JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

The Lolotoe Case: A Small Step Forward

Dili, East Timor
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The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, East Timor. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in East Timor. For further information see **http://www.jsmp.minihub.org**

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1. INTRODUCTION

1.1. BACKGROUND

The Special Panels for Serious Crimes[1] (Special Panels) were established by the United Nations Transitional Authority in East Timor (UNTAET) in the Dili District Court in June 2000. They were created in response to the extreme violence that was widely acknowledged to have occurred in East Timor under and immediately following Indonesian occupation. The Special Panels are a hybrid UN East Timorese tribunal, with each panel consisting of one East Timorese judge and two international judges. Under the UNTAET mandate, the Serious Crimes Unit (SCU) was also created to investigate and prosecute the cases before the Special Panel

Since East Timor gained independence on 20 May 2002, the SCU has worked under the legal authority of the Prosecutor-General of East Timor. Under UNTAET's successor mission, the UN Mission of Support in East Timor (UNMISET), the SCU is mandated to assist the authorities in East Timor in the conduct of serious crimes investigations and proceedings.

Investigations into crimes committed in the Lolotoe region originally resulted in the joint indictment of 5 co-accused. The case, however, concluded with three separate judgements. Two of the original accused are presumed to be at large in Indonesia and were therefore severed from the original indictment. Two of the remaining three defendants pleaded guilty, requiring three distinct judgments. These three judgments, that of *Joao Franca da Silva alias Jhoni Franca*[2], *Sabino Gouveia Leite*[3] and *Jose Cardoso Fereira alias Mouzinho*,[4] constitute the *Lolotoe* case. This case was recognised by the Serious Crimes Unit as one of ten requiring priority treatment and has further significance as the first time in which the Special Panels have tried and convicted a defendant for rape as a crime against humanity.

1.2. METHODOLOGY

The findings in this report are based on an unofficial transcript[5] taken by JSMP observers during the hearings of the *Lolotoe* case ever since the first preliminary hearing took place on 6 April 2001. JSMP observers recorded as much as possible on laptop computer, and this combined with direct court-room observations form the basis of the analysis contained in this report. These observations have been supplemented by discussions and interviews with a range of individuals involved in case.

[1] Serious Crimes is defined in UNTAET Regulation 2000/15 sub-sections 2.1, 2.3 and 2.4 as genocide, crimes against humanity, war crimes and torture – whenever and wherever they occurred – as well as murder and sexual offences under the Indonesian Penal Code where the offence was committed between 1 January 1999 and 25 October 1999.
[2] Special Panels Case No. 4a/2001.
[3] Special Panels Case No. 4b/2001.
[4] Special Panels Case No. 4c/2001.
[5] Despite s 26.2 UNTAET Regulation 25/2001 clearly stating that the record of proceedings 'shall be made available to the public' JSMP has been repeatedly denied access to the official transcript without proper justification. Accordingly, this report must rely on the unofficial transcript and despite best efforts to provide an accurate representation of courtroom proceedings, JSMP cannot guarantee that the unofficial transcript which forms the basis of this report is a completely accurate record of proceedings. JSMP continues to lobby for public access to the official transcript as provided for by law.

This report first assesses the *Lolotoe* case from a human rights law perspective, and provides an assessment of its compliance with international fair trial standards. These benchmarks for minimum performance are based both upon treaties, such as the International Covenant on Civil and Political Rights (ICCPR) as well as non-treaty standards such as the UN Basic Principles on the Role of Lawyers. These fair trial standards have frequently been cited by the UN Human Rights Committee, and its findings are quoted in this report whenever relevant. The report then provides a thematic discussion of the broader challenges facing the Special Panels as demonstrated by the *Lolotoe* case.

JSMP acknowledges the challenges facing the Special Panels, including the initial lack of resources and expertise,[6] as well as the difficulties caused by the political and development context of East Timor. This has been taken into consideration when writing this report and JSMP welcomes the significant improvements to the serious crimes process since its inception. UNMISET, and any follow-on mission has, however, an obligation to observe minimum international human rights standards when assisting East Timor to build its judicial system[7].

1.3. IMPORTANCE OF THE LOLOTOE CASE

JSMP decided to closely monitor the *Lolotoe* case for a number of reasons. First, it is the second of ten priority cases prosecuted by the SCU. The first priority case was the *Los Palos* case which ended in November 2002. *Los Palos* was the most complicated, high-profile trial heard by the Special Panels at that time and it was therefore a litmus test of the Special Panels' ability to effectively prosecute crimes against humanity. JSMP identified several areas of concern where the *Los Palos* trial did not comply with international standards.[8] The *Lolotoe* case, finalised almost 6 months later, provides a suitable point of comparison to determine whether issues identified in the *Los Palos Case* have been minimised or continue to persist.

Secondly, *Lolotoe* is the first time rape has been tried as a crime against humanity in East Timor. Thirdly, plea bargaining was a prominent aspect of *Lolotoe* with lesser convictions and reduced sentences granted on the basis of plea agreements. *Lolotoe* was the first major case to implement a plea agreement, and it appears to have become the model for plea agreements in subsequent cases. Further, plea agreements are now regularly employed in the Special Panels and have become a usual feature of the serious crimes process.

Finally, *Lolotoe*, like all cases prosecuted by the SCU, is an essential aspect of providing justice for the crimes against humanity committed in 1999. If carried out effectively, the trials of the Special Panels have the potential to assist the people of East Timor's to overcome their tragic past while establishing the rule of law as a central tenet of the East Timorese judicial system. *Lolotoe* is but one step in this crucial process.

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[6] See for example: JSMP report: *Justice in Practice: Human Rights in Court Administration*, November 2001, available at http://www.jsmp.minihub.org ; and Amnesty International Report: *East Timor: Justice past, present and future*, July 2001 (AI Index: ASA 57/0012/2001).

[7] See Section 5.1 of UNTAET Regulation 2000/11 and Section 3 of UNTAET Regulation 1999/1 which states that all public servants in East Timor shall observe internationally recognised standards including relevantly those contained within the International Covenant for Civil and Political Rights (ICCPR) (1966) and the Universal Declaration of Human Rights (UDHR)(1948).

[8] See JSMP Report 'The Los Palos case', 2002, available at http://www.jsmp.minihub.org.

As one of the major decisions to be issued by the Special Panels thus far, *Lolotoe* illustrates the extent to which the Special Panels are coping with the painstaking task of prosecuting gross human rights violations. It is a further test of whether this process meets international fair trial standards. *Lolotoe* therefore provides a suitable opportunity to 'take stock' of the Special Panels and to discuss broader issues arising from the case that reflect the court's development.

1.4. ACKNOWLEDGMENTS

JSMP would like to emphasise that this report would not have been possible without the assistance of the judges and staff of the Special Panels, the Serious Crimes Unit, the Public Defenders Unit, the Human Rights Unit of UNMISET and others that have facilitated the JSMP monitors in their work. JSMP would like to express its gratitude to these individuals and appreciates the hard work that they are doing and their achievements to date amid difficult circumstances. JSMP offers this report in the spirit of contributing to the development of a sustainable and fair justice system for the people of East Timor.

2. CASE OVERVIEW

2.1. GENERAL CONTEXT

Lolotoe, located near the border with West Timor, is a sub-district of Bobonaro, one of East Timor's 13 districts. In 1999, the Indonesian army or TNI[9] had a substantial presence in the area through KODIM 1636, which had its headquarters in Maliana, the capital of Bobonaro district. Alongside the military, Indonesia had further forces in Lolotoe through the Indonesian Police Force (POLRI) and the Mobile Police Brigade (BRIMOB). Working together with these forces were the KMMP[10], a militia formed after the Indonesian Government announced it would hold a popular consultation to allow the East Timorese to decide between autonomy within Indonesia or independence. The KMMP were comprised of pro-Indonesian supporters intent on intimidating the East Timorese into voting for autonomy within Indonesia. The KMMP were one of more than 25 militia groups operating throughout East Timor under the umbrella militia organisation fighting for integration with Indonesia, led by Joao Tavares.

The events that are the subject of *Lolotoe* primarily concern acts of violence conducted by the KMMP militia in conjunction with the Indonesian forces between April and October 1999. These attacks included intimidation, threats, unlawful arrests and detentions, interrogations, arson, murders, rape, torture, inhuman and degrading acts and other acts of persecution. The targets of these attacks were generally the civilian population in the Lolotoe sub-district who were considered pro-independence, were sympathetic to the independence cause or were connected with the East Timorese guerrilla forces, FALINTIL.[11] There is much evidence which suggests the Indonesian forces made no attempt to intervene or prevent the attacks from occurring, and in fact provided

[9] *Tentara Nasional Indonesia* – The armed forces who until 1 April 1999 were part of ABRI (Angkatan Bersenjata Republic Indonesia) together with POLRI – the Indonesian police force.
[10] *Kaer Metin Merah Putih*
[11] *Forcas Armadas de Libertacao Nacional de Timor Leste*

logistical support and compensated many KMMP militia for their actions against the civilian population.

2.2. CASE CHRONOLOGY

The following table provides a brief overview of the major procedural steps taken in *Lolotoe* case from arrest to handing down of sentence. The intention is to illustrate the main delays in the case along with a summary of how the case progressed. Issues arising from these events will be discussed in detail later on.

DATE	EVENT
19 May 00	Jose Cardoso arrested and detained.
4 Dec 00	Sabino Leite arrested and detained.
5 Feb 01	Jhoni Franca arrested and detained.
6 Feb 01	Original indictment of 5 co-accused filed by Prosecutor.
6 Apr – 5 Jul 01	Preliminary hearing – numerous delays. Trial date fixed for 23 Aug 01
25 May 01	Amended indictment of 3 co-accused filed.
10 Jul 01	Trial date rescheduled to 18 Sept 01 due to length of Los Palos case.
11 Nov 01	Los Palos case concludes, trial hearing rescheduled for 27 Nov 01 and then 8 Feb 02.
8 Feb 02	Hearing occurs but trial postponed to allow defence to submit list of evidence.
5 Mar 02	Trial opens, prosecution gives opening statement, but proceedings suspended to determine defence application to excuse judges.
11 Mar 02	Judge administrator dismisses defence application re dismissal of judges, trial further delayed.
27 Mar 02	Panel rules that indictment can be amended to clarify the factual allegations against Sabino Leite.
8–12 Apr 02	Trial recommences, prosecution begins examining first witness. Hearing then postponed due to unavailability of witnesses and defence counsel, and illness of judge.
3–15 May 02	Trial recommences, testimony of prosecution witnesses heard. Hearing then postponed due to Independence Day celebrations and unavailability of judges.
21 Oct 02	Trial recommences after 5 month delay, Jhoni Franca pleads guilty.
22 Oct 02	Panel accepts guilty plea and convicts Jhoni Franca.
22 Oct – 5 Nov 02	Testimony of prosecution witnesses heard for continuing trials of Jose Cardoso and Sabino Leite. Witness testimony for sentencing of Jhoni Franca heard.
29 Oct 02	Jhoni Franca sentenced to 5 years imprisonment.
11 Nov 02	Sabino Leite pleads guilty.
12 Nov 02	Panel accepts guilty plea and convicts Sabino Leite. Jose Cardoso case to continue but temporarily postponed.
20 Nov 02	Sabino Leite sentenced to 3 years imprisonment.
17 Dec 02	Sabino Leite conditionally released by order of the Special Panel.
3 Feb 03	Jose Cardoso case recommences after lengthy delay due to Court holidays.
19 Feb 03	Prosecutor withdraws persecution charge against Jose Cardoso from indictment.
17-25 Mar 03	Defence presents opening statement, and Court hears testimony of defence witnesses.
1-2 Apr 03	Closing arguments presented by both parties.
5 Apr 03	Jose Cardoso convicted of 9 counts, acquitted of 3, sentenced to 12 years imprisonment.
16 Apr 03	Jose Cardoso files for appeal.

2.3. FACTUAL OVERVIEW

The following details the prominent events that were at issue in *Lolotoe*. Only the major allegations that were either admitted by the defendants or proven in court will be described.[12] The court held that all of the following attacks were committed as part of a widespread and systematic campaign to intimidate the East Timorese civilian population into supporting autonomy with Indonesia.

The KMMP militia was inaugurated on 5 May 1999 with Joao Franca Da Silva alias Jhoni Franca (Jhoni Franca) appointed as Commander. In early June 1999, Jhoni Franca was removed as Commander of the KMMP militia, left Lolotoe and was replaced by Jose Cardoso Fereria alias Mouzinho (Jose Cardoso). Sabino Leite, the third co-accused, was Chief of the village of Guda in Lolotoe sub-district. All three bare varying degrees of responsibility for the following events and their direct role will be mentioned where relevant. On a general level, Sabino Leite provided the KMMP militia with information regarding the identities of civilians who supported East Timorese independence or had provided assistance to FALINITIL.

Around 22 May 1999, KMMP militia members under the command of Jose Cardoso, went to the house of Bendito Da Costa and Amelia Belo armed with a rifle, machetes, swords and knives. They interrogated the couple about the whereabouts of their son Mario, who was known to be a FALINTIL member at that time. When Bendito responded that he was unsure, they beat him and tied him to a pole, where he remained until they returned the next day. On their return, the KMMP then forced Bendito, Amelia and their two children to walk two hours to Lolotoe. There they were unlawfully detained in a small room in the sub-district Military Command (KORAMIL). Bendito and Belo remained detained until sometime in July 1999. A further three adults and two minors were similarly detained, with some direct TNI involvement. During their detention, all detainees were locked in small rooms without proper sanitation, were given inadequate food and water, and were released sometime in July 1999.

Mario Goncalves, was a member of the National Council of Timorese Resistance (CNRT)[13], and gave public speeches to encourage people to vote for independence. After hiding in the jungle for a month he sought refuge in a church. Around May 24, about one hundred members of the KMMP, led by Jhoni Franca went to the church and ordered Mario Goncalves to come out. He was then beaten and dragged to the field outside the CNRT office. Approximately 37 KMMP militia then beat Mario, and Jhoni Franca attacked him with a machete, cut off his ear and then forced him to eat it. Jose Cardoso and Sabino Leite were present at this time and incited militia to carry out these attacks.

Sometime in May 1999, Jose Cardoso, about 50 KMMP militia and a few TNI soldiers, armed with automatic weapons, grenades, machetes and knives went to Guda and gave a speech to the villagers. Acting on the information of Sabino Leite, they named Mariana Da Cunha, Victim A, Victim B and Victim C as FALINTIL supporters. They claimed these four women were supplying FALINTIL with food and were in relationships with its members. At different times, these four women were taken to Lolotoe and detained in Sabino Leite's house. From there, Victims A, B and C were taken to Jhoni Franca's house and then to a hotel in Atambua on 27 June. At this stage the three women had been

[12] For further information see the Table of Charges in Annex I.
[13] *Conselho Nacional da Resistencia Timorense*

detained for a number of weeks. At Atambua, it was stated that Jose Cardoso would sleep with Victim A, Bambang Indra with Victim B and Francisco Noronha and Victim C. On various nights in late June, the three women were injected with medicine they were told would prevent them from getting pregnant. The three victims were then sexually penetrated by the men, with Jose Cardoso also raping Victim B. The women were threatened that if they did not obey the men they would be killed.

On 8 September 1999, the KMMP militia, under the direct command of Jose Cardoso, went to the village of Sibi and attacked Herminio Belo's farm as they suspected FALINTIL or pro-independence supporters were there. Mariana da Costa and Carlito Freitas were killed as a direct consequence of this attack. Jose Cardoso actively participated in the attack and gave the order which provoked a second round of gunshots. On 16 September 1999, KMMP militia and TNI soldiers attacked Raimea. Augusto Noronha died just metres from his house after being shot and stabbed with swords by KMMP militia. Antonia Franca died while trying to escape his house after TNI and militia beat him and inflicted fatal injuries. It was not proven that any of the accused were present at this attack nor was it shown that they had exclusive authority over the acts of the perpetrators.

2.4. THE PRE-TRIAL STAGE

2.4.1. Indictment

The original indictment charged 5 co-accused with various counts of crimes against humanity: murder, serious maltreatment, unlawful deprivation of liberty of persons and rape. Two defendants, 2nd Lt Bambang Indra and Francisco Noronha, were severed from the original indictment as they were still at large, presumed to be in Indonesia. To date, the Indonesian Government has failed to cooperate in bringing them to East Timor, despite the Court issuing an INTERPOL arrest warrant on 6 April 2001. 2nd Lt Bambang Indra was sub-district commander (DANRAMIL) of the TNI forces in Lolotoe, and it was alleged that by providing logistical support, organising joint operations and leading some attacks, he had *de facto* control of the KMMP militia. Francisco Noronha, an East Timorese, was allegedly a member of the KMMP. As 2nd Lt Bambang Indra did not face trial, the role of the TNI in the Lolotoe attacks was not heavily scrutinised. This is a situation common to most Serious Crimes cases.[14]

The Court granted leave to amend the indictment in order to remove the two defendants presumed to be at large in Indonesia. On 25 May 2001, the Public Prosecutor filed an amended indictment which became the basis of the *Lolotoe* case. All three defendants were charged with committing various crimes against humanity[15], as defined in Section 5.1 of UNTAET Regulation 2000/15. The crimes against humanity counts range from murder, persecution, rape, torture to unlawful detention. The individual charges and convictions along with the relevant text of Regulation 2000/15 are attached to this report as ANNEX I.[16]

[14] As of April 2004, the Serious Crimes Unit has indictments pending against 313 persons. Of that number, 279 accused remain at large, presumably in Indonesia.
[15] The definition of crimes against humanity is taken directly from the Rome Statute of the International Criminal Court.
[16] The full text of the indictment is available at http://www.jsmp.minihub.org.

The Prosecutor made a further application to amend the indictment in order to insert two additional factual allegations against Sabino Leite. First, that he supplied the KMMP militia with information regarding the identity of pro-independence civilians, and secondly that he specifically named Victims A, B and C as having provided food for FALINTIL. Sabino Leite's defence counsel opposed the application as the amendment was too late (the original indictment was filed almost one year earlier), it unjustly penalised and prejudiced the defendant, and because it was too generalised.

On 27 March 2002, the panel allowed the amendment, rejecting the defence arguments. The panel held that the proposed addition to the indictment was not technically an amendment but a clarification of existing facts. As the allegations to be inserted did not constitute any new charges, the panel found that the defendant would not be unfairly prejudiced. This was particularly the case as the defence could challenge the new factual allegations at trial. In regard to timing, the panel held that as no witness had testified at that stage, it was reasonable to allow the 'amendment'. Finally, even though the amendment was not specific as to time, date or location, the panel found that it was not too general as it further clarified the existing charges.

2.4.2. Preliminary hearings

The Panel of judges during the preliminary hearings and throughout the *Lolotoe Case* consisted of Judge Sylver Ntukamazina (Burundi, presiding), Judge Maria Natercia Gusmao Perreira (East Timor) and Judge Benefito Mosso Ramos (Cape Verde). The preliminary hearing was delayed a number of times due to the amendment of the indictment, additional time granted for the defence to prepare a response to the amended indictment and the failure of the three accused to appear in court on the scheduled day. The hearing took approximately one month to complete.

An issue arose during the preliminary hearings regarding uncertainty over the composition of the Panel. Acting on rumours that one of the judges was about to be appointed to the newly established Court of Appeal, the Public Prosecutor requested that the proceeding be adjourned until the composition of the Panel could be confirmed for the whole trial. The arguments raised to support this position were primarily based on the need to avoid a repetition of the trial if a new judge were to be appointed once proceedings had commenced. Given that no official decision had been made regarding the judge in question, the hearing proceeded and as it turned out the composition of the Panel remained unchanged for the duration of the trial.

2.5. TRIAL

The ordinary trial ran from 5 March 2002 until 5 April 2003, and was conducted over 20 sessions until it was finalised with the conviction of Jose Cardoso. As seen in the case chronology, the trial was plagued with numerous delays. Due to the length of the trial, only the most significant issues that arose during proceedings will be discussed in the following section.

2.5.1. The prosecution case

The prosecution's opening statement emphasised the significance of *Lolotoe* and the importance of ensuring the defendants receive a fair trial. The widespread and systematic nature of the attacks in Lolotoe were further emphasised:

> 'The accused persons are not being tried today because they yielded to the normal frailties of human beings. It is their planned, orchestrated and widespread campaigns and acts of violence and inhumane treatment of civilians which brings them before this court…'[17]

The Court heard the testimony of 25 prosecution witnesses. They were all witnesses to the facts and their testimony at times applied to multiple defendants and covered many counts. The prosecution was questioning its third witness when Jhoni Franca made an admission of guilt. Shortly afterwards, Sabino Leite also pleaded guilty. Subsequent to their conviction, their cases were severed and the prosecution therefore focused entirely on Jose Cardoso.

All 13 counts against Jose Cardoso were crimes against humanity, an element of which is proof that the acts in question were committed in the context of a 'widespread or systematic attack' directed against the civilian population. This is known as the 'context element' and it is an essential requirement to convict an accused of crimes against humanity. Prosecution evidence in relation to the context element was primarily testimony and witness statements admitted into evidence which demonstrated that the civilians who were the victims of the attacks were somehow related to the pro-independence cause. This illustrated the systematic policy of targeting those affiliated with the fight for independence and the preconceived plan to intimidate people into voting for autonomy within Indonesia. The prosecution also presented a note by the Secretary-General of the UN, entitled the 'Situation of Human Rights in East Timor', the 'Report of the Indonesian Commission on Human Rights Violations in East Timor' and three agenda items from the fifty-sixth session of the Commission on Human Rights. All of these reports were admitted into evidence and were relied on to establish the context element.

Pursuant to the indictment, the prosecution had the burden of proving that Jose Cardoso was criminally responsible as a superior for the acts of his subordinates. According to s16 of UNTAET Regulation 2000/15, superior criminal responsibility occurs where:

> 'the 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.'

Evidence used to show command responsibility was primarily witness testimony which claimed that Jose Cardoso was the leader of the KMMP militia and in charge of KMMP operations. As the defendant was also directly involved in some of the attacks, command responsibility was not always relevant.

2.5.2. Jhoni Franca plea agreement

On 21 October 2002, an agreement was submitted to the court in which both the defence and prosecution made certain concessions in return for the submission of joint recommendations as to sentencing. According to the agreement, Jhoni Franca would plead guilty to the count of torture and the four counts of imprisonment or severe deprivation of physical liberty. The accused also agreed to make certain admissions regarding the crimes to which he pleaded guilty. In return, the prosecution agreed to withdraw the persecution charge and the two other charges of inhumane acts.

[17] JSMP unofficial transcript of Lolotoe trial 5 March 2002.

The prison sentences agreed on by the prosecution and defence were as follows:

CHARGE	SENTENCE
Imprisonment of Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Goncalves, Jose Gouveia Leite, and Aurea Cardoso and her two children	6 years
Imprisonment of Herminio Da Graca	1 year
Imprisonment of Mariana Da Cunha	1 year
Imprisonment of Victim A, Victim B, and Victim C	6 years
Torture of Bendito Da Costa, Adao Manuel, Mario Goncalves and Jose Gouveia Leite	7 years

The prosecution further agreed that the sentences would run concurrently, not consecutively. As a result, according to the plea agreement, the maximum time Jhoni Franca could serve is 7 years. He would also have the opportunity to offer facts in support of mitigation for a lower sentence than that requested.

Important to note is the application of s29A.5 of UNTAET Regulation 2001/25:

> 'Any discussions between the prosecutor and defense regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the court'.

The court therefore had no obligation to implement the plea agreement. Despite this, the prosecution and defence urged the court to adhere to the agreement, especially in light of the painstaking negotiations that took place.

2.5.2.1. Multiple defendants and plea agreements

The Court first had to resolve a subsidiary issue related to multiple defendants. Defence counsel for Jose Cardoso raised the question of how Jhoni Franca's admission would affect the trials of the other two co-defendants. For instance, how could the Court convict Jhoni Franca on the basis of his admission of guilt and then in the same trial not be prejudiced against Jose Cardoso, who is accused of the very same charges (based on the same events as described by the same witnesses) that Jhoni Franca has pleaded guilty to? It was submitted that no court can be expected to make contradictory conclusions. The example was raised that if Jose Cardoso was acquitted of torture, would the Court reverse its previous decision in regard to Jhoni Franca? It was therefore suggested that the Court make no findings as to Jhoni Franca until the end of the trial.

The prosecution responded to this line of argument by stating that the procedure in s 29A must be strictly followed. Accordingly, it was argued that the Court, after hearing a plea, has no scope to take some of the prescribed steps after the trial, regardless of the issues relating to multiple defendants. The prosecutor further claimed that the Court could maintain its objectivity, and thereby convict Jhoni Franca without prejudicing the other defendants. A more practical argument raised was the issue of Jhoni Franca becoming a witness. If he was not sentenced until the end of the trial, Jhoni Franca would be prevented from giving testimony as he would still have an interest in the proceedings. The prosecution claimed that they should have the opportunity to call Jhoni Franca and that necessitated the disposition of his case as soon as possible. The defence counsel for Jhoni Franca supported the prosecution position, claiming that sentencing the defendant at the end of a trial after a guilty plea midway through proceedings defeats the purpose of such a plea. An important incentive behind an admission of guilt is the avoidance of the anxiety and stress related to a lengthy trial. If the

defendant still had to sit through witness testimony and the cases against the other two co-accused, this benefit would be lost.

After hearing these submissions, presiding Judge Ntukamazina upheld the prosecution position that a strict reading of s 29A must be followed. He held that s 29A clearly provides for a guilty plea at any stage before the final decision of a case. Where an admission of guilt is given there are clear steps the Court must take and there is no provision allowing the Court to stall this process. The Court therefore decided to hear Jhoni Franca's guilty plea, determine whether facts exist that support the plea, and then determine sentencing. The cases of Jose Cardoso and Sabino Leite would be stalled until the completion of this process.

As to the question of prejudice against the remaining defendants, the Court held that findings of fact against one co-accused will not affect findings of fact against another. This is because those facts decided in relation to the defendant who pleaded guilty specifically relate to his charges and cannot extend by analogy to the others. The Court stated that the only instance where a defendant's admissions can be used against his former co-accused is if he testifies against them in court. In regard to findings of law, the Court stated that legal findings are made concerning the facts of the specific case and although the Court will generally apply the law in the same way to the same facts, this may not necessarily be the case.

2.5.2.2. Jhoni Franca's admission of guilt

The Court heard Jhoni Franca's plea by reading out the individual charges and then asking him whether or not he agreed with the charge. Jhoni Franca appeared not to understand the technical language used in the charges and on the defence counsel's suggestion, the Court simplified the language, asking questions such as 'did you imprison…?' Once this line of questioning was adopted, and Jhoni Franca was asked whether he imprisoned Herminio Da Graca and Mariana Da Cunha (as per charges 16 and 17), he stated that he did not agree and that he did not admit these two charges. This appears to be an emphatic statement denying responsibility of these crimes, especially in light of quite clear admissions of guilt in regard to the three other charges. Moreover, the Court sought clarification from the defendant, asking whether he had consulted his lawyer and again, whether he was responsible for the imprisonment of Herminio Da Graca and Mariana Da Cunha. Jhoni Franca replied that he had discussed the matter with his lawyer but he repeated that he was not responsible for these acts.

Jhoni Franca's defence counsel then requested an opportunity to talk with his client as there appeared to be confusion arising from a discussion held earlier that morning about the two counts in question. The request was granted and a discussion took place with the assistance of the Court translator. After a ten minute adjournment, Jhoni Franca freely admitted to the imprisonment of Herminio Da Graca and Mariana Da Cunha, stating that he was previously confused as he had discussed many things with his lawyer. He said that he now wanted to admit his responsibility as laid out in the plea agreement. Jhoni Franca's denial of guilt, contrary to his plea agreement, and then subsequent repudiation after consulting his lawyer, may simply be a matter of poor translation and confusion related to a drawn out negotiation process. This does, however, raise serious questions as to the defendant's understanding of the extent of his admissions and accordingly, it is possible that he did

not fully appreciate the consequences of his plea agreement. A following section on plea agreements deals with these issues in more detail.

2.5.2.3. Sentencing

The defence called four witnesses in mitigation of sentence. All knew Jhoni Franca well and testified to his good character and in particular, his involvement in pro-independence clandestine activities and how he was forced into joining the militia. Jhoni Franca gave an impassioned statement expressing sincere remorse, and emphasised that he only committed the crimes due to fear for his life and that he was the KMMP militia commander for only one month.

On 29 October 2002, Jhoni Franca was convicted of five counts of crimes against humanity as per the plea agreement. The remaining three counts were withdrawn by the prosecution. The Court found that the crimes of imprisonment and torture, committed by Jhoni Franca, must be considered one continued act for the purposes of sentencing. Applying the sentencing policy,[18] only one of the most severe penal provisions shall be imposed.[19] The Court therefore handed down a sentence of 5 years imprisonment, two years less than that agreed upon in the plea bargain.[20]

2.5.3. Sabino Leite plea agreement

After hearing a further 9 days of prosecution witness testimony, defence counsel for Sabino Leite submitted a plea agreement to the Court. The Court then read out the charges and Sabino Leite pleaded guilty to torture, other inhumane acts of a similar character and the three counts of imprisonment. Like the case of Jhoni Franca, the persecution charge was withdrawn. In the sentencing hearing, two witnesses gave testimony in support of mitigation. The main factor raised was Sabino Leite's support of FALINTIL. In his statement, Sabino Leite expressed remorse and emphasised that he was coerced into committing the acts by the TNI. Defence counsel further stressed these points, but also raised the fact that the defendant never committed acts of violence, but only provided information. The importance of his admission of guilt in the administration of justice was also emphasised.

On 20 November 2002, the Court sentenced Sabino Leite to three years imprisonment. Like Jhoni Franca's case, this sentence was also a conjunction of punishable acts. Due to time already served, however, the actual term of imprisonment was to be little more than a year. Further, pursuant to s 43 of UNTAET Regulation 2001/25, the defence filed an application for conditional release as Sabino Leite had already served two thirds of his sentence. Relying on a favourable report from the prison manager on Sabino Leite's behaviour in prison and considering he no longer posed a danger to public security, the Court upheld the application, but imposed certain conditions. Importantly, to uphold the interests of justice in Jose Cardoso's case, Sabino Leite was forbidden from contacting

[18] This policy is based on s 10.1(a) of UNTAET Regulation 2000/15 which states that 'the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals'. In practice, this has meant the application of the Penal Code of Indonesia (KUHP) in regard to sentencing.

[19] Art. 64(1) KUHP: 'If among several acts, even though each in itself forms a crime or misdemeanor, there is such a relationship that they must be considered as one continued act, only one penal provision shall apply whereby, in case of difference, the most severe penal provision shall be imposed'.

[20] On 20 May 2004 Jhoni Franca's sentence was reduced by 6 months by a Presidential Decree. The general criteria used in the granting of pardon were the behaviour of detainees, the promotion of reconciliation and to assist those who have suffered due to the vicissitudes of life.

witnesses and tampering with the crime scene in Lolotoe. The period of conditional release expired on 4 December 2003.

The Court essentially took the same approach to Sabino Leite's plea agreement as that of Jhoni Franca. The plea agreement was upheld, with the Court finding the facts established thus far in the trial satisfied the charges, as required under s29A of UNTAET Regulation 2001/25. Once again the Court did not enumerate the charges and then systematically apply the facts, thereby demonstrating that the charges had been proven beyond reasonable doubt. This raises questions over the extent to which the Court discharged its responsibility to ensure that the admission of guilt was consistent with the facts established by the court.

2.5.4. Defence case for Jose Cardoso

The opening statement of the defence emphasised Jose Cardoso's pro-independence activities, arguing that he was an unsophisticated farmer who due to circumstances beyond his control was forced into commanding the KMMP militia. The defence further claimed that had someone else been commander, the situation in Lolotoe would have been far worse. At the heart of the defence's statement was Jose Cardoso's innocence in regard to command responsibility for the acts of subordinates. The defence stated that he had no control over militia members, could not have stopped the violence and was not in a position to punish the perpetrators.

Eight witnesses were presented in defence of Jose Cardoso.[21] The defence's main strategy when questioning these witnesses was to highlight the defendant's clandestine and pro-independence activities. Witness testimony claimed that the KMMP contained pro-independence supporters, such as Jose Cardoso, who were coerced into joining the militia. There were thus two factions of the militia, one pro-independence and the other pro-autonomy.

The defence also provided witnesses that directly challenged the prosecution version of events. In relation to the four counts of murder, a defence witness provided an alibi for Jose Cardoso. In regard to the rape charges, a witness directly contradicted the prosecution case stating that one of the victims was at a shop with the accused at the time of the alleged rape. The Court later dismissed the testimony of these witnesses as unreliable, primarily due to doubts over the witnesses' independence.

The final evidence before closing arguments was a lengthy oral statement by Jose Cardoso. Preceding this, however, there was substantial debate over whether such a statement was allowed under the regulations. The Court held that the accused could not testify as a witness in his own case, and even though the accused was given the option to make a statement at the beginning of proceedings but chose to remain silent, in the interests of justice, the Court granted the accused an additional opportunity to address the Court. As the accused was not appearing as a witness, neither the Court nor either of the parties were allowed to question him. In his statement, Jose Cardoso repeatedly expressed remorse for what had occurred in Lolotoe and gave a detailed explanation of all of the incidents in question, particularly the rape charges. He generally claimed he was under the

[21] There is a discrepancy between the number of defence witnesses referred to in the judgment (5) and the number observed in trial (8).

control of the Indonesian military and was forced into taking action against pro-independence supporters.

Defence counsel continued this line of argument in the closing statement, emphasising the relatively minor role the defendant had as commander of the KMMP militia. The credibility of major prosecution witnesses was also attacked, primarily due to their difficulty in recalling the events as well as doubts over their ability to effectively identify the accused at the time of the acts in question. It was raised that one prosecution witness stated more than 20 times in his testimony that he could not remember what had occurred. The following quote from the defence's closing statement illustrates the core argument of the defence case:

> 'Where are the perpetrators – hiding in West Timor. I want to warn the court away from the temptation of convicting the accused. I know the burden is heavy and because witnesses came that lost their husbands, fathers who lost their sons. It does not necessarily mean that because the accused is the one in charge, he is the one to pay for their losses.'[22]

2.6. JOSE CARDOSO JUDGMENT

2.6.1. Decision

The Special Panel convicted Jose Cardoso of the murder of Mariana da Costa and Carlito Freitas, the four counts of imprisonment or severe deprivation of physical liberty and one count each of rape, torture and other inhumane acts. Similar to the cases of Jhoni Franca and Sabino Leite, the persecution charge against Jose Cardoso was withdrawn.

The Court acquitted Jose Cardoso of one other inhumane acts charge that alleged the conditions of detention at the KORAMIL caused serious bodily or mental harm. The Court held that there was insufficient evidence to prove this charge. There was, however, witness testimony on the inhumane conditions of another place of detention, the PKK room. Yet as the indictment only referred to the conditions of detention at the KORAMIL, the accused was acquitted of this count.

The Court also acquitted Jose Cardoso of two counts of murder due to the failure of the prosecution to successfully prove command responsibility. Interestingly, these were the only counts where command responsibility was in issue as the Court held that Jose Cardoso was present and participated in all of the attacks he was convicted of. It was established that Jose Cardoso was not present at the attack in Raimea which resulted in the deaths of Augusto Noronha and Antonia Franca. As the perpetrators of the attack, or at least the members of the TNI, were not under his exclusive authority, Jose Cardoso could not be held individually responsible for the two murders. In making this finding, the Court analysed extensive international jurisprudence on command responsibility, particularly from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In light of this analysis, the Court applied a three element test: first, that a superior-subordinate relationship existed; secondly, that the accused knew or had reason to know that the act was about to be or had been committed; and third, that it was possible for the accused to punish the behaviour of the subordinates. The Court held that the first two, but not the third, of these elements were satisfied.

[22] JSMP unofficial transcript of Lolotoe trial 2 April 2003.

The Court accepted that both KMMP militia and TNI military participated in the attacks of Raimea. The Panel did not believe, however, that Jose Cardoso, the commander of a non-official civil organisation, had the power or authority to punish the TNI perpetrators. It was further held that the accused was not in a position to punish the relevant militia members as this would have represented a direct challenge to the authority of the TNI. The Court therefore held that Jose Cardoso did not exercise exclusive authority over the militia and acquitted him accordingly.

2.6.2. Sentence

Jose Cardoso was sentenced to a total of 12 years imprisonment. In determining the length of the sentence, the Court took into account similar mitigating factors as with the other *Lolotoe* defendants, namely that the accused expressed remorse and was coerced into his role with the KMMP militia. The Court gave a combined sentence of 5 years for the 'continued' crimes of imprisonment, torture and other inhumane acts. The two murder convictions attracted a combined sentence of 9 years, and the punishment for the rape conviction was also 9 years imprisonment. Applying art 65.2 of the Indonesian Penal Code[23] as required by the sentencing policy of the Special Panel, the total punishment must not exceed one third beyond the most severe maximum punishment. In this case, the most severe punishment was 9 years, therefore by adding a third of this number the Court came to the total length of imprisonment of 12 years.

2.6.3. Appeal

Defence counsel for Jose Cardoso filed a notice of appeal on 16 April 2003.[24] As of June 2004, defence counsel are still awaiting court transcripts requested at the time of judgment. Until the transcripts are received, the Defence Lawyers Unit state they cannot file a written appeal statement. JSMP is concerned that this over one year delay in access to transcripts and the resulting inability to file an appeal statement may have caused Jose Cardoso to lose his right to appeal. According to s 40.3 UNTAET Regulation 2001/25:

> 'A party who has filed a Notice of Appeal shall file a written appeal statement with the court of first instance within thirty days after the filing of its Notice of Appeal. If no written appeal is filed within this period, the party concerned is deemed to have withdrawn the appeal, and the decision of first instance shall be final'.

A strict application of this provision could result in the appeal being struck out. The right of appeal is one of the fundamental rights of a fair trial. It is essential that court transcripts are available in a timely manner and statements of appeal filed within the prescribed time limit to ensure that defendants' rights can be upheld. Given the failure of the Court to provide transcripts, it is important that the Defence Lawyers Unit are proactive and file a written appeal statement on the basis of the information currently available.

The situation of Jose Cardoso's appeal is made even more concerning due to the defence he received at trial. As stated, his counsel changed frequently and as a result he may have strong grounds for

[23] Art 65.2 of KUHP: '(1) In case of conjunction of more acts which must be considered as separate acts and which forms more crimes on which similar basic punishments are imposed, one punishment shall be imposed. (2) The maximum of this punishment shall be the collective total of the maximum punishments imposed on the acts, but not exceeding one-third beyond the most severe maximum punishment'.

[24] This report is not intended to prejudice the appeal proceedings in any way.

appeal. Accordingly, it is imperative that Jose Cardoso's right to appeal is upheld as soon as possible to ensure that any potential defects that occurred at trial can be reviewed.

2.6.4. Evidentiary issues

Two significant evidentiary issues arose in *Lolotoe* which the Jose Cardoso judgment authoritatively settled. The procedural regulations applied by the Special Panel are generally worded and subject to interpretation so the following determinations represent important developments in the practice of the Special Panel.

2.6.4.1. Prior written statements

The Court held that where there is an inconsistency between the testimony of a witness before the Court and a previous written statement, the Court will give precedence to the oral testimony.[25] This issue arose continually throughout trial as many witnesses had difficulty recalling events and often contradicted their written statements. One prosecution witness revealed that she could not remember making a witness statement despite it being in the Court file. A resolution to this issue was crucial as the defence sought to tender her prior inconsistent statement to cast doubt on her credibility. The witness gave oral testimony which was arguably inconsistent with and ranged beyond the statement she had given to investigators in 2000. The statement had been submitted to the Court and to the defence in support of the indictment. When the witness was shown the statement, she said she had no recollection of making it or of ever having spoken to any investigators about what happened in 1999. The witness, who could not read or write, said she recalled being told to put her thumb print on a document but did not know what its contents were. In light of this, the Court held that the statement could not be used as substantive evidence due to doubts over whether it was actually made by the witness. The evidence of this witness was therefore limited to her oral testimony given in court.

In most jurisdictions doubts over the authenticity of the statement would be a significant issue for the Court. In the Special Panels, however, the prosecution rightly objected to the statement's tender but did not entertain the possibility that the written statement was not the statement of the witness. As the statement was excluded, the defence lost their main strategy of attacking the witness's credibility on the basis of her prior inconsistent statement. Accordingly, the defence could not effectively challenge a witness whose credibility was questionable given the confusion over whether she made a written statement. In the circumstances, however, it appears that the Court was left with few other options. The oral testimony of the witness was still relevant and defence counsel still had the opportunity to cross-examine the witness. As there were doubts over the authenticity of the written statement, it was right to disallow it and give precedence to the oral testimony.

Uncertainty over the probative value of written statements was raised at trial and is particularly important in the context of trials before the Special Panels. In *Lolotoe*, most statements were taken as a result of interviews with Serious Crimes investigators around two years prior to the witnesses appearing in Court. On one hand, given the age of many witnesses and the time lapse from the events in question to the testimony at trial, these original witness statements may be more reliable than oral testimony. On the other hand, the written statements were generally taken through interpreters from illiterate witnesses, who could not check the accuracy of the statement, nor the quality of the

translation. Further, several statements were not made under solemn declaration before judicial officers. For example, Victim B's statement was taken via a translator and read back to her in English. The statement included only one allegation of rape by Bambang Indra and did not allege that Jose Cardoso also raped her. This, however, came to light at trial.[26] Although the sensitivities involved in coming forward with another rape allegation may have influenced Victim B's action, it appears likely that as her statement was not read back to her in a language she could understand, the second rape allegation may have been unwittingly left out.

The Court resolved the issue of written statements by applying the general principle that oral testimony should be given precedence, and any inconsistencies between evidence should be dealt with on a case by case basis. This position is consistent with most other jurisdictions as the truth of oral testimony can be tested by the Court.

2.6.4.2. Hearsay evidence

The status of hearsay evidence arose repeatedly throughout the trial. The Court determined at trial and reiterated in its judgment that hearsay evidence is clearly admissible and 'the only issue that may arise is the weight to be attached to such evidence'.[27] The Court stated there was clearly no blanket prohibition on hearsay evidence in the UNTAET procedural regulations and also justified this position by referring to the similar practice of the ICTR and ICTY. Thus, similar to all other forms of evidence, whenever hearsay is alleged, the Court can only exclude hearsay evidence where its probative value is substantially outweighed by its prejudicial effect. Confusion over the admissibility of hearsay evidence was primarily due to the existence of lawyers from both common law and civil law backgrounds. This was further compounded by the lack of specificity of the Special Panel rules of procedure.

3. SPECIFIC AREAS OF CONCERN

While the previous section of this report described the background and progress of the case, this section analyses several aspects of the trial that raise significant human rights concerns.

3.1. DELAY

Article 14(3)(c) of the ICCPR guarantees the right to trial 'without undue delay'. This principle is further enshrined in section 6.3 of UNTAET Regulation 2001/25. The UN Human Rights Committee has further noted that:

> This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered: all stages must take place 'without undue delay'.[28]

It is clear that *Lolotoe* suffered from lengthy delays: it took almost one year from the first arrest to preliminary hearing and then two years from preliminary hearing to the handing down of the final judgment.[29] To be determined, however, is whether the accused were tried without *undue*

[25] *Public Prosecutor* v. *Jose Cardoso*, Judgment of 5 April, at 76
[26] Ibid.
[27] *Public Prosecutor* v. *Jose Cardoso*, Judgment of 5 April, at 76.
[28] UN Human Rights Committee General Comment 13, 13 April 1984, at paragraph 10.
[29] Refer to case chronology on p 6 for further detail.

delay. When making this evaluation, aspects other than the time period must also be taken into account. The European Court of Human Rights has listed a number of criteria to be evaluated, which correspond with the analysis made by the UN Human Rights Committee. These include the complexity of the case, what is at stake for the accused, the handling of the case by authorities and the defendant's own conduct.[30]

Lolotoe was undoubtedly complex: it was the first time rape was charged at the Special Panels and it involved complicated issues of command responsibility. The importance of the case for the accused is also apparent given the possibility of the maximum sentence under East Timorese law and the crimes charged being some of the gravest under international law. In regard to the handling of the case by authorities, the European Court of Human Rights has stated that administrative shortcomings in general do not provide an excuse for not trying cases within a reasonable time frame.[31] It was therefore the responsibility of UNTAET, and then the East Timorese Government in conjunction with UNMISET, to ensure that the administration of justice met minimum fair trial standards. A mere lack of resources does not justify breaching the rights of the accused.

The primary reasons for the delays in the pre-trial stages of *Lolotoe* were the unexpected continuation of the *Los Palos* case and regular adjournments during the preliminary stages to resolve procedural issues and to grant the defence additional time to submit the list of evidence and witnesses. Once the trial was in progress, however, there were also numerous and lengthy delays. The most striking example is a 5 month adjournment from May to October 2002. In the words of Presiding Judge Sylver Ntukamazina:

> '…it had been impossible, since May, to assemble the Judges for the continuation of the trial but now it is anticipated that the trial can continue uninterrupted until it is finished'.[32]

Despite the Presiding Judge's intentions, the trial faced further delays from this point on due to issues such as a change in Jose Cardoso's defence counsel.

There were also trends that affected the progress of the trial once the Court was regularly in session. For example, court almost always started at least an hour late or was delayed throughout the day. These delays were caused by a variety of factors: trouble locating interpreters, judges arriving late, the accused being brought late from prison, and coordination problems in general. Court was often forced to finish earlier than expected as the accused had to be returned to prison by 5pm and regular half hour adjournments were necessary to give interpreters a break as there were no replacements.

Although the cause of most of these delays are beyond the control of the court administration, greater efforts should have been made to ensure that personnel issues did not hamper the trial's progress. The main problem appears to be in the area of recruitment as there were simply not enough qualified judges and lawyers with sufficient expertise to ensure the Court functioned at an efficient rate. The other significant cause is underdeveloped court procedures; often it appeared that the rules in regard to lists of witnesses, pre-trial conferences and motions seemed either not established or poorly understood.

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[30] See for example Buchholz v. The Federal Republic of Germany, European Court of Human Rights, 6 May 1981, para. 49.
[31] See for example Boddaert v. Belgium, European Court of Human Rights, 12 October 1992, para. 39.
[32] JSMP unofficial transcript of Lolotoe trial 21 October 2002.

It appears that the delays in *Lolotoe* were on the whole reasonable in the circumstances. The European Court of Human Rights in the *Milasi* judgment[33] has accepted that the political and social background in the country concerned can be taken into consideration when evaluating whether a trial has been conducted without undue delay. It is difficult to overestimate the destruction and devastation from which the Special Panels developed, including destroyed court infrastructure and a complete lack of lawyers and court staff. Given the difficult situation facing the Special Panels and the justice system in East Timor more generally, many of the delays seem justified. Yet it must also be recalled that the Special Panels began operation in January 2001 and so by the time *Lolotoe* was finalised the Court had been in operation for over two years. Even in light of this lengthy period in which to improve the efficiency of the Special Panels, it does not appear that *Lolotoe* suffered undue delay. Significant improvements in court facilities and staff have yielded positive results, especially when compared to the situation during the *Los Palos* case[34]. That said, the efficiency of the Court still needs considerable improvement and the more time goes on the less justification the Special Panels has to process cases with such lengthy delays.

3.2. DETENTION

The lengthy delays at the early stages of *Lolotoe* resulted in extensive periods of pre-trial detention. For example, at the commencement of trial on 5 March 2002 Jose Cardoso had been in custody for 21 months, Sabino Leite 15 months and Jhoni Franca 14 months. Pursuant to UNTAET Regulation 2001/25 suspects can be held in pre-trial detention for an initial period of 6 months, with an extension of 3 months given compelling grounds, and indefinitely if exceptional circumstances can be demonstrated and 'as long as the length of pre-trial detention is reasonable in the circumstances, and having due regard to international standards of fair trial'.[35] All three defendants were legally detained until the end of the trial, with the Court finding that the severity of the crimes and situation in East Timor constituted exceptional circumstances.

Pursuant to article 9(3) of the International Covenant on Civil and Political Rights:

> 'anyone arrested and detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time of release'.

As determined above, the delays that plagued the *Lolotoe Case*, although concerning, were on the whole reasonable given the circumstances. To be determined, therefore, is whether the court was justified in rejecting applications for conditional release. The Court's main grounds for continued detention were the instrumental roles the suspects allegedly played in the violence, the risk they may attempt to interfere with witnesses and the risk of flight to avoid prosecution. It appears that these factors justified the detention of the defendants for the duration of the trial.

According to the timetable of the Court of Appeal there was an interlocutory appeal made in relation to the detention of Jose Cardoso.[36] In a majority decision,[37] the appeal was rejected as the defence

[33] Milasi v. Italy, European Court of Human Rights, 25 June 1987, para. 19.
[34] See Chapter 3.1.2 Right to be tried without undue Delay, JSMP Trial Report, Los Palos Case, March 2002.
[35] See s 20.10, 20.11, 20.12 UNTAET Regulation 2000/30.
[36] For more information see the trials page of the JSMP website, http://www.jsmp.minihub.org.

filed the appeal almost one month after the decision of the Special Panel not to grant conditional release.[38] Pursuant to art 23.2 UNTAET Regulation 2001/25, interlocutory appeals must be filed within ten days. Accordingly, due to the unjustified delay by the defence in submitting the appeal, the accused lost the chance to appeal the decision on detention. Of further concern is the time taken by the Court of Appeal to decide the interlocutory appeal. It took until June to decide an interlocutory appeal filed in March. When appeals concern the detention of an accused it is vital that these occur as quickly as possible to ensure that unnecessary detention does not occur.

3.3. EQUALITY OF ARMS

A crucial requirement of any legitimate judicial process is access to defence counsel of a reasonable standard. This concept is encapsulated in the term 'equality of arms' which requires that each party to a proceeding has equal opportunity to present their case and that neither party should enjoy any substantial advantage over their opponent. This position is underpinned in Article 6 of the UN Basic Principles on the Role of Lawyers which states that lawyers should be of experience and competence that correspond with the offences allegedly carried out by the accused.

In *Lolotoe*, as with all trials that come before the Special Panels, there was a vast difference in the resources available to the prosecution as compared to the defence. The international Public Defenders that represented the defendants in *Lolotoe* had to work under extremely difficult conditions with minimal resources available to assist the preparation of the defence case. The prosecution, on the other hand, had access to far greater funding giving them a distinct advantage in the number of potential witnesses that could be interviewed. The prosecution also had a pool of highly qualified prosecutors and investigators at their disposal. This significant disparity in the resources available to both parties, put the defence at a disadvantage and raises doubts over the equality of arms in the case.

There are concerns arising from the absence of Jose Cardoso's lead counsel and the subsequent change of his lead counsel midway through the trial. Further, there were a total of five lawyers who represented Jose Cardoso during the trial. These occurrences may have potentially impacted on Jose Cardoso's defence case. As of November 2002, Jose Cardoso's lead counsel was overseas and the court was unsure when or whether she was going to return. As a result the accused requested either the trial be postponed until his lead counsel returned or additional counsel be appointed as he felt his case was too complex for his secondary counsel to manage alone. Jose Cardoso even suggested a specific lawyer to be appointed: the same lawyer who had represented Jhoni Franca until his guilty plea and conviction. After deliberation, the Court held that a new lawyer should be appointed and that as there would be no conflict of interest, if possible, it should be the lawyer who had previously represented Jhoni Franca.

These circumstances raise a number of concerns. First, extended periods of absence of Jose Cardoso's lead counsel impacted on the quality of the defence case as his co-counsel appeared at

[37] Judge Fredrick Egonda-Ntende issued a separate judgment which refused the appeal but on the basis of different reasons. Judge Egonda-Ntende was of the view that under UNTAET Regulations an accused does not have an interlocutory right of appeal in respect of decisions made by the trial court with regard to detention.

times unprepared to lead the defence. Secondly, although unavoidable in some circumstances, a change in counsel mid-trial can further affect the accused's defence. In particular, the strategy of the defence case may have to be rethought and the new counsel will need considerable time to become acquainted with the case, adding further delays and a loss of momentum. The public defender appointed to take over Jose Cardoso's case requested a 4 week adjournment to speak to potential witnesses. The prosecutor responded to this by highlighting a recent two month postponement, including one month of Court holidays, in which the defender should have undertaken this work. The prosecution further emphasised its role in a civil law jurisdiction to investigate any evidence that supports the accused's case. Accordingly there was no need for the defence to bear all of the investigative burden for their case. In the event, the Court initially granted the defence two weeks to prepare their case. This period was, however, extended by a further two weeks.

There are also issues involving a possible conflict of interest. Jose Cardoso specifically requested the lawyer who had previously represented Jhoni Franca as he had confidence in his ability. The Court recognised the benefit of the accused selecting his own counsel and wanted to facilitate this if possible given the confines of the publicly provided defence lawyer's unit. The Panel was, however, divided over the existence of a conflict. The majority held that there was no general conflict and the Court would deal with any specific issues as they arose. In particular, the majority stated that there would be no conflict if Jhoni Franca were called as a prosecution witness and then Jhoni Franca's ex-counsel (Jose Cardoso's newly appointed counsel) were to cross-examine him. In dissent, Judge Benefito Mosso Ramos stated that as the counsel in question had negotiated a plea agreement with the prosecution for Jhoni Franca, in the interests of justice he should not act for Jose Cardoso.

In response to the majority decision, the prosecution highlighted the duty pursuant to s 5.3 of the Code of Conduct for Public Defenders[39] to cease to act where 'a conflict of interest or a *significant risk* of a conflict of interest arises between the interests of two or more clients' (emphasis added).[40] It appears that the circumstances described give rise to a significant risk of conflict of interest. The most obvious example of this is if the newly appointed counsel had to cross-examine his previous client in the same proceedings. Although the former client's case had by this time been finalised, the counsel went through an involved plea bargaining process, and his impartiality must therefore be at risk. The Court, however, took a cautionary approach allowing the appointment of the new counsel while resolving to deal with any conflict issues as they arose. This position was justified by the need to give the accused the best legal assistance available. The reality of the lack of human and other resources in the Public Defender's Office was also an implicit factor.

While such a desire to ensure the accused receives a high-quality defence and the counsel of his choosing is admirable, it appears to be in breach of the Code of Conduct for Public Defenders as found in the Schedule to UNTAET Regulation 2001/24. The majority decision further affected the equality of arms as it gave rise to the possibility that the defence case would be jeopardised due to the risk of a conflict of interest.

[38] Court of Appeal Decision, Case Number 2001/09 of 29 June 2001.
[39] The Code of Conduct for Public Defenders is found in the Schedule to UNTAET Regulation 2001/24.
[40] JSMP unofficial transcript of Lolotoe trial 13 November 2002.

3.4. INTERPRETATION

Effective and impartial interpretation is a precondition to the success of trials before the Special Panels. The Court has four working languages: Portuguese, Tetum, Bahasa Indonesia and English[41]. At times during *Lolotoe* witnesses also gave testimony in the local dialect Bunak. As the Court's working language in this case was English, interpretation of a consistently high standard was necessary to convey witness testimony and to ensure all court actors were informed of debates and decisions on points of law and procedure.

The right to an interpreter has been listed as a fair trial guarantee in art 14(3)(f) of the ICCPR. This position is further reflected in art 23 of UNTAET Regulation 2000/15 which provides that:

> 'Courts shall provide translation and interpretation services in every case where a party to the proceedings, or a judge, or a witness or expert witness does not sufficiently understand the language spoken in Court'.

The provision of interpreters was not directly in question in *Lolotoe*, rather it was the conditions interpreters were forced to work in and their expertise which was concerning. Throughout the trial, the number of interpreters appeared inadequate as often they were forced to work for a whole day or extended periods without a break and at times were required to translate into three languages. These conditions often resulted in widespread frustration. For example, the Court at one stage had to disqualify an interpreter without any prejudice to a finding of contempt due to a shouting outburst and his failure to return to the courtroom at the Court's request.[42] The high-stress environment of the Special Panels played a significant role in this translator's actions.

Of most concern was the general pattern of exchanges between counsel and judges not being translated into a language the accused could understand. It is unclear whether this was due to fatigue on behalf of interpreters or another cause, however the Court made little attempt to ensure that discussion on matters such as admissibility and procedural issues were translated. The most pertinent example of this occurred when Jose Cardoso made an admission that all of a particular witness' testimony was true.[43] A lengthy debate ensued between the Panel, prosecution and defence to determine whether this admission could be considered an admission of guilt of the charge in question. The majority of this discussion was not translated even though it had a massive impact on the accused's case. The accused was repeatedly questioned to clarify his admission, however his responses indicate that he failed to appreciate the legal ramifications of his admission. The lack of interpretation of exchanges between counsel and judges undoubtedly contributed to his confusion.

There were also several instances which raise doubts over the quality of the interpretation provided. The difficult working conditions discussed above must be taken into account in this context. The first example is of a newly appointed Bunak interpreter whose translation from the Indonesian of 'you have come to testify in the case against the three accused' to Bunak was 'you have come here to testify against the three accused who murdered people'.[44] As soon as this translation was given, Jose Cardoso and Sabino Leite raised their hands in protest as this translation clearly prejudiced the

[41] Article 159 Constitution of RDTL. See also Section 35 UNTAET Regulation 2000/11 as amended by Regulation 2001/25.
[42] JSMP unofficial transcript of Lolotoe trial 1 November 2002.
[43] Ibid, 5 November 2002.
[44] Ibid, 8 May 2002.

witness against them. Alarmingly, only the defendants could question the quality of the interpretation as they were the only people present in the courtroom – except from the witness himself – who spoke Bunak. This interpreter was dismissed shortly after this incident.

Further, there were several occasions when the prosecution counsel interjected to correct a mistranslation from Indonesian to English. The first time this occurred the translator who made the error was replaced, however the prosecution counsel later identified a mistake in the replacement's translation.[45] The same problem occurred twice the following day. On the second occasion, the Court ruled that it would rely on its expert interpreters and it did not require alternative translations.[46] The most striking example of this concerns translation of the Indonesian word *putus*. The court interpreter translated it as 'saw' however the prosecution interjected with the correct contextual translation of 'cut-off'.[47] The translation of *putus* was crucial because at issue was the witness' first-hand testimony of the ear slicing incident. Incidents such as these raise serious questions as to the expertise of the court translators.

The prosecution argued that as officers of the Court they were under a duty to raise translation concerns without bias. The Court dismissed the prosecution's argument, effectively barring the prosecution from raising specific translation issues. In most occasions, JSMP observers agreed with the translation given by the prosecution over that given by the court interpreter. The problem of disputed translations places the Court in a difficult position. The Court cannot blindly accept the prosecution's translation, yet it must recognise that the prosecution is bound to raise material issues that affect the court proceedings. Accordingly, the Court should have requested the witness reword the statement or sought confirmation from another court interpreter. At the very least, the Court should have remained open to the prosecution raising translation issues at any time, regardless of how disruptive this may have been to proceedings.

Despite the criticisms made above, there was a marked improvement in the quality of translation in *Lolotoe* as compared to *Los Palos*. This was particularly evident towards the end of *Lolotoe* when there were a greater number of court translators and regular breaks could be taken. It further appeared that the translators better utilised the facilities available. That said there were a number of instances where the quality of translation services most likely had a negative impact on the trial.

3.5. WITNESS PROTECTION

Although not a specific guarantee under international fair trial standards, witness protection is a crucial aspect of an effective trial. If witnesses feel threatened and are unwilling to come forward, the evidence available to the court will be necessarily limited. Accordingly, it is important that courts facilitate an environment in which witness's feel comfortable and are encouraged to give testimony. In this light, it is positive that the Special Panels granted protection orders for Victims A, B and C[48] –

[45] Ibid, 22 October 2002.
[46] Ibid, 23 October 2002.
[47] Ibid, 29 October 2002.
[48] Defence counsel raised the issue that using the pseudonyms Victims A, B and C was prejudicial as it had not yet been determined whether they were victims or not. Defence counsel suggested they be called Witness A etc. The Court held by a majority of 2:1 that they could be called victims, JSMP unofficial transcript of Lolotoe trial.

the three victims of rape in *Lolotoe*. These protection orders were granted to protect the rape victims from any intimidation, harassment or interference by the accused or their family members. Specifically, the protection orders stipulated that documentary evidence related to protected witnesses should only be shown to the prosecution, defence and defendants; no identifying information should be given to a third party, the public or the media; and any person acting on behalf of the witness should not contact the witnesses or their families without the consent of the prosecutor or a judge.

As *Lolotoe* was the first case involving rape as a crime against humanity, it is positive that the Special Panels recognised the sensitivity of these charges and took steps to protect the dignity of the witnesses, thereby encouraging other witnesses in future trials to come forward. In particular, the Court commendably placed significant weight on the affidavit of a Serious Crimes Unit investigator:

> 'The kidnapping and rape have traumatized the victims. Their mistrust and emotional breakdowns in the presence of investigators attempting to pursue finer details from them demonstrate this. The victims live in remote villages, and have limited knowledge of the legal system. Any attempt to force the victims to testify in public would exacerbate the trauma they have suffered. They have shown a reluctance to speak any further about the matters, unless it is to see justice being done'.

Despite the protective measures put in place, Victims A, B and C informed the prosecution that they were yelled at by the accused's family on court premises after the close of proceedings. The prosecution requested the court take action as these witnesses did not feel safe in the courtroom due to the presence of family members of the accused. Upholding the importance of a public trial and the need for the accused to have moral support from their family, the court permitted the family members to stay providing they did not speak to or have direct contact with the three witnesses.[49] A similar request was made from the defence counsel of Jose Cardoso, in response to which the Court banned family members of the witnesses intimidating or harassing the accused.

When Victims A, B and C did actually give testimony, the court was closed to the public, including JSMP monitors. Although JSMP supports the steps taken to protect the witnesses, it also believes that court monitors can play a valuable role in these circumstances. A debate over whether monitors and human rights workers should be present occurred in court, however the judges decided that as monitors could not report on what occurred due to the privacy of the protected witnesses then it was pointless for them to attend.[50] JSMP disputes this position as its role is to ensure a fair trial and due process, not just to publicly report what occurred, and JSMP believes it could have effectively monitored the closed session without jeopardising the identity of the witnesses. This situation is particularly concerning as JSMP was informed by a defence lawyer that at one stage during the closed session, the defence was not allowed to cross examine a protected witness. The reasons for this are unclear, however as the court operated in a closed session, JSMP could not verify the accuracy of this claim.

As a result of this incident, JSMP wrote to the judges of the Special Panel requesting that JSMP be allowed to monitor hearings with protected witnesses. This request was denied for the testimony of

[49] JSMP unofficial transcript of Lolotoe trial 14 November 2002.
[50] Ibid, 19 November 2002.

Victims A, B and C, however the Special Panel indicated that JSMP would be allowed to monitor all future hearings.

4. DISCUSSION ISSUES

4.1. PLEA BARGAINING

The benefits of a plea agreement are clear for both parties. For the prosecution, a conviction is guaranteed with far less time and money expended, while for the defence, a plea bargain usually results in a reduced sentence and the defendant avoiding the trauma of trial. There are also benefits for command responsibility cases as plea bargaining may encourage lower ranking soldiers to testify against their commanders. More broadly, plea agreements also facilitate the efficient administration of justice as less time is spent in the courtroom and resources can be allocated to contested cases. These benefits are only meaningful if the admission of guilt is genuine and safeguards are carried out to ensure that the defendant is fully informed of the consequences of their admission.

Plea bargaining in the context of crimes against humanity trials has added considerations from that undertaken in regard to national criminal justice. The Special Panels try international crimes and were established as part of the UN's commitment to participate in bringing those 'responsible for grave violations of international humanitarian and human rights law' to justice.[51] An implicit although unstated aspect of this process is the broader goals of ensuring that the trials before the Special Panel assist in the reconciliation process and in documenting the truth of human rights violations. This is reflected in the two quotes from the prosecution's opening statement in *Lolotoe*:

> 'From this record shall future generations know not only what this generation of East Timorese have suffered…';
>
> '…this case will provide a contemporary yardstick and an authoritative and impartial record to which future historians may turn for truth, and future politicians for warning'.

The Special Panel trials can accomplish these aims by providing accountability, punishment and deterrence through due process, by giving victims and witnesses the opportunity to be present in court and give testimony, and through the effective dispensation of justice the trials can make it possible for the East Timorese people to move on from their tragic past. By endorsing plea bargaining, however, there are concerns that the court may undermine the crucial role the Special Panels has to play in facilitating justice, reconciliation and truth-seeking.

For example, in *Lolotoe*, the guilty pleas of Jhoni Franca and Sabino Leite on the surface appear a success, as two convictions were secured and court resources saved. In doing so, however, charges were withdrawn,[52] Jhoni Franca and Sabino Leite arguably received lenient sentences and as discussed, questions must be asked about the genuineness of Jhoni Franca's admission in relation to two imprisonment charges. Importantly, s 29A.5 of UNTAET Regulation 2001/25 requires that even if the parties negotiate a plea agreement, the court must still fulfil its overriding duty to evaluate the evidence and determine that the charges have been met beyond reasonable doubt. Given the doubts

[51] United Nations Security Council Resolution 1319 (2000).
[52] The charges withdrawn included counts of persecution against each defendant. For more detail on the reasons for this see section 4.4 on Charging Policy.

over Jhoni Franca's plea it is doubtful whether the plea bargain in this case can be considered a success.

The consequences of the plea bargaining process undermine the broader function the court has to play. In regard to the two convictions arising from plea bargains, the charges and the length of sentences were less severe, and the number of witnesses given the opportunity to testify were reduced. Accordingly, the record against Jhoni Franca and Sabino Leite and of the crimes they committed may not accurately reflect what occurred. It is highly possible that this situation has negatively impacted on victims and their families, and it may be perceived that justice has not been served. On the other hand, there are arguments that encouraging people to admit their guilt aids reconciliation. However, if defendants negotiate a favourable plea agreement, they may not be admitting to the full extent of their crimes. Any benefit for reconciliation that an admission of guilt entails will be undermined if the admission is not complete.

In regard to the ICTY and ICTR, plea bargaining is implicitly allowed. Rule 39(ii) of the ICTY, for example, grants the power to do what is 'necessary for completing the investigation and the preparation and conduct of the prosecution'. This is similar to the Special Panels which refer to 'any discussions between prosecutor and defence regarding modification of the charges'.[53] In practice the ICTY has restricted plea negotiations to lower level officials in order to balance the interests of ensuring justice and maximising resources.[54] As the majority of defendants before the Special Panels can be considered relatively low level, the practice of plea bargaining in the serious crimes trials is consistent with international practice.

Given 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 an accused's guilty plea is genuine are strictly adhered to.

4.2. ADMISSIONS OF GUILT

Admissions of guilt have been at issue from the very outset of trials before the Special Panels. The Court was initially cautious in its approach with some admissions being rejected, but by mid-2002 it adopted a seemingly more flexible approach.[55] The Court has faced difficulty as most admissions of guilt have been accompanied with claims of coercion.[56] In such cases, the Court has occasionally been unable to effectively distinguish duress from superior orders – a distinction that is vital given the former is a complete defence while the latter may only mitigate sentence. These trends which were prominent in early cases[57] of the Special Panels are also relevant to *Lolotoe*.

In *Lolotoe*, two defendants initially entered pleas of not guilty and then made admissions of guilt after negotiating plea agreements with the prosecution. As discussed, serious doubts exist over the

[53] s 29A.5 of UNTAET Regulation 2001/25.
[54] Bantekas, I, et al, 'International Criminal Law', London, 2001, 89.
[55] 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.
[56] Ibid.

genuineness of Jhoni Franca's admission in relation to two charges. It is therefore relevant to analyse the jurisprudence of other international criminal tribunals to determine whether the Special Panels are consistent with international practice.

According to the ICTY in *Jelisic* (at para 25), '[a] guilty plea is not in itself a sufficient basis for the conviction of an accused'. Consequently a guilty plea should only be accepted if it is:

a) **Voluntary**. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises;

b) **Informed**. The accused must understand the nature of the charges against him and the consequences of pleading guilty to them, i.e. the accused must know what he is pleading guilty to; and

c) **Unequivocal**. In other words, it must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.[58]

Although expressed somewhat differently, it is submitted that these criteria are entirely consistent with and implicit in s 29A of UNTAET Regulation 2001/25, which governs admissions of guilt in the Special Panels.[59] This section includes a number of safeguards to ensure a defendant's guilty plea is genuine. First, the accused must understand the nature and consequences of the admission of guilt. Secondly, the admission must be voluntarily made after consultation with defence counsel. The final requirement, found in s29A.1(c), stipulates that the admission of guilt be supported by the facts of the case that are contained in:

(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.

Thus only if the guilty plea is supported by facts revealed in the evidence, can the Court uphold the plea and convict the accused.

As discussed, s 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. According to the ICTR Appeals Chamber, in relation to a guilty plea in *Kambanda*:

'The duty of a Trial Chamber to inform an accused person of the possible sentence is *not to be mechanically discharged*. The proceedings have to be read as a whole, inclusive of the submissions of the parties'.[60] (emphasis added)

It is not clear whether this will require the presiding judge to explain in detail the elements of the relevant crimes and all of the consequences of making a guilty plea or whether reasonable enquiries and a basic explanation will suffice.[61] Ultimately, the overriding concern in applying the s 29A criteria is to ensure that the proceedings are fair.[62]

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[57] See for example cases of *Joao Fernandes*, *Julio Fernandes*, *Yoseph Leki*, *Manuel Lete Bere*, *Jose Valente*, *Agustinho da Costa*, *Gaspar Leite* and *Los Palos*.
[58] *Erdemovic* (Appeals Chamber) IT-96-22 (at paragraph 8), Joint Separate Opinion of Judge McDonald and Judge Vohrah.
[59] See paragraph 2.5.2 on Jhoni Franca's plea agreement for more information.
[60] *Prosecutor* v. *Jean Kambanda*, Case No. 97-23-A, Judgment, 19 October 2000, at 76.
[61] See *Prosecutor* v. *Drazen Erdemovic*, case No. IT-96-22-T, Trial Chamber II, Judgment, 29 November 1996, per Judge Shahabudeen, at 3.
[62] *Prosecutor* v. *Drazen Erdemovic Erdemovic*, Joint Separate Opinion of Judge McDonald and Judge Vohrah at para 7.

In light of this general approach, there are serious doubts as to whether, in accepting the guilty pleas of Jhoni Franca and Sabino Leite, the Special Panels adequately complied with the safeguards to which they are subject pursuant to s 29A.1. In JSMP´s view, the Court´s application of the criteria in the case of Jhoni Franca was deficient in two important respects. There are similar concerns in relation to the guilty plea of Sabino Leite, however, these are not as pronounced as in the case of Jhoni Franca.

First, it is questionable whether Franca was sufficiently aware of the consequences of the guilty plea in relation to charge 14. The Court asked whether he understood the nature and consequences of his admission, however, there was difficulty in translating the question into a form which could be understood by Franca. After continued difficulties the Court simply asked whether he knew the consequences of the plea. His response was that he did and the Court then proceeded to deal with the remainder of Franca´s guilty pleas.[63] The approach adopted in *Kambanda* requires that, irrespective of the circumstances:

> 'the accused must understand the nature of a guilty plea and the consequences of pleading in general, the nature of the charges against him, and the distinction between any alternative charges and the consequences of pleading guilty to one rather than the other'.[64]

Merely asking Franca whether he understood the consequences of his guilty plea in circumstances where he is clearly having difficulty understanding the question, but responds affirmatively, is inadequate – the Court cannot simply accept the word of the accused at face value.[65] The duty imposed by s 29A requires proactive questioning so that it is not enough for the Court to simply repeat the words of the relevant regulation to the accused.[66] At the very least, the Court ought to have made further enquiries to ascertain whether he understood what was being said and *explained* to Franca the consequences of a guilty plea, namely, that he was forfeiting the right to be presumed innocent, to a trial and to challenge witnesses.

Secondly, Franca's plea of guilt to charges 15 and 16 was preceded by an initial and unequivocal denial. It was only after a brief discussion with his lawyer that he decided to reverse his original position and plead guilty. Franca´s final guilty plea therefore ought to have alerted the Court to the possibility that Franca did not fully understand the nature and consequences of a guilty plea. In these circumstances the court was obliged to take particular care to ensure that the accused was fully aware of the implications of his guilty plea and that the charge was supported by the evidence. The latter requirement obliged the Court to closely examine the elements of each of the offences to which Franca pleaded guilty and satisfy itself that the facts on which these elements relied had been proven beyond reasonable doubt. No further evidence was tendered with the Court relying on the witness statements already tendered and the three witnesses who had already testified. The Court was satisfied that all the essential facts had been proven and subsequently accepted Jhoni Franca's guilty plea without detailed analysis of how these facts fulfilled the charges.

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[63] JSMP unofficial transcript of Lolotoe trial 19 November 2002.
[64] *Kambanda*, above n 51, at 75.
[65] *Joao Fernandes v Prosecutor General*, Criminal Appeal No 2 of 2001 (29 June 2001), Judge Egonda-Ntende Separate Opinion, at 30.
[66] Ibid, 31.

The failure of the Court to properly satisfy itself as to the validity of Franca´s guilty pleas, in accordance with the criteria imposed under s 29A.1, is particularly pronounced in light of the serious nature of the charges and the fact that he clearly experienced difficulties in understanding the translation of the Judges´ questions. It was recognised in *Erdemovic* that, in these circumstances, the Court is under an even more onerous burden to satisfy itself that the accused pleads voluntarily and with full knowledge of the consequences of his plea.[67] The Special Panels will continue to deal with defendants of limited education who are charged with serious offences and so the acceptance of guilty pleas is an area to which significantly more attention must be paid.

4.3. RAPE AS A CRIME AGAINST HUMANITY

The *Lolotoe* case was the first time rape was tried as a crime against humanity before the Special Panels. The following discussion assesses the court's handling of the rape charges.

As rape is left undefined under UNTAET Regulations, the court looked to jurisprudence from the ICTR and ICTY and also to the Rome Statute of the International Criminal Court. In general terms, the ICTR jurisprudence on rape emphasises a broad, 'non-mechanical' definition. The leading ICTR case on rape is that of *Akayesu* which emphasised that:

> '… rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'.[68]

In contrast to the ICTR's approach, the ICTY has adopted a relatively narrow definition of rape as a crime against humanity, focusing on force as the defining characteristic. The Special Panels particularly relied on the ICTY decision in *Kunarac* and emphasised the non-consensual aspect of the act, rather than the use of force or constraint: 'this Court considers as persuasive the absence of consent as the central element of the definition of the crime of rape'.[69]

In determining what circumstances negate consent, the Special Panels turned to evidentiary provisions that relate to sexual assault cases. Section 34.3(b) of UNTAET Regulation 2000/15 disallows consent as a defence to sexual assault if the victim:

> (1) has been subjected 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;

The court used the circumstances in this provision, which related to consent as a defence, as examples of situations which negate consent in the execution of rape as a crime against humanity.

Even though both the jurisprudence of the international criminal tribunals and the UNTAET provision on consent as a defence were referred to, the court saw no reason to depart from the definition of rape as established under the Rome Statute. The court held that Jose Cardoso personally raped Victim A and B without systematically applying the facts of the case to the definition of rape as discussed above. This is particularly concerning as the rape charge was given added complexity

[67] 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 at 16.
[68] *Prosecutor* v. *Akayesu*, Case No ICTR-96-4-T, Judgment, 2 September 1998, at 687.
[69] Jose Cardoso Judgment, at 128.

due to the accused alleging in his final statement that one of the victims consented to the intercourse. Although the court discussed in general terms the positions under international law that rape in the context of detention negates the defence of consent and that the court needs no corroboration of the victim's testimony, particularly in sexual violence cases, there was no specific analysis of how these principles applied to the facts at hand. In summary, the court stated the facts and the law but came to a decision without well-reasoned analysis of how the facts in question satisfied the applicable law.

The Court further analysed the role of Jose Cardoso in aiding and abetting the rape of Victims B and C by the two Indonesians severed from the original indictment. Relying on the ICTY trial case of *Furundzija*[70] and both the trial and appeal judgments of *Aleksovski*[71] the Court set out the mental and physical elements needed to prove aiding and abetting at the general level. In regard to specifically aiding and abetting rape, the Court referred to the ICTR judgment of *Akayesu*:

> 'The accused having had reason 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 or in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place'.[72]

Unlike where Jose Cardoso personally perpetrated the rape, the court applied the facts of the case to the definition of aiding and abetting rape as outlined in *Akayesu*. Important events relied upon by the court were Jose Cardoso threatening the victims that they would be killed if they did not have sexual intercourse and that he took the victims to the rooms where they were raped by the Indonesian men. Accordingly, the Court held that Jose Cardoso aided and abetted the rape of Victims B and C. Under s 15 of UNTAET Regulation 2000/15, aiding and abetting the commission of a crime results in individual criminal responsibility. Applying this provision, Jose Cardoso was convicted of the rape of all three victims.

The facts surrounding the rape charge were complex and confusing. There were significant issues arising from Jose Cardoso's claim that he committed the rape only due to superior orders and that one of the victims allegedly consented to the intercourse. Rather than fully analyse these complex issues, the court took a superficial approach and convicted Jose Cardoso without thorough exploration of how the facts in question applied to the law. Given this was the first time rape came before the Special Panels, and especially as there were complex factual circumstances, detailed analysis would have been instructive. On the other hand, the Court's survey of international jurisprudence is commendable and the conviction on the rape count does not appear to be legally flawed. The reasoning behind this decision, however, was insufficient due to the lack of analysis of the link between the facts and the law.

4.4. CHARGING POLICY

Persecution charges were withdrawn in regard to all three defendants. According to the prosecution, this occurred due to a change in the charging policy during the trial. The prosecution decided to

[70] *Prosecutor v Furundzija*, Case IT-95-17/1-T, Judgment, 10 December 1998
[71] *Prosecutor v Aleksovski*, Case IT-95-14/1-T, Judgment, 25 June 1999; Aleksovski Appeal Judgment, 24 March 2002.
[72] Jose Cardoso Judgment, at 458.

pursue a cumulative charging approach, and decided that to charge the broader crime of persecution as well as other specific crimes such as imprisonment and torture, would in this case amount to duplicity:[73] the defendants being charged twice for the same crime. Accordingly, the prosecution was faced with the decision to either charge one count of persecution or multiple counts of specific crimes.

Further, the court's sentencing policy at that time meant that if the defendant was convicted of the persecution charge as well as other counts, there would only be a single sentence for the most serious crime, in this case persecution. However, if multiple specific charges were proven, the defendant would serve a number of sentences concurrently. The prosecution selected the latter as it was felt that victims and their families, who were heavily involved in the trial, would be more satisfied if the accused was seen to receive multiple sentences. Accordingly, the persecution charges were withdrawn.

It is commendable that the impact on victims was forefront in the decision of the prosecution. It is arguable, however, that the crime of persecution better takes account of the crimes committed in Lolotoe. There is a strong likelihood that persecution on political grounds would have been satisfied in this case. Persecution is a more serious crime under international law and more accurately reflects the situation where independence supporters and sympathisers were specifically targeted. Conversely, the political nature of the crimes is relevant under the 'systematic' aspect of all crimes against humanity charges, and therefore the specific charges do take account of the political situation to some extent. Even so, it is difficult to deny that a persecution charge, if included, would have more accurately reflected the severity and the political nature of the crimes in Lolotoe.

In the event, given the court's sentencing policy, the prosecution had to balance community perceptions of the trial against a persecution charge which arguably better reflected the situation. The withdrawal of the persecution charges to pursue a victim based approach appears justifiable given the circumstances.

4.5. BROADER ASPECTS OF JUSTICE

As with most trials that come before the Special Panels, *Lolotoe* illustrates the general injustice of the serious crimes process.[74] Three East Timorese involved in militia activities have been convicted while an Indonesian officer who was also originally indicted,[75] the sub-district commander of the TNI forces in Lolotoe 2nd Lt Bambang Indra, lives in impunity. There is little doubt from the evidence tendered in relation to the three accused that Bambang Indra deserves to face trial. There is also a strong suggestion that he bears responsibility for the acts of those convicted. This in no way excuses the three defendants of their acts, however it does highlight the injustice of lower level

[73] The SCU policy now is to charge persecution as well as other specific crimes only if the persecution charge includes facts which are broader than those that are the subject of the specific crimes. The case of *Public Prosecutor v Xisto Barros and others* Case 01/2004, will be a test case on this issue. At the time of writing the case is in progress before the SPSC.

[74] This section discusses the failure of the serious crimes process to provide justice from a broader social perspective rather than what specifically occurred at trial.

[75] As stated previously, two Indonesians were severed from the original indictment before proceedings commenced. Accordingly, the role of the Indonesian officials was not directly in question and as such the court's primary concern was the actions of the three East Timorese defendants.

perpetrators receiving prison sentences while those higher up the command chain do not even face trial.

As no member of the Indonesian authorities faced trial, the relationship between the East Timorese militia and the TNI could not be heavily scrutinised. All defendants argued that they were coerced by Indonesian authorities into their position with the KMMP militia, but due to two guilty pleas the issue of TNI pressure was primarily discussed in terms of mitigation of sentence. There was some evidence in regard to the 'widespread and systematic' element of crimes against humanity, and this illustrated how victims were linked to the independence movement and how the attacks were systematically organised. It did not, however, relate to potential TNI responsibility for the specific acts in question.

The issue of command responsibility arguably could have been an avenue to document the relationship between TNI and militia, however Jose Cardoso was acquitted of the only two charges where command responsibility was in issue. It was held that he did not have authority over the TNI soldiers who were the main perpetrators of the attack. There was therefore no detailed analysis of any command structure, funding, or relationship between the KMMP militia and the TNI. Issues such as these go to the heart of the conflict in East Timor, and although not a primary consideration for the court, the absence of detailed analysis on this point gives a somewhat distorted version of events.

All three defendants had positions of authority within the KMMP militia, however in real terms they were quite low in the overall command chain. Thus the real architects of the Lolotoe crimes remain free in Indonesia. If the broad social purpose of the *Lolotoe* trial was to bring those primarily responsible to justice, then it has failed. Although Jhoni Franca, Sabino Leite and Jose Cardoso were rightly convicted of crimes against humanity, they were low level East Timorese perpetrators and were influenced by the highly coercive environment created by the Indonesian authorities. It seems an affront to common notions of justice that these low level perpetrators serve time while those most responsible avoid an impartial judicial process and live in impunity.[76]

Overall, it appears beneficial for victims and families that the three defendants have been punished for the crimes they committed in Lolotoe. Yet justice in the broader sense can only be served when people such as 2nd Lt Bambang Indra and his superiors face an independent, impartial trial. Unless this occurs, accountability for the Lolotoe crimes cannot be fully established.

5. CONCLUSION

Lolotoe demonstrates much needed improvement in the overall standard of trials before the Special Panels. Since the *Los Palos* case, legal representation and legal arguments have overall been of a higher standard, interpretation problems minimised, and the court appears to have operated in a more orderly and professional manner. There remain, nevertheless, areas of concern that need to be

[76] It is beyond the scope of this report to discuss the different process for crimes against humanity committed in 1999, in particular the shortcomings of the Ad hoc Human Rights Court for East Timor in Jakarta. For more information see Amnesty International and JSMP, 'Justice for Timor-Leste: The Way Forward' April 2004.

addressed. The most significant of these are lengthy periods of pre-trial detention, constant delays throughout trial and inequality between defence and prosecution counsel. More broadly, *Lolotoe* demonstrates shortcomings in the court's approach to guilty pleas and the need for development in the analysis of rape charges.

When analysing trials before the Special Panels it is imperative to take into account the difficult circumstances faced by the court. Throughout *Lolotoe*, the working conditions were trying, there was generally a lack of resources, and to a lesser extent, a lack of expertise throughout some parts of the court process. It must also be remembered that *Lolotoe* was quite early on in the court's history, and that the Special Panels are plagued with similar resource issues as the general legal system in East Timor. Furthermore, in a sense the Special Panels were still 'feeling out' the law to be applied and were still making important decisions as to the court procedure. Given these challenges the substantial improvement since *Los Palos* is commendable.

Of most concern, however, is the continued impunity of those who potentially bear command responsibility for the acts of Jose Cardoso, Jhoni Franca and Sabino Leite. At present, only those low in the broader command chain have been held accountable for their actions. If this situation persists, the complete version of events regarding the crimes against humanity committed in Lolotoe will not be uncovered and those who arguably bear most responsibility will escape justice.

The *Lolotoe* case marks a significant point in the work of the Special Panels. As the second major trial, it demonstrates a maturation of the crimes against humanity trials. It further shows that there is much room for improvement. As other trials come before the Special Panels and are appealed, it is hoped that the lessoned learnt from *Lolotoe* will continue to influence the court's practice.

ANNEX I - CHARGES

UNTAET Regulation 2000/15

Section 5
Crimes Against Humanity

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;

…

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rule of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(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;

…

(k) Other humane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

TABLE OF CHARGES, CONVICTIONS AND SENTENCES

Jose Cardoso Fereira alias Mouzinho: Counts 1-13

Count	Verdict	Sentence
1. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Goncalves, Jose Gouveia Leite, and Aurea Cardoso and her two children in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Guilty	5 years combined
2. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Herminio Da Graca in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Guilty	
3. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Mariana Da Cunha in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Guilty	
4. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Victim A, Victim B, and Victim C in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Guilty	

5. Torture as a crime against humanity of Bendito Da Costa, Adao Manuel, Mario Goncalves and Jose Gouveia Leite in violation of Section 5.1(f) of UNTAET Regulation 2000/15	Guilty	
6. Other Inhumane Acts Of Similar Character Intentionally Causing Great Suffering Or Serious Injury To Body Or Mental Or Physical Health as a crime against humanity for intentionally causing great suffering or serious injury to body or mental or physical health of the civilians detained at the KORAMIL in Lolotoe sub-district between May and June 1999 in violation of Section 5.1(k) of UNTAET Regulation 2000/15	Not guilty	–
7. Other Inhumane Acts Of Similar Character Intentionally Causing Great Suffering Or Serious Injury To Body Or Mental Or Physical Health as a crime against humanity of Mario Goncalves in violation of Section 5.1(k) of UNTAET Regulation 2000/15	Guilty	5 years combined *
8. Rape as a crime against humanity of Victim A, Victim B and Victim C on or about 27 June 1999 at Hotel Merdeka, in Atambua, West Timor in violation of Section 5.1(g) of UNTAET Regulation 2000/15	Guilty	9 years
9. Murder as a crime against humanity of Mariana Da Costa, on or about 8 September 1999 in Lolotoe sub-district, in violation of Section 5.1(a) of UNTAET Regulation 2000/15	Guilty	9 years combined
10. Murder as a crime against humanity of Carlito Freitas, on or about 8 September 1999 in Lolotoe sub-district in violation of Section 5.1(a) of UNTAET Regulation 2000/15	Guilty	
11. Murder as a crime against humanity of Augusto Noronha , on or about 16 September 1999 in Lolotoe sub-district in violation of Section 5.1(a) of UNTAET Regulation 2000/15	Not guilty	–
12. Murder as a crime against humanity of Antonio Franca, on or about 8 September 1999 in Lolotoe sub-district in violation of Section 5.1(a) of UNTAET Regulation 2000/15	Not guilty	–
13. Persecution as a crime against humanity of supporters of independence of East Timor in Lolotoe Sub-District, Bobonaro District, between May and September 1999 in violation of Section 5.1(h) of UNTAET Regulation 2000/15	Withdrawn	–
TOTAL SENTENCE: 12 years imprisonment		

* The sentence for Count 7 is included with the combined sentence of 5 years for Counts 1-5.

Joao Franca Da Silva alias Jhoni Franca: Counts 14-21

Count	Verdict
14. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Goncalves, Jose Gouveia Leite, and Aurea Cardoso and her two children in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Pleaded guilty
15. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Herminio Da Graca in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Pleaded guilty
16. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Mariana Da Cunha in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Pleaded guilty
17. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Victim A, Victim B, and Victim C in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Pleaded guilty
18. Torture as a crime against humanity of Bendito Da Costa, Adao Manuel, Mario Goncalves and Jose Gouveia Leite in violation of Section 5.1(f) of UNTAET Regulation 2000/15	Pleaded guilty

19. Other Inhumane Acts Of Similar Character Intentionally Causing Great Suffering Or Serious Injury To Body Or Mental Or Physical Health as a crime against humanity of Mario Goncalves in violation of Section 5.1(k) of UNTAET Regulation 2000/15	Withdrawn
20. Other Inhumane Acts Of Similar Character Intentionally Causing Great Suffering Or Serious Injury To Body Or Mental Or Physical Health as a crime against humanity of the civilians detained at various places in Lolotoe sub-district, between May 1999 and July 1999 in violation of Section 5.1(k) of UNTAET Regulation 2000/15	Withdrawn
21. Persecution as a crime against humanity of supporters of independence of East Timor in Lolotoe Sub-District, Bobonaro District, between May and September 1999 in violation of Section 5.1(h) of UNTAET Regulation 2000/15	Withdrawn
COMBINED TOTAL SENTENCE: 5 years imprisonment[77]	

Sabino Gouveia Leite: Counts 22-27

Count	Verdict
22. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Goncalves, Jose Gouveia Leite, and Aurea Cardoso and her two children in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Pleaded guilty
23. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Herminio Da Graca children in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Pleaded guilty
24. Imprisonment Or Other Severe Deprivation Of Physical Liberty as a crime against humanity of Victim A, Victim B, and Victim C in violation of Section 5.1(e) of UNTAET Regulation 2000/15	Pleaded guilty
25. Torture as a crime against humanity of Bendito Da Costa, Adao Manuel, Mario Goncalves and Jose Gouveia Leite in violation of Section 5.1(f) of UNTAET Regulation 2000/15	Pleaded guilty
26. Other Inhumane Acts Of Similar Character Intentionally Causing Great Suffering Or Serious Injury To Body Or Mental Or Physical Health as a crime against humanity of the civilians detained at various places in Lolotoe sub-district, between May 1999 and July 1999 in violation of Section 5.1(k) of UNTAET Regulation 2000/15	Pleaded guilty
27. Persecution as a crime against humanity of supporters of independence of East Timor in Lolotoe Sub-District, Bobonaro District, between May and September 1999 in violation of Section 5.1(h) of UNTAET Regulation 2000/15	Withdrawn
COMBINED TOTAL SENTENCE: 3 years imprisonment	

[77] On 20 May 2004 Jhoni Franca's sentence was reduced by 6 months by a Presidential Decree granting pardon.