commits the crime, by attempting to commit the crime, etc.<sup>i</sup>

### *(i) Applicable law*

*UNTAET Regulation 2000/15* included two provisions relating to forms of criminal responsibility: s14.3 set out forms of “individual” responsibility (including committing, ordering, aiding, attempting etc) and s16 provided for command responsibility.

#### *UNTAET Regulation 2000/15, s14.3:*

In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or

(ii) be made in the knowledge of the intention of the group to commit the crime;

(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

#### *UNTAET Regulation 2000/15, s16:*

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and

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<sup>i</sup> In relation to the requirements for pleading forms of criminal responsibility in indictments see section 3.3.1 above.

the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

## **5.1. Generally**

### ***Forms of individual criminal responsibility under Section 14 apply to all crimes within the jurisdiction of the panels***

*Domingos Amati and Francisco Matos*, 12/2003, Decision on the Defendants' Motion on Defects in the Indictment, 11 November 2004, at pp3-4:

...Moreover, it contents that Section 14 "does not apply" to the crime of murder, whether brought under Article 340 or 338. ...

The Defendants position with respect to Section 14 and the scope of its application is without merit. Indeed it conflicts with a plain reading of the regulation itself, which states: "A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation." Section 14.2 of U.R. 2000/15. Moreover in Section 14.3, which enumerate the various modes of individual responsibility under the regulation, it is stated that Section 14.3 applies to "a crime within the jurisdiction of the panels."

It is undisputed by the Defendants that murder is "a crime within the jurisdiction of the panels." See Section 8 of U.R. 2000/15. Consequently, the provisions of Section 14 apply to indictments alleging that offence and a defendant so charged "shall be individually responsible and liable for punishment in accordance with the present regulation." See Section 14 of U.R. 2000/15. The regulation contains absolutely no exception in the case of murder, nor is there any language in the provision that even remotely suggests that Section 14 applies solely to crimes against humanity.

Moreover, if the Defendants are correct that Section 14 of U.R. 2000/15 "does not apply" to the crime of murder, then the responsibility for that offence can only be asserted under Section 16 of U.R. 2000/15 ("Responsibility of commanders and other superiors"). Such a reading of the regulation leads to a legal cul-de-sac in that Section 16, by its own terms, applies only to "serious criminal offences referred to in Sections 4 to 7" (genocide, crimes against humanity, war crimes and torture). Thus, if the Defendants are correct that Section 14 "does not apply" the consequence would be that murder cannot be prosecuted at all, either on the basis of individual criminal responsibility under Section 14 or command responsibility as provided in Section 16.

As the interpretation of Section 14 urged by the Defendants leads to this incongruous result, it must be rejected. It remains that Section 14 is applicable to the crime of murder, just as it is applicable to any other crime over which the Special Panels has jurisdiction.

### ***Relationship of subsidiary forms of criminal responsibility where more than one arises from the same facts***

*Anton Lelan Sufa*, 4a/2003, Judgment, 25 November 2004, at [18]-[22]:

The more indirect form of liability (of being merely a superior who did not prevent the criminal acts or punish his subordinates) is subsidiary to the more direct form of participation (ordering the killings).

The Court is aware that different solutions have been found for the concurrence (coinciding) of individual and superior responsibility:

The ICTY was of the view that in such cases the type of responsibility incurred "may be better characterized" as personal liability (Kordic, Judgement, 26 February 2001, para.371), and that superior responsibility "is subsumed" under the Article (of the ICTY



statute) referring to individual responsibility (Krstic, Judgement, 2 August, 2001, para. 605).

On the other hand, the ICTR has held an accused individually responsible and “additionally” responsible as a superior (Kayishema and Ruzindana, Judgement, 21 May 1999, para. 555), and has considered convicting the same person under both forms of liability as “perfectly appropriate” (Delalic, 16 November 1998, Judgement, para. 1222).

However, the Court is of the opinion that, when certain facts of the case support both types of liability, one of them cannot simply be “characterized” as another or “subsumed” under the provision of the other, because this would imply that the Court has some sort of discretion to choose one or the other, although this would violate one of the basic principles of criminal law, apart from Sec. 12.2 Reg. 2000/15.

Rather, in a first stage, it has to be acknowledged that both types of criminal responsibility exist, and in a second stage it must be decided whether they continue to co-exist or whether one is displaced by the other.

In this second stage, the Court took recourse to legal instruments developed in “civil law” jurisdictions to resolve the concurrence:

In “civil law” jurisdictions, a person who intentionally participates in the commission of a crime by ordering it, is regarded as a perpetrator of that crime himself, whereas a superior who fails to prevent a crime by his subordinates is not regarded as the perpetrator of that crime but of a separate crime of omission (failure to supervise).

In such a case it is an undisputed principle that the separate crime of omission (by negligence) is subsidiary to the (intentionally) ordered crime.

This principle also applies to international criminal law (Ambos in Cassese et al, The Rome Statute (Oxford, 2002), 843).

This view is supported by the following:

Since a superior who orders a crime (Sec.14.3(b) Reg.2000/15) must also be regarded as committing it “through another person” in the sense of Sec.14.3(a) Reg.2000/15, and since the various forms of individual responsibility enumerated in Sec.14.3 have a distinct ranking – from the most direct form of commission in *lit.* (a) to the most indirect form of participation in *lit.* (d) – the more indirect form of responsibility incurred for the same conduct must be subsidiary to the more direct one, if violation of the principle *ne bis in idem* is to be avoided.

The principle of subsidiarity has found expression in Article 65.2 Penal Code of Indonesia (still applicable, *supra* para.3), which reads:

“If for an act that falls under a general penal provision there exists a special penal provision, only the special penal provision shall be considered.”

Similarly, this view is also supported by the notion underlying Sec. 32.4 Reg 2000/30 according to which “a crime which is a lesser included offense of an offense which is stated in the indictment, shall be deemed to be included in the indictment”: Had the lesser offense not existed in the first place (but later become subsidiary by the more serious one), it could not be deemed to be included in the indictment.

Finally, it is widely held that no necessity is apparent to make use of superior responsibility for other purposes than as a “fall back liability” in the event that the ordering of a crime (“direct command responsibility”) cannot be proven.

## **5.2. Commission**

### **5.2.1. Generally**

#### *(i) Applicable law*

*UNTAET Regulation 2000/15, s14.3(a):*

In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

#### *(ii) Treatment by the SPSC*

Commission as a form of criminal liability under s14.3(a) of UNTAET Regulation 2000/15 includes three forms:

- individual commission;
- commission jointly with another person or persons; and
- commission through another person or persons.

The first is the classic form of criminal liability where the material elements of the crime are carried out by the accused person him or herself. The second occurs where two or more people together carry out the material elements of the crime and was referred to by the Panels as co-perpetration.

The third form (commission *through* another person or persons) was not considered by the Special Panels in any cases.

### **5.2.2. Individual Commission**

*Francisco Pedro, 1/2001, Interlocutory Decision to Dismiss Amended Indictment, 22 May 2001, at p5:*

... In fact, an individual can be said to have committed a crime when he physically perpetrates the relevant criminal action. ...

*Francisco Pedro, 1/2001, 14 April 2005, Judgment, at [14]:*

Since the accused killed Jorge Mau Loe without assistance by another person, he committed the crime "as an individual" in the sense of Reg. 14.3(a) Reg. 200/15 (solitary perpetration).

### **5.2.3. Co-perpetration**

*Francisco Pedro, 1/2001, 14 April 2005, Judgment, at [14]:*

As he and another militia each stabbed Elias Pires according to a pre-conceived common design to kill him, he committed the crime "jointly with another" in the sense of Sec. 14.3 (a) Reg. 2000/15 (co-perpetration).

*Lino de Carvalho, 10/2001, Judgment, 18 March 2004, at [61]:*

Consequently, pursuant to Sec. 14.3(a) of U.R. No. 2000/15, a person can be individually responsible for a crime whether he committed the crime as an individual or jointly with another. Here the defendant was one of several people who joined together to kill Sabino Pereira, and the defendant was the last assailant to stab the victim before he died. Even though the fatal wound or wounds are not identified in the autopsy report, the defendant testified in Court that he stabbed the victim and then the victim died. The Court is satisfied that the defendant's individual criminal responsibility stems from his act of stabbing Pereira in the back, causing the victim's death.

*Damiao da Costa Nunes*, 1/2003, Judgment, 10 December 2003, at [62]-[63]:

The accused, Damiao Da Costa Nunes is criminally responsible for having committed the crimes jointly with others according to Sect. 14.3(a) Reg 2000/15:

...

As regards the killing of Jaime da Costa, it is irrelevant that the accused himself did not stab him: Because he held him tight while someone else (Jose Manek) stabbed him, he is a co-perpetrator, making it possible for the perpetrator to materially perform the crime (Tadic Judgement, Appeals Chamber, 15 July 1999, para.192).

*Agostinho Cloe et al*, 4/2003, Judgment, 16 November 2004, at [12]:

The accused, by taking part in the attack against Anton Beto and Leonardo Anin committed with arrows, knives, a machete and a stone intentionally contributed to the victim's death.

They acted purposely in collaboration, and therefore have to be held accountable as co-perpetrators for causing the death of Anton Beto and Leonardo Anin even if a certain accused did not inflict a wound himself, and without the Court having to determine whether death would have been caused solely by the wounds inflicted by a certain accused.

See also *Lino Beno*, 4b/2003, Judgment, 16 November 2004 at [12], *Domingos Metan*, 4c/2003, Judgment, 16 November 2004 at [12] and *Anton Lelan Sufa*, 4a/2003, Judgment, 25 November 2004 at [29].

### **5.3. Ordering, soliciting, or inducing**

#### **5.3.1. Generally**

##### *(i) Applicable law*

*UNTAET Regulation 2000/15*, s14.3(b):

In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

....

orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

##### *(i) Treatment by the SPSC*

#### **General principle**

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [61]:

#### A. Individual Criminal Responsibility

...pursuant to Section 14.3(b) of UNTAET Regulation No. 2000/15, a person can be individually responsible for a crime even if he did not personally commit the offense, provided that he “orders, solicitors or induces” its commission.<sup>11</sup> This is true whether the crime “in fact occurs or is attempted.”

<sup>11</sup> See Prosecutor v. Francisco Dos Santos Laku, Case No. 08/2001 (Decided 25 July 2001) in which the Court ruled at page 11 that “even if [the defendant] was not the main perpetrator of the murder, he ordered the murder, [and] thereby his individual responsibility is met in Sect. 14.3(b) of UR-2000/15.” (in Laku the defendant was a Timorese member of the TNI who had ordered the militia members to kill an independence supporter.) See also Deputy Prosecutor General for Serious Crimes v. Anton Lelan Sufa, Case No. 4a/2003 (Decided 25 November 2004) at par. 12 in which the Court found that the defendant, who was a militia member, acted on instructions from a village chief and ordered other militia members to kill several independence supporters. At pars. 16 and 17, the Court ruled that the defendant ordered the members of his militia group to commit murder “knowing they would follow his orders and were able and sufficiently armed to do so [and therefore he] bears individual criminal responsibility according to Sec. 14.3(b).”

#### ***The relationship between ordering, soliciting and inducing***

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [62]-[64]:

##### B. Scope of the phrase “orders, solicits or induces”

We first note that the phrase “orders, solicits or induces” is framed disjunctively rather than conjunctively. Consequently, a defendant is criminally responsible for an offense committed by another so long as the defendant performs any one of the three actions described in Section 14.3(b). It is thus not necessary to establish that he ordered, solicited and induced another to commit a crime for him to be individually responsible.

Accordingly, the gravamen of the offense described in Section 14.3(b) is that a defendant must engage in conduct by which he seeks to cause another to commit a crime. It is not necessary to prove that he accused himself committed the crime or participated in its commission. Rather, it is only necessary to prove that the defendant ordered, solicited or induced its commission or attempted commission by another.

The three terms used in the statute describe different levels of instigation by which a defendant may urge another to commit a crime

#### ***Requirement that the defendant’s actions cause the crime to occur***

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [65]:

##### C. Causation and intent

Regardless of the term which best defines a particular defendant’s actions, criminal responsibility under Section 14.3(b) requires more than a mere causal relationship between the actions of a defendant and the resulting offense. ...

#### ***Requirement that the defendant intended the crime to be committed***

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [65]-[66]:

##### C. Causation and intent

Regardless of the term which best defines a particular defendant’s actions, criminal responsibility under Section 14.3(b) requires more than a mere causal relationship between the actions of a defendant and the resulting offense. Even in circumstances where a defendant’s action in fact caused another to commit a crime or attempt to do

so, a defendant can be held criminally responsible only if he acted with the intent that the resulting crime be committed.<sup>13</sup> Were we to conclude otherwise, a defendant could be held responsible for the criminal actions of others even in circumstances where the defendant had neither the intent nor a reasonable expectation that his own actions would lead to the commission of the crime.

This view is consistent with the provisions of Section 18.1 of UNTAET Regulation 2000/15, which states that an accused shall be criminally responsible only if the material elements of his crime “are committed with intent and knowledge.” As defined in Section 18.2 of the same regulation, the meaning of intent “in relation to a consequence” is that person means to cause that consequence or is aware that it will occur in the ordinary course of events.” Similarly, the requirement of “knowledge” is met when a defendant has “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”

<sup>13</sup> The proof of such intent could be satisfied in circumstances where a reasonable person would know or have reason to know that his actions were likely to produce the resulting crime, regardless of the subjective intent of the particular accused.

But contrast the following statements from earlier judgments which suggests that the mental requirement for responsibility by ordering relates not to an intention that the crime be committed but the knowledge that it will be:

*Joni Marques et al*, 9/2000, Judgment, 11 December 2001, at [717]:

His *mens rea* arises from the evidence that, by participating in the decision-making for ordering the killing of the victim, he really knew that it would occur by other expeditious means. For him, the death was an expected result.

*Anton Lelan Sufa*, 4a/2003, Judgment, 25 November 2004, at [16]:

The accused, by ordering the abovementioned members of his militia group to kill Anton Beto and Leonardo Anin, knowing they would follow his orders and were able and sufficiently armed to do so, bears individual criminal responsibility according to Sec. 14.3(b) Reg. 2000/3.

***The crime need not be completed but must be at least attempted***

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [67]-[68]:

D. Whether the crime “in fact occurs or is attempted”

The final element that must be established is that the purpose of the defendant’s action was the commission of a crime within the jurisdiction of the Special Panels “which in fact occurs or is attempted.” Thus, although a defendant must have intended that another person commit a particular crime, it is irrelevant whether the person was successful in the commission of the crime, so long as it was attempted.

An attempt requires more than the mere contemplation of a crime or planning of an offense. Even steps taken in preparation for a crime may fall short of an attempt. As stated in Section 14.3(f) of UNTAET Regulation 2000/15, an attempt to commit a crime requires “taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions.” In a situation where a perpetrator takes such a substantial step, even though the crime does not occur, a defendant who ordered, solicited or induced the commission of the underlying offense nonetheless bears criminal responsibility under Section 14.3(b) for the other’s attempt.

### **5.3.2. Ordering**

#### ***Requirement that a superior-subordinate relationship exists***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [481]:

In the case the prosecutor v *Akayesu*, the Trial Chamber was of the opinion that “ordering” implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence.<sup>81</sup> ...

<sup>81</sup> Para 483

#### ***The superior-subordinate relationship need not be military***

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [64]:

Order – The first term stated in the regulation, “order,” refers to an action in which an accused commands another to commit a particular crime. Although orders are most commonly issued in a military setting, there is no indication in the regulation that it was intended to apply only in those circumstances. Indeed, even outside the military context it is possible for one person to order another to do something, including the commission of a crime, in circumstances where the person issuing the command has reason to believe that his words will be obeyed.<sup>12</sup> As noted below, whether or not an the regulation can apply to orders given in a civilian context is irrelevant in the circumstances of the present case.

<sup>12</sup> See Anton Lelan Sufa at n.10, *supra*.

#### ***Order may be express or implied***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [481]:

...There is no requirement that the order be in writing or in any particular form; it can be express or implied. That an order was issued may be proved by circumstantial evidence. ...

#### ***Order can be communicated indirectly***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [482]:

The Trial Chamber in *Blaskic* followed the definition in *Akayesu* and went further to hold at paragraph 282 that an order does not need to be given by a superior directly to the person(s) who perform(s) the *actus reus* of the offence...

#### ***It is irrelevant whether the order was clearly illegal***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [482]:

...Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order. Therefore, it is irrelevant whether the illegality of the order was apparent on its face. The Trial Chamber in *Kordic* agreed with and applied the above principle adding that, what has to be shown is that the accused possessed the authority to order.

### **5.3.3. Soliciting**

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [64]:

Solicit – The second term used in the regulation is “solicits,” which generally denotes a less emphatic form of conduct than an “order.” In criminal terms, solicitation is an offense that also reaches conduct by one which encourages, entices or requests another to commit a crime. Consistent with this view is the Model Penal Code, which defines solicitation as encouraging or requesting another person to engage in conduct that constitutes a crime or an attempt to commit a crime, with the intent that the crime be committed. Model Penal Code, Se. 5.02(1) (1962).

### **5.3.4. Inducing**

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [64]:

Induce – The final term is the most comprehensive of the three in that it refers to a wide spectrum of actions intended to produce or bring about a particular result. In that sense it subsumes the previous two terms, as both orders and solicitations can be said to induce the result that they seek to achieve. Nonetheless, to induce a particular result does not necessarily require an order or a solicitation and can be brought about through less demanding means such as persuasion and the use of other forms of influence.

## **5.4. Attempt**

*(i) Applicable law*

*UNTAET Regulation 2000/15*, s14.3:

In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

### **General application and principles**

*Mateus Tilman*, 8/2000, Judgment, 24 August 2001, at [54], [62]

...And Article 53 PCI provides that “Attempt to commit a crime is punishable if the intention of the offender has revealed itself by a commencement of the performance and the performance is not completed only because of circumstances independent of his will.”

...

Concerning the charge of attempted murder, the law does not provide particular jurisdiction for attempted crimes different to the jurisdiction for the same completed crimes. Whether attempted or completed, it is still a crime of the same nature. Article 53 IPC only says that the maximum of the basic punishment imposed on the crime in case of attempt shall be mitigated by one third, and that the additional punishments for attempts are the same as for the completed crimes. Therefore, the Special Panel shall exercise jurisdiction to the crime of murder, whether attempted or completed, insofar as the crime was committed in the period between 1 January 1999 and 25 October 1999.

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [71]:

As a serious criminal offense contained in Section 5.1 of UNTAET Regulation No. 2000/15, murder as a crime against humanity can be either committed as provided in Section 14.3 (a) through (d) of the same regulation or attempted as provided in Section 14.3(f). Accordingly, when a person attempts to commit a murder as a crime against humanity and (1) commences the execution of the crime by taking a substantial step toward its accomplishment, and (2) the crime does not occur because of circumstances independent of that person's intentions, that person nonetheless incurs criminal responsibility under Section 14.3(f) for his attempt to commit the crime. ...

See also *Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at pp11 and pp48-49, where the Court followed this approach.

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at p11:

(d) The appropriateness of the charge of "Attempted Murder"

An indictment must allege that the purpose of a defendant's action was the commission of a crime within the jurisdiction of the Special Panels. Nonetheless, it need not allege that the accused was successful in the commission of the offense. Individual criminal responsibility and liability for punishment attach equally to "attempts to commit such a crime" so long as an accused takes "action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions." Section 14.3(f) of UNTAET Regulation 2000/15. This is equally true if the attempt was to commit a crime against humanity in the form of murder....

***Attempts are a form of criminal liability not a distinct crime***

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at pp11-12

Although Count 3 of the indictment refers to "Crime Against Humanity: Attempted Murder," it is arguable that a better phrasing of the charge is possible, although not necessarily required as a matter of law. In the case of *Prosecutor v. Rudolfo Alves Correia*,<sup>3</sup> the defendant was charged with a crime against humanity in the form of murder. The panel concluded that there was insufficient evidence of a completed murder, but there was sufficient evidence of its attempted commission. Accordingly, the panel qualified the crime for which the defendant bore individual criminal responsibility as "an attempt to commit a crime against humanity in the form of murder."

Regardless, the phrasing of the indictment in its present form is sufficient in that it properly alleges a crime within the jurisdiction of the Special Panels and does so in a manner that provides adequate notice to the defendants of the charges against them.

<sup>3</sup> Case No. 27/2003. Decided on 25 April 2005.

***No special mens rea requirement for attempts***

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at p11:

... Contrary to the assertion of the defendants, there is no specific intent required in the case of an attempted murder other than the intent to commit murder itself, as the lack of success in the execution of the crime is "independent of the person's intentions." See Section 14.3(f).



### ***Requirement that a substantial step was taken***

*Mateus Tilman*, 8/2000, Judgment, 24 August 2001, at [55]:

... An attempted is to take the step necessary to produce the desired consequences. For an act to constitute an attempt, it must be immediately and not merely remotely, connected with the commission of the offense. It must to be more than mere preparation for the commission of the offence.

*Francisco Pedro*, 1/2001, Judgment, 14 April 2005, at [15]:

Because the accused had the intent to kill Carliot Mau Loe as part of a systematic attack on the civilian population, and was prevented from doing so only by the escape of the victim, but had already taken him to the intended place of killing under cover of darkness, and had made him leave the car there, he had performed acts that commenced the execution of the crime by a "substantial step" in the sense of Sec.14.3(f) Reg. 2000/15, wherefore he is responsible for the Crime against Humanity of Attempted Murder.

Sec. 14.3 (f) Reg. 2000/15 is in so far consistent with customary international criminal law, which requires a significant step towards the completion of the crime (Ambos, in Triffterer (ed.), Commentary on the Rome Statute of the ICC, "Art. 25", margin No. 32).

*Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005, at [68]:

An attempt requires more than the mere contemplation of a crime or planning of an offense. Even steps taken in preparation for a crime may fall short of an attempt. As stated in Section 14.3(f) of UNTAET Regulation 2000/15, an attempt to commit a crime requires "taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independence of the person's intentions."...

### ***Acts held to amount to a 'substantial step' by the Special Panels:***

- Accused took victim to intended place of killing under cover of darkness and made him get out of the car: *Francisco Pedro*, 1/2001, Judgment, 14 April 2005, at [15].
- Accused ordered soldier to shoot victim, soldier raised gun and shot at victim (but autopsy evidence ruled out that victim had been shot in the head as alleged in indictment): *Rudolfo Alves Correia*, 27/2003, Judgment, 25 April 2005.
- Accused set houses on fire knowing that the victims were inside and attacked victims as they fled the houses: *Mateus Tilman*, 8/2000, Judgment, 24 August 2001, at [55].

## **5.5. Aiding or abetting**

(i) *Applicable law*

*UNTAET Regulation 2000/15*, s14.3:

In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission

### ***General principle and application***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [458]:

With respect to the jurisprudence of the ICTR regarding the issue of aiding and abetting rape, the Tribunal found in the case of *Akayesu* that according to Article 6(1) of its Statute, that the Accused, having had reasons to know that sexual violence was occurring, aided and abetted acts of sexual violence by allowing them to take place on or near the premises of the *bureau communal* and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence without which those acts would not have taken place.

### ***Aiding, abetting and assisting are forms of accessorial liability***

*Francisco Pedro*, 1/2001, Interlocutory Decision to Dismiss Amended Indictment, 22 May 2001, at p5:

In accordance to the jurisprudence of the ICTY (International Criminal Tribunal for the former Yugoslavia), the verbs *to assist*, *to commit*, *to abet* or *otherwise to assist* a crime are not all compatible. In fact, an individual can be said to have committed a crime when he physically perpetrates the relevant criminal action. As opposite, to the commission of a crime, *aiding*, *abetting* and *assisting* is a form of accessory liability. ...

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [456]:

The Appeals Chamber of the ICTY in *Tadic* explained the differences in the following terms:

The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

### ***Requirement for an act of assistance***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [456]-[457]:

The Appeals Chamber of the ICTY in *Tadic* explained the differences in the following terms:

...

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

...

It is clear from the various judgments of the Trial Chamber and the Appeals Chamber of the ICTY that the elements to be established for an accused for a finding that an accused is responsible for aiding and abetting is as follows:

An accused will incur individual criminal responsibility for aiding and abetting a crime under Section 5.1 where it is demonstrated that the accused carried out an act, which consisted of practical assistance, encouragement or moral support to the principal offender of the crime.<sup>76</sup> The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.<sup>77</sup> The act of assistance may be either an act or omission, and it may occur before or during the act of the principal offender.<sup>78</sup> Mere presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.<sup>79</sup>

<sup>76</sup> *Furundzija* Trial Judgment, pars 234,249. 137 – *Furundzija* Trial Judgment pars 223, 224, 249; Prosecutor v Aleksovski, Case IT-95-14/1-T, Judgment, 25 June 1999 (“*Aleksovski* Trial Judgment”), par 61; *Kunarac* Trial Judgment, par 391; *Kordic and Cerkez* Trial Judgment, par 399.

<sup>77</sup> *Aleksovski* Appeal Judgment, 24 Mar 2000 par 162; *Kunarac* Trial Judgment, par 391.

<sup>78</sup> *Prosecutor v Furundzija*, Case IT-95-17/1-T, Judgment, 10 Dec 1998 (“*Furundzija* Trial Judgment”), par 232; *Tadic* Appeal Judgment 7 May 1997, par 689; *Kunarac* Trial Judgment par 393.

<sup>79</sup> *Aleksovski* Appeal Judgment par 162; *Tadic* Appeal Judgment par 229; *Kunarac* Trial Judgment, par 392.

### ***Need not demonstrate that the defendant’s assistance caused the crime***

*Francisco Pedro*, 1/2001, Interlocutory Decision to Dismiss Amended Indictment, 22 May 2001, at p5:

In accordance to the jurisprudence of the ICTY (International Criminal Tribunal for the former Yugoslavia)... “The act of assistance needs not to have caused the act of the principle”.<sup>1</sup>

<sup>1</sup> Prosecutor v. Anto Furundzija, case n. IT-95-17/1-T, Judgement May, 10 dec 1998; Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, case no. IT-96-23-T & IT-96/23/I-T, Judgement 22 February 2001.

### ***Mens rea requirements***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [456]-[457]:

The Appeals Chamber of the ICTY in *Tadic* explained the differences in the following terms:

...

In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed).

It is clear from the various judgments of the Trial Chamber and the Appeals Chamber of the ICTY that the elements to be established for an accused for a finding that an accused is responsible for aiding and abetting is as follows:

...

To establish *mens rea* of aiding and abetting under Section 14.3(c), it must be demonstrated that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.<sup>80</sup> The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender’s state of mind. However the aider and abettor need not share the intent of the principal offender. The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability from that of an accused acting pursuant to a joint criminal enterprise who does share the intent of the principal offender.

<sup>80</sup> 141 – *Aleksovski* Appeal Judgment 24 Mar 2000 par 162; *Kunarac* Trial Judgment, par 392.

### ***Distinction between aiding and common purpose***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [455]-[458]:

With respect to individual criminal responsibility under Section 14.3(c) – aiding & abetting – the Court will first distinguish individual criminal responsibility for aiding and abetting pursuant to Section 14.3(c) and acting in furtherance of a common purpose or design to commit a crime pursuant to Section 14.3(d).

The Appeals Chamber of the ICTY in *Tadic* explained the differences in the following terms:

The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed).

See also the cases of *Augustinho da Costa* (7/2000, Judgment, 11 October 2001) and *Francisco Pedro* (1/2001, Judgment, 14 April 2005) in which the aiding or abetting form of criminal responsibility was applied.

## **5.6. Common purpose**

### *(i) Applicable law*

*UNTAET Regulation 2000/15*, s14.3(d):

In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

...

in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or
- (ii) be made in the knowledge of the intention of the group to commit the crime;

(ii) *Treatment by the SPSC*

The Special Panels applied the “common purpose” mode of liability under section 14.3(d) of UNTAET Regulation 2000/15 in many cases, but gave very little explanation of the scope of the term. The cases in which an accused was found liable for this form of participation include:

- *Joseph Leki*, 5/2000, Judgment, 11 June 2001
- *Augustinho da Costa*, 7/2000, Judgment, 11 October 2001
- *Augusto Asameta Tavares*, 2/2001, Judgment, 28 September 2001
- *Jose Cardoso*, 4c/2001, Judgment, 5 April 2003
- *Anastacio Martins and Domingos Goncalves*, 11/2001, Judgment, 13 November 2003
- *Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005.

Where analysis of this form of responsibility was given, it was based on the ICTY's approach to its form of liability referred to as “joint criminal enterprise”. In *Jose Cardoso* (4c/2001, Judgment, 5 April 2003) the Panel adopted for s 14.3(d) the same elements as the ICTY had applied in its joint criminal enterprise jurisprudence (at [369-375]). That jurisprudence requires three basic elements: the existence of an arrangement or understanding by the group, participation by the accused, and a mental element.

***The requirement of an understanding or arrangement***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [369]:

The Appeals Chamber in *Tadic* summarized the objective elements (*actus reus*) and subjective elements (*mens rea*) of the mode of participation envisaged in Section 14(a) if committed as a joint-enterprise and Section 14(d) are as follows:

“i. A plurality of persons. They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.

ii. The existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

...

In the case of *Prosecutor v Krnojelac*<sup>44</sup> the Trial Chamber of the ICTY adopting the approach of the Appeals Chamber in *Tadic* set out the elements necessary to establish the existence of a joint criminal enterprise:

a. For liability pursuant to a joint criminal enterprise to arise, the Prosecution must establish the existence of that joint criminal enterprise and the participation in it by the Accused.

b. A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.

...

In the case of *The Prosecutor v Vasiljevic*<sup>45</sup> the Trial Chamber of the ICTY set out the elements for criminal responsibility under a joint criminal enterprise. For individual criminal liability to arise under a joint criminal enterprise, the Prosecution must establish

the existence of a joint criminal enterprise and the participation of the accused in that enterprise.

1. The Prosecution must establish the existence of an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed. The arrangement or understanding need not be express, and it may be inferred from all the circumstances. The fact that two or more persons are participating together in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act.

...

44. IT-97-25 "Foca" [Judgment of 15 March 2002]

45. IT-98-32 "Visegrad" [Judgment 29 November 2002]

*Francisco Pereira*, 34/2003, Judgment, 27 April 2005, at pp19-20:

At any level, joint criminal enterprise must require a *minimum* of coordination among those who participate in the action, in order to assure that the aim of the action is properly pursued. This *minimum* may be represented as a horizontal expression of will, explicit or implied, which binds those taking part in the specific action and is, in the end, the very reason for gluing their responsibility together. ...

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at [124]:

In considering the application of Section 14.3(d)(i) we must first determine whether there existed a group of persons acting with a common purpose; ...

### ***The requirement of participation by the defendant***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [369]-[375]:

The Appeals Chamber in *Tadic* summarized the objective elements (*actus reus*) and subjective elements (*mens rea*) of the mode of participation envisaged in Section 14(a) if committed as a joint-enterprise and Section 14(d) are as follows:

...

iii. *Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.*

...

In the case of *Prosecutor v Krnojelac*<sup>44</sup> the Trial Chamber of the ICTY adopting the approach of the Appeals Chamber in *Tadic* set out the elements necessary to establish the existence of a joint criminal enterprise:

...

c. A person participates in that joint criminal enterprise either:

- i. by participating directly in the commission of the agreed crime itself (as a principal offender);
- ii. by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participating in the joint criminal enterprise to commit that crime; or

- iii. by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.
- d. If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission.

In the case of *The Prosecutor v Vasiljevic*<sup>45</sup> the Trial Chamber of the ICTY set out the elements for criminal responsibility under a joint criminal enterprise. For individual criminal liability to arise under a joint criminal enterprise, the Prosecution must establish the existence of a joint criminal enterprise and the participation of the accused in that enterprise.

- ...
- 2. A person participates in a joint criminal enterprise by personally committing the agreed crime as a principal offender, or by assisting the principal offender in committing the agreed crime as a co-perpetrator (by undertaking acts that facilitate the commission of the offence by the principal offender), or by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system. If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.

- ...
- 44. IT-97-25 "Foca" [Judgment of 15 March 2002]
- 45. IT-98-32 "Visegrad" [Judgment 29 November 2002]

*Anastacio Martins and Domingos Goncalves*, 11/2001, Judgment, 13 November 2003, at p14:

The material or objective element, or *actus reus*, will be a cooperative behaviour, of any significance and not merely passive, which, by adhesion to the action of the group, gives a contribution to the achievement of the common aim: in the specific cases, the presence and the participation, by the accused, in the execution of at least of a part of the general plan of raid and murders, strengthened the determination of the group, giving moral support to the will and determination of the other participants to the action. The fact that the two accused did something specific in the course of the action – by stabbing or chopping some of the victims or, in the case of Anastacio Martins, giving orders – distinguishes their contribution in comparison with the simple presence of other militia members which were on the spot but have not been prosecuted for their merely passive role (e.g. Jose Gomez, Armendo da Conceicao, Anselmo Da Silva). On these premises, the multiplicity of murders and other crimes (deportation, in this case) is merged in a unity where the identity of the single crime is lost and the participants bear the burden of the whole. In the end, it was a single, yet multifaceted, action and those who gave a contribution to it are responsible not for the single element that they directly committed but for its' entirety.

*Francisco Pereira*, 34/2003, Judgment, 27 April 2005, at p20:

...By adhering to a plan or a common (i.e. shared) purpose, the accused would further the criminal activity by lending moral support to someone else's execution. Persisting in the geometrical representation, it is this horizontal will that would bind the co-perpetrator in joint criminal enterprise and not the will expressed by the order from the militia leader to the subordinate. The order is a "vertical" expression of will in the sense that it implies the presence of a hierarchy, of a leader and of subordinates and is not, by itself, a source of joint criminal responsibility. ...

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at [124]:

In considering the application of Section 14.3(d)(i) we must ... determine ... second, whether the defendant contributed to the commission of a crime by such a group with the aim of furthering its criminal activity or purpose...

### ***The mental element***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [369]-[375]:

The Appeals Chamber in *Tadic* summarized the objective elements (*actus reus*) and subjective elements (*mens rea*) of the mode of participation envisaged in Section 14(a) if committed as a joint-enterprise and Section 14(d) are as follows:

...  
By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.

In the case of *Prosecutor v Krnojelac*<sup>44</sup> the Trial Chamber of the ICTY adopting the approach of the Appeals Chamber in *Tadic* set out the elements necessary to establish the existence of a joint criminal enterprise:

...  
e. To prove the basic form of joint criminal enterprise, the Prosecution must demonstrate that each of the persons charged and (if not one of those charged) the principal offender or offenders had a common state of mind, that which is required for that crime. Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.

...  
In the case of *The Prosecutor v Vasiljevic*<sup>45</sup> the Trial Chamber of the ICTY set out the elements for criminal responsibility under a joint criminal enterprise. For individual criminal liability to arise under a joint criminal enterprise, the Prosecution must establish the existence of a joint criminal enterprise and the participation of the accused in that enterprise.

...  
3. The Prosecution must also establish that the person charged shared a common state of mind with the person who personally perpetrated the crime charged (the "principal offender") that the crime charged should be carried out, the state of mind required for that crime. Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.

44. IT-97-25 "Foca" [Judgment of 15 March 2002]

45. IT-98-32 "Visegrad" [Judgment 29 November 2002]

*Anastacio Martins and Domingos Goncalves*, 11/2001, Judgment, 13 November 2003, at p14:

On the mental element of the action, or *mens rea*, it is sufficient to say that the intention to participate can hardly be placed in doubt, given the kind of action committed by the accused. Similarly, "the knowledge of the intention of the group to commit a crime"



(14.3 of UNTAET Regulation 2000/15) is undisputable, if also it takes the shade of a *dolus indeterminatus* (which is still an epiphany of *dolus directus*) where the intention includes the option of a limited but not determined number of possibilities. Like the will of a suicide bomber or of the terrorist who puts a bomb in a crowded place in order to reach a number of victims which cannot be predetermined and which can range from none to many, the intention of the militia member, at the onset of the action, covered an open range of options. Of course, this does not presume an unlimited acceptance of an unlimited number of killings nor (unlike the terrorist or the suicide bomber in the examples given before) was it the purpose of each militia member to reach the highest possible number of deaths; nonetheless the intention was clear and the adherence to the plans so clearly outlined in the meeting of 2<sup>nd</sup> September implies the determination or acceptance of the inevitable results.

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at [124], [140]:

In considering the application of Section 14.3(d)(i) we must ... determine ... third, whether the defendant's contribution to the commission of the crime was intentional.

...

A defendant's contribution to the commission of a crime must be intentional in the sense that he must mean to advance the commission of the crime or to increase the likelihood of it being committed. This is to distinguish the defendant from a person who advanced the commission of a crime without intending to do so or having reason to know that his actions would have that effect.

## **5.7. Command responsibility**

### *(i) Applicable law*

UNTAET Regulation 2000/15, s16:

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

### *(ii) Treatment by the SPSC*

In contrast to other institutions established to try international crimes, the SPSC rarely relied on command responsibility as a means by which to establish the liability of accused persons. This was probably due in large part to the fact that those indicted were usually the direct perpetrators, rather than the planners and organizers, of crimes. The only detailed consideration of the doctrine was given in the case of *Jose Cardoso* (4c/2001, Judgment, 5 April 2003, at [507]-[522].

## ***General principle and application***

*Joao Franca Da Silva*, 4a/2001, Judgment, 5 December 2002, at [125]:

... Superior criminal responsibility is the responsibility of a superior for the acts of his subordinates if they superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary steps or reasonable measures to prevent such acts or to punish the perpetrators

thereof. It has been shown that acts incriminated were committed by, or at the instigation of, or with the consent of, a person in authority....

*Anton Lelan Sufa*, 4a/2003, Judgment, 25 November 2004, at [17]:

Because the accused had effective control over the militia members who committed the killings, and because he neither prevented the commission of the criminal acts nor punished his subordinates afterwards, also bears superior responsibility according to Sec.16 Reg 2000/30.

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [507]-[513]:

The principles of command responsibility are set in Section 16 of the UNTAET Regulation 2000/15...

The concept of command responsibility as stated in the mention UNTAET regulation is not new and follows the examples set in the ICTY and ICTR Statutes, that develop a concept already well-established in customary international law and eventually also in conventional international law.

The doctrine defines two types of command responsibility: the so-called direct command responsibility, arising out of the positive acts of the superior, and the indirect command responsibility or command responsibility *strictu sensu* that derives from culpable omissions from the commander. Indirect command responsibility means that the superior is not only responsible for ordering or planning acts carried out by his troops, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates. The criminal liability of a superior for positive acts follows from general principles of accomplice liability, as stated in Section 14.3 b) as follows: "a person shall be criminally responsible if orders, solicits or induces the commission....". On the contrary the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act. The reasoning behind this idea is that international law imposes a positive obligation on superiors to prevent persons under their control from committing violations of international humanitarian law. The non-compliance of this obligation carries out the criminal responsibility under Section 16 of the Regulation 2000/15.

After the Second World War the doctrine of command responsibility for failure to act received its first judicial recognition in an international context. Whilst not provided for in the Charters of the Nuremberg or Tokyo Tribunals, a number of States at this time enacted legislation recognizing the principle (p.e the French Ordinance of 1944, Concerning the Suppression of War Crimes, the Chinese Law of 1946, Governing the Trial of War Criminals or the Luxembourg Law of 1947 on the Suppression of War Crimes). Military courts used the principle of command responsibility for failure to act as a valid basis for placing individual criminal responsibility on superiors for the criminal acts of their subordinates.

The United States Supreme Court, in *In Re Yamashita*, stated that the law of war imposed on an army commander a duty to take the appropriate measures within his power to control the troops under his command for the prevention of acts in violation of the law of war, and he may be charged with personal responsibility for failure to take such measures when violations result. The United States Military Tribunal at Nuremberg, in the "*Medical Case*", declared that "*the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war.*" Similarly in the "*Hostage Case*" it was declared "*a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.*" Equally the "*High Command Case*"

held that “*under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility.*”

Despite this jurisprudence, the Geneva Convention of 1949 did not include an express provision on command responsibility. However arts. 86 and 87 of the Geneva Additional Protocol I (1977) have codified the principle in international conventional law. Art.86 states the principle under which a superior may be held criminally responsible for the crimes committed by his subordinates where the superior has failed to properly exercise his duty and Art. 87 declares the duty of commanders to control the acts of their subordinates and to prevent or, where necessary, to repress violations of the Geneva Conventions or the Protocol.

However, it was not until the conflicts in Rwanda and Yugoslavia that the doctrine was applied. In the ICTY the Trial Chamber in *Delalic Case* (also known as *Celebici case*) notes the inclusion of provisions recognizing the principle of command responsibility in several National Army Field Manuals, in the Additional Protocol I and in the draft Statute of the ICC concluding that the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.

The jurisprudence from the *Celebici case* and the case against General Balski influenced the inclusion of Article 28 of the Statute of the International Criminal Court, making command responsibility a basis for criminal responsibility when international crimes are committed. Art. 28 reads as follows:

**Article 28**  
**Responsibility of commanders and other superiors**

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commanders shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

***Requirement for a superior-subordinate relationship***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [519]:

The Panel agrees with the 3 essential elements of superior responsibility identified by the General Prosecutor in its closing statement, including the Superior-Subordinate relationship, the fact that the superior knew or had reason to know that the criminal act was about to be or had been committed, and the failure to prevent or punish.

***The superior-subordinate relationship need not be military and can be merely de facto***

Jose Cardoso, 4c/2001, Judgment, 5 April 2003, at [514]-[517]:

Art. 28 establishes that the responsibility affects not only to military superior (art. 28 a) but also to other superiors (art.28 b). This possibility has also been established by the jurisprudence of the International Courts that don't put the emphasis in the position of the accused within the military hierarchy but in the existence of a superior-subordinate relationship.

The existence of such a relationship can derivate from a *de jure* situation or from a *de facto* situation. It is a *de jure* superior-subordinate relationship when the assumption of responsibilities comes as a consequence of an official appointment. In the absence of such an appointment the accused must actually be found to possess the right to control subordinates. Mere authority to control actions of others does not preclude a finding of command responsibility. It is necessary to determine the existence of the command by reference to the position of the accused in the overall organization, and analyse the nature itself of the organization. Dealing with these matters the ICTR Trial Chamber declared in the *Akayesu* case a local civilian official could be considered as somebody with command responsibility as according to Rwandese law its position as a burgomaster placed him as the person responsible for maintaining and restoring the peace.

*De facto* command doesn't require the formal appointment of the commander. Superior means superior in capacity and power to force a certain act and not only superior in rank. *De facto* command authority is a particularity of civil warfare, where the State authority is diffused. Power to force a certain act inevitably involves the power to demand an actual capacity to impose obedience.

A superior-subordinate relationship requires a chain of command. Evidence of *de facto* command may be assessed through an analysis of the distribution of tasks. The mere capacity to influence others doesn't constitute command liability but the effective subordinate as a result of this capacity can be considered as command responsibility. However opinions on this matter are not unanimous and in the *Celebici* case it is stated that the influence of a sub commander over some prison guards did not demonstrate his superior status but the fear of the guards, and for the Chamber that was not sufficient ground to establish the responsibility.

...

However, when it came to applying these principles to the circumstances of militia groups in Timor, the Panel had some difficulty. Jose Cardoso, 4c/2001, Judgment, 5 April 2003, at [521]:

a. ... Regarding the first element the Panel admits the possibility of applying the theory of command responsibility to non-military commanders as has been stated in ICTR *Akayesu* case and ICTY *Delalic* case. However, the Panel notes that in such cases this possibility was referred either to non-military state officers or to political leaders or civilian superiors in positions of authority. The nature of militias in East Timor cannot be compared to the civilian structure of a State. It is not disputed that the accused Jose Cardoso, as leader of the militia, was formally in a position of command with respect to its members. It is uncertain, however, what was the nature of the relation between the militia members and the Indonesian military and especially up to what point militia members were under the only command of the accused or, on the contrary, obeyed to different chains of command. Although, as stated by the Prosecution quoting *Blaskic* case, a commander may incur criminal responsibility for crimes committed by persons who are not formally his subordinates, insofar as he exercises effective control over them, it is not clear if TNI member operating together with militia members were under the authority of Cardoso and, moreover, if other members of the militia considered

themselves under the authority of TNI members apart from being under the authority of the accused.

***Requirement for the superior to have knowledge of the crime***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [521]:

b. On the second element of the command responsibility, whether the accused knew or had reason to know that the act was about to be or had been committed the Panel has to clarify two points. Firstly, if the accused knew in advance which was the nature and objective of the operation and secondly if he knew its results. It is undisputed that he accused and his members went to Raimea in order to implement a military operation. However it has not been proved that the objective of the operation were the killing of the victims. Defense witness Oscar Du Ceo declared that the accused informed him that their mission was to destroy and burn those building that belonged to the Government, but that they were not allowed to burn private houses or harm people. There is no doubt that after the killings took place Cardoso had knowledge of it. According to witnesses Oscar Du Ceo the accused was informed by radio that in Moco Raimea huses were burnt and people had been killed. The reaction of the accused, that said “now we are in trouble; they have already killed people” allows to believe that he wasn’t satisfied with the results of the operation.

***Requirement for the superior’s omission to prevent or punish***

*Jose Cardoso*, 4c/2001, Judgment, 5 April 2003, at [521]:

c. Having known the accused that the criminal act has been committed the next step for the Panel is to determine if he had the possibility to punish the behaviour of its subordinates. As already declared above it is uncertain the nature of the relationship between the accused as a commander of the militia and the TNI military. TNI soldiers (presumably Inazio and Armando Istakio) participated in the killings of Raimea along with militia members. The Panel doesn’t believe that the accused, as a commander of a non-official civil organization had the power or authority to punish members of the security forces of Indonesia, that according to military hierarchy would be responsible only before their respective military commander (at the moment 2<sup>nd</sup> Lieutenant Bambang Indra). Moreover, the punishment of non-TNI militia members participating in the attack would have supposed a challenge to the authority of the TNI. The participation of military in the operation gave to the action an image the legitimacy that was not in the hands of the accused to challenge.

## 6. DEFENSES

*UNTAET Regulation 2000/15* s 19 provides for defenses to criminal responsibility. It listed a number of specific defenses (insanity, intoxication, self-defense, duress) and also reserved the possibility for other defenses “derived from applicable law” to remain applicable (s 19.3). An additional ground for excluding criminal liability – mistake – is provided in s 20. However, these grounds of exculpation were raised in a surprisingly small number of cases before the Special Panels, and were successful in only very few.

Note also that provocation was treated not as a defense but as a mitigating circumstance. See eg *Carlos Soares*, 9/2002, Judgment, 8 December 2003, at p8 and further in this Digest at p124.

### 6.1. Insanity

(i) *Applicable law*

*UNTAET Regulation 2000/15*, s.19.1(a):

A person shall not be criminally responsible if, at the time of that person's conduct:

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

This provision was never considered by the Special Panels in a case.

### 6.2. Duress, self-defense, and superior orders

(i) *Applicable law*

*UNTAET Regulation 2000/15*, s19.1(c) and (d):

A person shall not be criminally responsible if, at the time of that person's conduct:

...

(c) the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person's control.

*Indonesian Penal Code* art. 49:

(1) Not punishable shall be the person who commits an act necessitated by the defence of his own or another one's body, chastity or property against direct or immediate threatening unlawful assault.

(2) Not punishable shall be the overstepping of the bounds of necessary defence, if it has been the immediate result of severe emotion caused by the assault.

*UNTAET Regulation 2000/15, s21:*

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires.

Contrast *Indonesian Penal Code*, art. 51, which provided a defense for the following of an official order issued by a competent authority:

(1) Not punishable shall be the person who commits an act for the execution of an official order issued by the competent authority.

(2) An official order issued incompetently shall not exempt the punishment unless it was considered in good faith by the subordinate to be issued competently and its execution lied within the limit of his subordination.

As explained above at 1.6.1 UNTAET Regulations take precedence over inconsistent Indonesian legislation.

### ***General principle and application***

In a number of decisions the Special Panels considered the case of defendants who claimed that their actions were the result of coercion, duress or similar. This argument was usually based on a claim that the defendant had been forced to join a militia and to participate in its actions, and that a refusal to do so would have resulted in serious injury or death to the defendant. In most cases the Special Panels did not clearly differentiate between the various specific legal defenses that such a factual allegation might raise, but rather tended to conflate duress, self-defense and superior orders.

In many cases the Court referred to the relevant legislation providing bases for exculpation and simply dismissed it as not applicable on the proven facts of the case. See for example:

- *Julio Fernandez*, 2/2000, Judgment, 27 February 2001, at p8
- *Carlos Soares Carmone* 3/2000, Judgment, 8 March/25 April 2001, at pp7-8
- *Manuel Goncalves Leto Bere*, 10/2000, Judgment, 15 May 2001, at pp10-11
- *Carlos Soares*, 12/2000, Judgment, 31 May 2001, at pp9-10
- *Augusto Asameta Tavares*, 2/2001, Judgment, 28 September 2001, at [44]-[50]
- *Jose Valente*, 3/2001, Judgment, 19 June 2001, at p10
- *Lino Beno*, 4b/2003, Judgment, 16 November 2004, at [16]
- *Domingos Metan*, 4c/2003, Judgment, 16 November 2004, at [15]
- *Anton Lelan Sufa*, 4a/2003, Judgment, 25 November 2004, at [27].

A more detailed explanation of why the defense of duress was not made out in such cases was first given in *Joseph Leki* (5/2000, Judgment, 11 June 2001). In particular the Panel emphasized that the question of duress must be assessed not only in reference to the specific date of the crime, but throughout the defendant's entire participation in the militia (at pp8-9):

The alleged duress can be assessed not only the day the accused shot Paulino Cardoso as stressed by the Defense, but also along his whole activity in the militia group.

The accused joined the militia in June 1999; he did it supposedly to avoid threats to himself and his family, as his statements underline. However, such constraint is not plenty to put aside his criminal responsibility for the acts he was latter involved. He alleged that he militia could kill him or his family if he refused to join (p.179, line 46). Asked why he didn't take his family and fled to hide in the places the population was forced to, he just answered that "there was a big number of familiars" (p.180, line 38). No one should be supposed to stand a heroic behaviour by challenging the alleged constraint to join. However, the Court is persuaded that the accused had several choices to do as long as he was with his family and worked as house security guard as he informed when the militia leaders came before him (p.185, line 16). Leki admitted that many other persons resisted joining the militia (p.178, line 15) and recognized that they were forced to hide in the forests (p.180, lines 30/32). The accused chose to be in line with the guns.

From the time when he joined until the operation came after the ballot in August 1999, he had many chances to refuse to share the purposes of the militia group. The retaliation would come as soon as the results pro-independence were confirmed. More than two months after he joined, would Leki still be afraid to be killed? The Court is convinced that his personal condition was not worse nor better than what forced the rest of the population who fled to the forests.

The Defense emphasizes that the accused could not avoid killing Paulino Cardoso on the second day of the operation. "He had no voluntarily shot, he had a gun pointed at his head to shoot Cardoso", justifies the Defense in final statement. The Court agrees that this specific circumstance was really sufficient to exclude his criminal responsibility for the murder as principle perpetrator. However even so remains his individual responsibility as one of those who provided the opportunity and the means for the result, considering that he had prior joined the militia plans to make possible the attack. The killings, burnings and forced deportation came as a corollary of the militia campaigns he joined to. Even before having a gun pointed at his head – specific circumstance that by itself should be duress – the accused had already agreed with and accepted that he rifle he was entitled to hold and his performance in the attacks were necessary to the acts committed by the main perpetrators. Both the rules above are appropriate to consider his responsibility in the two counts.

Therefore, the alleged – and proved – duress on the accused at the very last time he fired his gun at Paulino Cardoso would exclude his responsibility, since he could not necessarily and reasonably avoid that threat, as says Sect.19.1(d) of UR-2000/15. However, the undisputed fact that he, prior to the very last moment of duress, could avoid that circumstance endows the Court sufficient grounds to believe that Joseph Leki was able to avoid such threat simply by refusing to contribute to the attacks.

The same approach was subsequently taken in *Augustinho da Costa*, 7/2000, Judgment, 11 October 2001, at [64]-[71] and *Mateus Tilman*, 8/2000, Judgment, 24 August 2001, [43]-[51] and was cited and followed in *Joni Marques et al*, 9/2000, Judgment, 11 December 2001, where the Panels stated (at [936]) that:

...the alleged duress has to be current; not the alleged duress to join a group. There is a difference between being forced to join a group and to be engaged in a particular operation of the group.

Finally, in *Carlos Soares* (12/2000, Judgment, 31 May 2001) the defendant claimed that he shot the victim in the belief that the victim was holding an iron bar with which he was about to attack the defendant. The Panel concluded that the version of events was unbelievable and the defense was not made out: "There should be no threat in holding an iron bar against a rifle" (at p8).



### 6.3. Intoxication

*UNTAET Regulation 2000/15, s19.1(b)*

A person shall not be criminally responsible if, at the time of that person's conduct:

....

(b) the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the panels

The defense of intoxication was raised in the case of *Carlos Soares Carmone* (3/2000, Judgment, 25 April 2001). However the Panel found that the defense was not made out on the facts, as the required level of intoxication had not been proved by the evidence (at pp7-8).

### 6.4. Mistake

*(i) Applicable law*

*UNTAET Regulation 2000/15, s20:*

20.1 A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

20.2 A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the panels shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Section 21 of the present regulation.

*(ii) Treatment by the SPSC*

*Gaspar Leki, 5/2001, Judgment, 14 September 2002, at [33]:*

...Section 20 UNTAET Regulation 2000/15 provides that: "A mistake of fact shall be a ground of excluding criminal responsibility only if it negates the mental element required by the crime". In the present case what the accused intended to kill was a pig and not a person. The applicable law, i.e. article 340 IPC applies to the intentional and premeditated killing of another person and not the killing of an animal.

*Manuel Goncalves Leto Bere, 10/2000, Judgment, 15 May 2001, at p9:*

As last, the Special panel believes that the "mistake of fact" consisting in the believe that Joao Consalves was already dead is both unproved and groundless. In fact it is undisputed that the victim was transported sitting on the front seat of the car, and all the witnesses stated that he was able to talk. How could Manuel Leto Bere think that the victim was already dead? Anyway, "a mistake of fact shall be ground for excluding criminal responsibility only if it negates the mental element required by the crime" ...

See also *Carlos Soares*, 12/2000, Judgment, 31 May 2001, at p8 where another attempt at reliance on mistake of fact was rejected by the Court as "both groundless and unproven."

## 7. SENTENCING

Sentencing was a key area of the SPSC's work in which there were frequent inconsistencies. This could in part be attributed to the absence of clear rules or principles to guide the SPSC in deciding on sentences, other than those imported by s 10 of 2000/15. The SPSC is required to take into account "the gravity of the offence and the individual circumstances of the convicted person" (see s 10.3). Further, in imposing custodial sentences of up to 25 years in duration the SPSC were required by *UNTAET Regulation 2000/15*, s 10.1(a) to "have recourse to the general practice regarding prison sentences in the courts of East Timor" as a determinant of prison sentences. On the basis that the only sentencing practice applied in the courts of East Timor is that of Indonesia, the Indonesian sentencing provisions specified in Chapter IV of the Indonesian Penal Code apply to sentencing before the SPSC, unless inconsistent with the applicable laws of Timor Leste.

### *(i) Applicable Law*

*UNTAET Regulation 2000/15*, s 10:

10.1 A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present regulation:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals; for the crimes referred to in Sections 8 and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor, shall apply.

(b) A fine up to a maximum of US\$ 500,000.

(c) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties.

10.2 In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

10.3 In imposing a sentence of imprisonment, the panel shall deduct the time, if any, previously spent in detention due to an order of the panel or any other court in East Timor (for the same criminal conduct). The panel may deduct any time otherwise spent in detention in connection with the conduct (underlying the crime).

*UNTAET Regulation 2000/30*, s 19<sup>1</sup>, s 42.5:

19 Any period spent in pre-trial detention in relation to an alleged crime, shall be credited against service of any subsequent sentence ordered in the same case.

...

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<sup>1</sup> This s 19 was added by *UNTAET Regulation 2001/25*.

42.5 The Court shall discount from the term in prison the time the convict spent under pretrial detention in respect of the crime for which the convict has been convicted. Prison sentences shall be supervised and executed by a District Court in accordance with Section 13 of Regulation No 2000/11. The convict may present any claim to the Court in relation to the violation of his or her rights.

The various domestic crimes included in the Indonesian Penal code are also ascribed separate penalties under that law.

## **7.1. General approach**

### ***Purpose of Penalty***

*Sisto Barros and Cesar Mendonca*, 1/2004, Judgment, 12 May 2005, at [165]:

The Penalty imposed on a defendant found guilty by the Special Panel serves several purposes.

First, the penalty is a form of just retribution against the defendant, on whom an appropriate punishment must be imposed for his crime.

Second, the penalty is to serve as a form of deterrence to dissuade others who may be tempted in the future to perpetuate such a crime by showing them that serious violations of law and human rights shall not be tolerated and shall be punished appropriately.

Third, the prosecution and punishment of the perpetrators of serious crimes committed in East Timor in 1999 promotes national reconciliation and the restoration of peace by bringing closure to such cases, discouraging private retribution and confirming the importance of the rule of law.

## **7.2. Some factors in sentencing**

Since sentencing is a matter highly depending on the facts and circumstances of each individual case, there is little purpose served in attempting a comprehensive list of the factors which were taken into account by the SPSC in its sentencing decisions. JSMP therefore draws attention below to some basic principles which were pointed out by the Special Panels in respect of sentencing. Of course, many other factors were considered on a case-by-case basis in the determination of sentences.

### ***The accused's degree or type of intent***

*Carlos Soares*, 9/2002, Judgment, 8 December 2003, at p7:

Given the kind of crime, on the gravity of the offence there is not much to state, since the taking of someone's life is not subject to variations of intensity; what can and does vary is the intensity of the intention to kill (ranging from the weak *dolus eventualis* to premeditation through a variety of different nuances of will). In the majority of the developed legal systems, the level of intensity of the will is taken as one of the means to measure the retribution of the penalty, for the obvious consideration that with the rise of the intensity of the criminal will, the wickedness of the personality of the accused rises as well.

In application of the same rule, it can be noticed that the *dolus impetus* which qualify the action of stabbing in the present case, is not evidence of an intense criminal personality, rather of a personality which can not restrict itself and that is therefore unable to place a psychological barrier between the insurgence of the deliberation and the execution.

### ***Provocation as a mitigating circumstance***

Carlos Soares, 9/2002, Judgment, 8 December 2003, at p8:

It is acceptable that the sense of grief, of sadness and of loneliness for the sudden loss of many relatives and of all the belongings created a condition of mental obfuscation or confusion which, if not enough to justify the murder or to support an acceptable reprisal to a verbal provocation, diminishes the responsibility of the accused and explain why he was not ready to resist his compulsion to strike.

...

This is the key to understand an act that, otherwise, appears incongruously disproportionate. Of course all this does not amount to provocation in the meaning common to common law lawyers (i.e. a defence to reduce the charge from murder to manslaughter) but amounts to a diminishing circumstance, as generally considered in civil law countries.

### ***Guilty pleas as a factor indicating leniency***

Agustinho Atolan, 3/2003, Judgment, 9 June 2003, at p7:

When the accused pleads guilty, the Court has shown a markedly lenient approach: ... the Panel has taken into consideration the opportunity to show a welcoming approach to those who, being regretful, chose a procedural option which spares time and resources of the Court. ...

In the majority of modern legal systems the guilty plea, in different shapes and with different features, gives the accused who faces a charge that cannot be challenged or that he or she does not want to challenge, the possibility to shortcut the trial and to accept a penalty immediately imposed by the judge. The inherent consequence for the advantages in terms of timesaving and procedural simplification is a relevant reduction of the penalty imposed if the accused is found guilty. Sometimes the Law or the Statute takes the duty to determine the reduction rate, depriving the judge of discretion on the issue, but most of times the Norm is silent and the judge or the Court are left free to assess the penalty in relation to the case and its circumstances; in the last eventuality, the judge will bear in mind the function and benefit of the application of the plea of guilt and will grant a discretionary reduction of the term that would be imposed if the accused were found guilty at the end of the trial.

In the use of a discretion of this sort, this Court has usually considered that, in the given circumstances, to represent an advantage for the accused, the reduction of the term which would be otherwise imposed at the end of the full trial, must be a material one, cutting around half of the term. A less drastic approach proved to be useless: after the first decision of the Special Panel ... where the Court took a less lenient decision, more than one year elapsed before a second guilty plea was submitted.