JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

THE CASE OF X: A CHILD PROSECUTED FOR CRIMES AGAINST HUMANITY

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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 www.jsmp.minihub.org

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1. INTRODUCTION

The case of X was the first, and to date the only, in which a minor was charged with crimes against humanity before the Special Panels for Serious Crimes (SPSC). X, a fourteen year old at the time the crime occurred, was charged with Crimes Against Humanity extermination and attempt termination for the killing of three young men in the Passabe massacre in Oecusse, East Timor. The accused would eventually plead guilty and be convicted for murder under Indonesian law during the trial hearing. The case raises a number of questions regarding pre-trial proceedings as well as the possibility of prosecution of minors for crimes against humanity.

This report is based on the monitoring JSMP carried out throughout the proceedings as well as consultation of the case file and interviews with the relevant court actors. Due to the sensitive nature of the case and in order to protect the privacy of the accused, neither the name, sex or place of residence of the accused is identified. The accused is referred to as 'X'.

2. BACKGROUND

After 24 years of Indonesian occupation, in 1999 a referendum was held in East Timor to decide between autonomy and independence. Both before and after the announcement of the results of the popular consultation, which decided for independence, a widespread and systematic attack was conducted against the civilian population as a part of a campaign of violence. This attack was carried out by militia groups who supported autonomy. Amongst others, the attack included threats to life, assaults, forced displacements, arsons, murders, rapes and torture[1].

The Special Panel for Serious Crimes ('SPSC') was established pursuant to *UNTAET Regulation 2000/15* to exercise jurisdiction over the 'serious crimes' of murder and sexual offences, committed between 1 January 1999 and 25 October 1999, and genocide, war crimes and crimes against humanity, whenever they occurred.[2]

3. SUMMARY OF THE FACTS

In October 2001, X, a 16 years old, was arrested and detained as a suspect of having committed crimes against humanity. At the police station, X gave a statement after having reportedly waived the right to have a lawyer present. In April 2002 s/he gave a second statement in the presence of a public defender. What follows is an account of both statements that were supported in essentials by witnesses and never contested in substance by the Prosecution.

X claims to have been forced to join a militia in September 1999 by the village chief under threat that his/her parents would be killed if he/she did not obey. At the time X was 14 years old.[3] X, together with a group of young people that claim to have also been recruited that day[4], was ordered to follow militias to a village in West Timor, where they found seventy five young men tied to each other in pairs. of the recruited was assigned responsible for two prisoners and at midnight ordered to march to a village in East Timor. Around 3 am, after having crossed the border, they were ordered to "kill the prisoners". X claims to have been afraid and kept silent which prompted a senior militia member to hit him/her on the forehead with a piece of wood causing him/her pain and fear to be killed. Following this incident, X killed three young men with a machete, hitting one on the right side of his head and the other two on the neck causing the victims to immediately fall dead to the ground. In

[1] Several reports were presented in Court by the Prosecution namely 'Report of the Indonesian Commission on Human Rights Violations in East Timor, January 2001' where a more detailed account of the events of 1999 can be found.
[2] Section 1 and 2, UNTAET Regulation 2000/15
[3] X claims that prior to this the militias had burnt the family's traditional house but the case file does not provide any further evidence of this allegation.
[4] At least two other youngsters gave statement at the police station of Oecussi in which they claimed to have been forced to join the militia. Both deny to have killed any of the prisoners.

total, 47 young men were killed that night. Following these events, X left the area and went home. Five days later, X and his/her parents fled to West Timor having allegedly been told to do so by a militia member because INTERFET troops were on the way. In October 2001, being homesick and missing his/her grandparents, X returned to his/her village and was arrested shortly afterwards.

4. CRIMINAL PROCEEDINGS

4.1 Pre-trial proceedings

Information on the events prior to the hearing in the case of X is scarce. The case files indicate that in October 2001 X was called to the police station to give statement, which he/she did voluntarily after having waived the right to have a legal representative. There was also no family member present at the time. In the statement X gave a detailed account of the events and admitted to the killings although he/she claimed to have been forced to commit them. It appears that X was arrested and detained at this time which was on or about 13 or 14 of October 2001. On 17 October 2001 the Serious Crimes Unit (SCU) obtained an arrest warrant and two days after that he/she was brought before an investigating judge and a detention order was issued for six months.

In the detention decision made by the Investigating Judge it appears that the issue that the suspect was a minor was never brought up although in the statement to the police the accused had stated to have been born in 1985. The order of pre-trial detention was reviewed in February, March, April and June 2002. In June 2002, over a month after the original pre-trial detention order had expired, the Court extended the order of pre-trial detention on the grounds that there was a risk the accused would try to escape. The Court further noted that the pre-trial review hearing should have taken place until May[5] but considered that as long as the substantive requirements justifying pre-trial detention persisted such delay consisted of a mere irregularity and did not automatically create a situation of illegal pre-trial detention. In September, during the preliminary hearing, the Court substituted pre-trial detention by restrictive measures considering that there were no reasons justifying the detention of X.

4.2 The charges

The indictment, dated May 2002, charged X with extermination and attempted extermination. In the alternative, the Prosecution also presented a charge for other inhumane acts. The trial hearing commenced in October and on the first day, the Defence and the Prosecution presented a written agreement to the Court in which the accused pleaded guilty to murder under article 338 of the Indonesian Penal Code. The Prosecution presented accordingly an amended indictment.

4.3 The trial hearing

The accused was present at the trial hearing. The Court asked the accused whether he/she had read the indictment and understood the charges. Since he/she was unable to state that he/she understood the charges, the Judge recessed the hearing so that X could talk with the defence counsel. When the hearing was resumed the Court asked the accused whether he/she wanted to make a statement, to which the accused said yes. In that statement X pleaded guilty but added that he/she was forced to do it under threat of being beaten. The Presiding Judge alerted the Defence that the agreement on admissions did not mention the allegation of the accused not having acted out of his/her free will. It further pointed out that duress could be raised in trial as a form of defence and not just as mitigation. The Defence consulted with the accused who decided to go on with the statement.

The Court asked several questions to X in order to establish the facts and determine whether the accused understood the implications of the guilty plea. Three days after the trial hearing started and after verifying the validity of the guilty plea, the Court convicted X and sentenced him/her to

[5] Section 20.10 TRCP.

imprisonment of twelve months for the murder of three men whose identities were not established. Since X had been eleven months in pre-trial detention the remaining time was not to be served unless the accused, in the period of one year, committed another offence. During all court proceedings the Panel made sure the accused had an interpreter to the dialect he/she speaks and frequently asked whether he/she felt too tired to go on or wished to have a break.

5. JUVENILE JUSTICE ISSUES ARISING FROM THE CASE

Section 2 of UNTAET Regulation 2000/30 as amended by 2001/25 (Transitional Rules of Criminal Proceedings - TRCP) contains a comprehensive list of fair trial and due process guarantees that are in accordance with recognized international standards. Amongst them are the right to equality before the law, the prohibition of arbitrary arrest or detention and the right to be presumed innocent until the final decision of the court. Section 6 complements this provision by laying down specific rights of suspects upon arrest namely the right to remain silent, the right to contact a legal representative and the right to be brought before a judge within 72 hours to have the detention reviewed.

Minors are naturally entitled to all these rights[6] and, due to their age, they also enjoy specific additional guarantees. Section 45 and 46 TRCP are the only UNTAET law provisions that specifically rule on juvenile jurisdiction. Section 45 establishes the age of criminal responsibility at twelve years of age and stipulates that the TRCP are applicable to cases of murder, rape and crimes of violence causing serious injury to the victim. Section 46 contains a set of rights and procedural guarantees that minors are entitled to throughout the investigative procedures namely the requirement of having a legal representative present in questionings carried out by the Public Prosecutor and the right to be accompanied by a relative the review hearing. Although the list of specific rights enjoyed by minors facing criminal proceedings is far from exhaustive, the law establishes that the age of the suspect or accused must be taken into account at all stages of proceedings and that the rights of the minor shall be protected in accordance with the rights set forth in the Convention on the Rights of the Child.[7]

There are a number of factors in the case of X indicating that court actors had an appreciation of the need for special consideration in the conducting of court procedures and defendant's rights in cases involving juveniles. Despite the fact that, apart from Section 45 Reg. 2000/30, there are no specific provisions of UNTAET Law ruling on juvenile justice, the Court demonstrated great care in assuring the defendant could understand and participate in the criminal proceedings. It is more doubtful however, whether the accused's procedural guarantees were equally respected when he/she was arrested and in the period preceding the preliminary hearing, namely throughout the period of pre-trial detention.

5.1 The arrest and the order of pre-trial detention: rights of a minor

5.1.1 The arrest

In October 2001, upon return from West Timor, X was arrested by CIVPOL after being called to the police station, which he/she did voluntarily.

Section 19.1 TRCP gives the Investigating Judge the power to issue an arrest warrant when there are reasonable grounds to believe a person has committed a crime. It is clear that at the time X was arrested no arrest warrant had been issued by an Investigating Judge.

[6] Section 46.3 UNTAET Regulation 2000/30 as amended by 2001/25 reads 'A minor is entitled to all the rights of an accused as set forth in Section 6 of the present regulation'.

[7] Since Section 45.4 determines that the Convention on the Rights of the Child is to be observed in proceedings against minors over 16 years, it should be considered as implicit that it must equally be taken in consideration in cases the minor is between 12 and 16 years of age.

Outside these cases, the police may arrest a suspect without an arrest warrant if 'there are reasonable grounds to believe the suspect has committed a crime and there is an immediate likelihood that before the warrant could be obtained the suspect will flee or destroy, falsify or taint evidence, or endanger public safety or the integrity of the victims or witnesses'.[8] It is presumed that in the present case the police acted according to these powers although there are no documents in the case-file indicating that it was so.

The fact that the law considers an arrest without warrant by the police an exceptional situation, imposes on the police the burden of proving that there are sufficient reasons to believe the suspect committed the crime and that there is a founded fear the suspect will flee, taint evidence or interfere with witnesses. In the present case, the confession provided could have lead to a reasonable presumption that the suspect committed a crime but there is no evidence on the case file as to how the other requirements of the arrest without a warrant was justified. It is noted that the decision of the investigating judge does not refer to the arrest of the suspect only the arrest warrant.

5.1.2. The right to legal representation

Following the arrest, the police questioned X without the presence of a legal representative, a right that according to the case file the suspect had waived. The law stipulates that immediately after the arrest, the suspect will be informed of the right to remain silent and the right to have a legal representative present during questioning[9] and there is no reference as to, if the suspect is a minor, he/she can also to waive this right.

In this statement X admitted to the killings (although arguing he/she was forced to join the militia). Had there not been a guilty plea, the Prosecution would most likely request the statement to be admitted as evidence in trial. The fact that the statement that the accused gave to the police could potentially be admitted as evidence raises two separate questions: a) was the questioning lawful? And, b) did X have a full understanding of the right he/she was waiving?

The general rule is that the Court may admit any evidence that deems relevant and has enough probative value, which leaves enough room to allow as evidence in trial previous statements given by the suspect to a competent authority. However, the law equally allows the Court to exclude evidence if its probative value is substantially outweighed by its prejudicial effect or if there are substantial doubts on its reliability.[10] The jurisprudence of the SPSC in relation to admissibility of previous statements of the accused as evidence has been uneven.

Decisions that have ruled on the admissibility of previous statements given to a competent authority require the statement to have been informed and voluntary. Before admitting a statement as evidence the Court must satisfy itself that the accused was not under any coercion and that he/she had been informed that in case he remained to remain silent, silence could not be interpreted as an admission of guilt.

The opposite view has upheld that allowing statements given by the accused prior to trail to be admitted as evidence amounts to a de facto violation of the right to remain silent at the trial hearing.[11]

In the present case, if the Panel was to consider the statement constituted evidence that had probative value and that was therefore relevant, at a second moment, it would still have to consider whether it was informed. Because the suspect was a minor it is difficult to conclude it was an informed decision. The Beijing Rules, the main international instrument on Juvenile Justice, state that basic procedural safeguards such as the right to counsel must be guaranteed at all stages of proceedings. These rules

[8] Section 19A.4 (b) TRCP
[9] Section 6.2 (a) and (f) TRCP
[10] Section 34.2 TRCP
[11] In *Damiao da Costa Nunes*, Case no. 01/2003, the Special Panel admitted a previous statement as evidence in trial. However, in the case of *Francisco Pereira a.k.a Siku Gagu*, Case no. 34/2003, the panel ruled that only statements given by the suspect before an investigating judge could be admitted as evidence

are based on the premise that minors, due to their young age, are not legally fully capable (sui juris) and therefore must be assisted throughout all stages of criminal proceedings. As a consequence, statements given by a minor without the presence of a representative should always be considered inadmissible for lack of competence of the minor in assessing the implications of his/her decision.

The TRCP applied by the SPSC, although not clearly stating a minor has necessarily to be represented in police questionings by a lawyer, require the presence of a legal representative in questionings carried out by the Public Prosecutor[12]. To consider as lawful questionings carried out by the police without the presence of a legal representative, would be to undermine the scope of protection that the law confers to juvenile offenders. This provision gives minors the guarantee of having the presence of a legal representative whenever questionings are conducted by the Public Prosecutor, even if the minor wishes to waive that right. If the presence of a legal representative is required because the minor does not have the necessary understanding of proceedings, then the same rule should apply to questionings conducted by police authorities.

5.1.3 The right to the presence of a family member

Under international law standards, minors have the right to the presence of a relative at all stages of criminal proceedings.[13] This guarantee is reflected in the TRCR in several provisions. Section 6.2 (a) states that all suspects must immediately upon arrest be informed of the right to contact a relative. If the suspect is a minor the law gives parents, guardians and closest relatives the right to be present in any criminal proceeding[14]. The presence of a relative during criminal proceedings appears however to be highly desirable but not indispensable since the wording of the law indicates that parents or relatives may or may not chose to exercise that right.

There are no indications that X contacted or tried to contact a relative, namely the grandparents. Although, this circumstance in itself does not make the questioning of X by the police unlawful, it adds to the fact that there was also no legal representative.

It is however noteworthy that the TRCP stipulate that when a minor is suspected of having committed a crime that entails a sentence of more than five years imprisonment, the police must only inform the prosecutor but not the family of the suspect.[15] X was a suspect of having committed crimes against humanity, which can carry out a sentence of a maximum of twenty years. The purpose of this provision is unclear and contradictory with the right of the suspect to contact a family member. It is the more so because if the suspect is a minor, there is in addition the right of the relative to be present during any criminal proceedings; the minor enjoys more and not less procedural guarantees than an adult who is a suspect of having committed a crime.

5.1.4 The order of pre-trial detention

After the questioning, the Serious Crimes Unit (SCU) obtained an arrest warrant and X was taken before an Investigating Judge. Between the time of the arrest and the moment X was brought before a judge approximately five days elapsed. Section 20.1 TRCP requires the hearing to review the lawfulness of the arrest and detention to take place within 72 hours of arrest. If the suspect is not brought before a judge within the 72 limit the arrest must be considered to be unlawful. In the present case, the period of five days clearly exceeds the 72 hours limit prescribed by law.

X was represented by a Public Defender at the review hearing. The Investigating Judge may confirm the arrest and order of detention if there are reasons to believe that the suspect was the perpetrator of a

[12] Section 46.2
[13] Rule 7 Beijing Rules
[14] Section 45.8. It is curious to not that the Beijing rules confer this right to the minor and the TRCP to the parents. Section 46.4 further establishes that at the review hearing the minor must be accompanied by the parents, guardian or closest relative.
[15] Section 46.1 TRCP.

crime and that detention is necessary because there are reasons to believe the suspect will flee, there is a risk evidence may be tainted or destroyed or that there are reasons to believe the suspect will pressure victims and witnesses.[16]

At this hearing the Investigating Judge confirmed the lawfulness of the arrest and made an order for pre-trial detention for six months. The fact that the 72 hours limit had been exceeded does not appear to have been brought up by the Defence. In any event, the Investigating Judge was in a position to determine that limit had been infringed and nevertheless confirmed the arrest and ordered the detention of the suspect.

Furthermore, according to Section 29.9, the Investigating Judge must review the detention of the suspect every thirty days[17], which according to the case-file only happened for the first time in February 2002, four months after the arrest. In May 2002, two days before the order of pre-trial detention expired, the Prosecution filed a request for its extension and, on the same day, presented an indictment charging X with two counts of crimes against humanity.

The detention order was reviewed in February, March, April and June 2002. The last review took place over a month after the Prosecution filed the request for extension and therefore already after the six months period had expired. The decision of the review of the order for pre-trial detention held that the Prosecution had made the request for extension of the pre-trial detention two days before the order expired, therefore the fact the review would only effectively take place a month after that request gave rise to an irregularity but did not constitute grounds for a situation of illegal detention. Considering the gravity of the facts of which X was accused of and that there were reasons to believe that the suspect was the perpetrator of the crime, the court ordered the detention of X until trial was concluded.

It was not until September 2002, at the preliminary hearing, that the order for pre-trial detention was again subjected to review. The review decision substituted the pre-trial detention for the following restrictive measures: the obligation to reside in the same village the accused had been arrested in and to report once a week to the local police station; the prohibition of the accused to establish contact with the witnesses or the victims and the obligation to be present in future hearings.

5.1.5 Detention facilities

X was arrested in October 2001 and remained in pre-trial detention until September 2002. At an unspecified date the accused was brought to the prison of Becora, in Dili where, to JSMP's knowledge, he/she was together with adults. Section 45.11 of the Rules of Criminal clearly states that minors who are detained must be kept separated from adult detainees and, when possible, in different facilities. JSMP recognizes that it was not possible to keep the accused in separate facilities from adults since they did not exist at the time. Nevertheless, even in the absence of adequate facilities it is still important to ensure that minors are not kept together with adults.

5.2 Ability to understand proceedings

The trial on criminal charges of a minor and the inherent need to guarantee them a fair trial requires the conducting of proceedings to take full consideration for the age, the maturity and the intellectual capacity of the child. The child-accused, like every other defendant, has the right to understand and participate in proceedings. This right presumes the defendant has an understanding of the charges and proceedings he/she is facing. It is therefore for the Court to conduct the hearing in such a way that

[16] Section 20.8 TRCP

[17] For discussion of case law contesting JSMP's view that decisions should be reviewed every thirty days see JSMP report: " Overview of the Jurisprudence of the Court of Appeal in its First Year of Operation Since East Timor's Independence" p 24.

reduces the feeling of intimidation while ensuring the defendant has the necessary understanding of the proceedings against him/her.

5.2.1. The preliminary hearing: courtroom proceedings

In this respect, the conduct of the presiding judge in X throughout the preliminary hearing is worth particular praise. The hearing started in the courtroom. The presiding judge asked X if he/she understood the nature of the charges. In face of the defendant's negative answer and the visible signs of distress, the Court interrupted the hearing and granted the defence counsel more time to explain the charges to the accused.

Although a child of sixteen years old could already be expected to have some degree of understanding of the proceedings, it is important to place the defendant in the context of a rural area of East Timor, with a high percentage of illiteracy in which people refer to the traditional rather than the formal justice system. Furthermore, the seriousness of the offences as well as the circumstances in which the facts occurred – the violence lived in East Timor in 1999 – are factors that potentially contributed for the defendant's feeling of intimidation before the Court.

Throughout the preliminary hearing, the Court continued to show appreciation for the defendant's age. After the first day, and due to the permanent signs of uneasiness of the defendant, the presiding judge decided to continue proceedings in a smaller meeting room and all the judges took out their robes. The defendant was also told that whenever he/she felt tired the hearing would be interrupted to give him/her time to rest. The defendant was accompanied by the grandfather during the hearing.

At the Defence's request and pursuant section 45.5, the court ordered the hearing to be closed to public. In order to protect the accused's identity it also ordered for the name of the accused to be substituted by the letter X in all court documents.

The adoption of these measures in the conducting of the hearing showed the Court's sensitivity towards the defendant's age and emotional capability. There was all throughout the hearing a most commendable effort to modify the standard proceedings as much as possible as to adapt them to the accused's young age and thus allowing him/her to have an understanding of the proceedings.

5.2.2. The trial hearing: the guilty plea

Following the amendment of the original indictment that dropped the charges for crimes against humanity, X pleaded guilty to murder under article 338 IPC. Although the Court is not bound by law to the agreement the Defence and the Prosecution have reached, it may accept the admission of guilt if it is satisfied that the accused understands the nature of and consequences of the admission; that the admission is voluntary and informed and it is supported by the facts of the case.[18]

The Court first tried to establish whether the accused understood the charges against him/her. It then proceeded to hear the accused's statement. In the statement X admitted to the killings but argued to have been forced to commit the crimes. At this point the presiding judge alerted the defence to the fact that under the applicable law, duress constitutes a complete defence and not merely a mitigating circumstance. The hearing was recessed for the defence counsel to have the opportunity to speak with the accused and explain him/her the consequences of the guilty plea.

The Panel then continued to hear the defendant and accepted the accused's statement to constitute an admission of guilt for the purposes of Section 29A TRCP, that is considered it to be voluntary, with a full understanding of the charges and supported by the facts of the case. If the court is not satisfied that these requirements are met, namely if the statement of the accused contains facts that exclude or

[18] Section 29A TRCP

diminish criminal responsibility, it may decide to continue with a full trial.[19] The fact the accused chose to plead guilty, and the fact the guilty plea was accepted by the court, excluded the accused's right to a full trial and therefore excluded the possibility of bringing duress as a defence.

6. CHILD SOLDIERS

There is no precise definition as to what is a child soldier. Generally speaking, a child soldier is "any person under the age of eighteen who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists. Child soldiers perform a range of tasks including participation in combat, laying mines or explosives; scouting, spying, acting as decoys, couriers or guards; training drill or other preparations; logistics and support functions, portering, cooking and domestic labour; and sexual slavery or other recruitment for sexual services."[20]

A child soldier can be someone who joined an armed group voluntarily or who was forced to join. If it was not a voluntary decision, the person is still considered to be a child soldier but in such cases it is possible to argue duress as a defence or as a mitigating factor. X was fourteen years old at the time the crime was committed, that is, a minor under international law.[21] Both the original indictment and the amended indictment accused X of being a militia member. The Court in its final decision also considered X to be a member of the militia.

In situations involving gross violations of human rights, combating impunity and ensuring the victims and society's need for justice through accountability is the main goal of prosecutions. However, whenever children take an active participation in conflicts, it is necessary to decide whether, despite their age, they too can be prosecuted.

Criminal responsibility of minors is a concept that can be found in most domestic legal systems and that often creates controversy. The debate however tends to concentrate not on whether children are responsible but at what age children become responsible. Under international criminal law, the logic is somewhat reversed and it revolves on whether children should be prosecuted at all. While it is well known that child soldiers are responsible for serious violations of international criminal law, the decision on whether they can be made accountable for their acts requires consideration of the fact that they are minors, that they are typically forcibly recruited and that they act under the orders of their recruiters.

In situations in which children have been forcibly recruited and committed unlawful acts, and independently of the possibility of them being held responsible, it is necessary to consider what should be the recruiters' responsibility.

6.1 Prosecuting Recruiters

The legal standing of child soldiers under international law has only recently begun to be defined. Despite the fact that the use of children in armed conflict prompts a feeling of wrongness, States have been reluctant in entering into binding obligations to prohibit the use of child soldiers. In 1977 the Additional Protocol II to the Geneva Conventions established a prohibition of recruitment of children[22] but it was not until the ratification of the Rome Statute for the International Criminal Court

[19] Section 29A.3 TRCP
[20] Definition given by the Coalition to Stop the Use of Child Soldiers - www.child-soldiers.org
[21] Article 1 CRC
[22] Article 4, paragraph 3 (c) reads:
" Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities". The same approach was followed in 1989 by the drafters of the CRC in Article 38, paragraph 2: *" State parties shall take all feasible measures to ensure that persons who have no attained the age of fifteen do not take a direct part in hostilities"*.

("the Rome Statute") that recruitment of children was criminalized. Article 8 (2) of the Rome Statute reads:

> *"War Crimes*
> *For the purpose of this Statute, "war crimes" means:*
> …
> *(b) (xxvi): Conscripting or enlisting children under the age of fifteen years into armed forces or using them to participate in hostilities.*
> ….
> *(e) (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or use them to participate actively in hostilities.*

More recently, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol") has made an important contribution to the discussion. The Optional Protocol establishes an absolute prohibition on *forced* recruitment of children under 18 into the armed forces but allows voluntary recruitment under certain conditions.[23] Recruitment of children under 18 into other armed groups is prohibited in *all circumstances* [24].

The criminalisation of recruitment of children under international law does not however exclude further responsibility of recruiters. In cases in which it can be proved the children were under the control and acted according orders of others, the latter may also be hold responsible for children's acts through the theory of command responsibility.

6.2 Prosecuting child soldiers?

Whereas domestic legal systems regulate issues of juvenile justice, it remains unclear whether prosecution of minors is permitted under international law. The possibility of prosecution of child soldiers does not appear to be fundamentally contradictory with the CRC nor with its Optional Protocol since neither of them makes reference to the age a child may be held responsible for her/his actions. The Optional Protocol prohibits forced recruitment of children into armed groups, such as militias, but it is silent as to whether child soldiers can be prosecuted. On the contrary, the CRC provides guidelines on the establishment of the age of criminal responsibility therefore implicitly allowing criminal proceedings against minors to be lawful as long as fair trial standards are respected.

Reluctance to prosecute child soldiers for crimes under international law tends to arise from the fact that the interests of justice lie in prosecuting those most responsible for the crimes committed. Child soldiers are more likely to have been forcibly recruited and have acted under some sort of coercion and so they should be seen as victims rather than perpetrators. In the event that children can face criminal charges, proceedings should be appropriate to the child's age and understanding. Unlike trial of adults where sentencing aims at retribution and deterrence, prosecution of minors should have the child's best interests as its core therefore favouring measures that facilitate rehabilitation.

The statutes of the international ad hoc tribunals for the former Yugoslavia and for Rwanda (the ICTY and ICTR respectively) are silent as to the possibility of prosecution of minors. Since there is no explicit provision excluding that possibility, it can theoretically be argued that charges could be brought against minors without contravening the statutes. The Rome Statute however clearly excluded jurisdiction over people under eighteen years old at the time the crime was committed. It must however be borne in mind that this does not preclude States from making recourse to their national jurisdictions if they establish the age of criminal responsibility at a lower age than eighteen.

[23] Article 2 and 3
[24] Article 4 of the Optional Protocol. The ILO Convention 182 equally provides a prohibition of forced or compulsory recruitment of children under 18 for use in armed conflict.

This issue was discussed during the negotiations for the establishment of the Special Court for Sierra Leone (SCSL) [25]. While civil society and the government of Sierra Leone considered that judicial accountability for crimes committed had necessarily to include prosecution of child combatants, international non-governmental organisations objected to any criminal proceedings for those under eighteen. Article 7 of the Statute eventually established that the court had jurisdiction over people of fifteen years of age, this being the first time that prosecution of minors for crimes against humanity was expressly accepted.

6.2.1 Establishing the age of criminal responsibility

The age of criminal responsibility, that is, the age at which one can be held legally responsible for his/hers actions or omissions, differs greatly from country to country. The age of a child is determined by its age at the time the alleged crime was committed. Under the CRC, a child is every person below the age of eighteen.[26] However, in most countries the age of criminal responsibility is lower than that. For example, it is seven in Indonesia, ten in Australia, thirteen in France and sixteen in Portugal.

The CRC itself provides a set of procedural guarantees for children facing criminal charges[27], that is, implicitly allowing prosecution of children. In principle there is nothing in the Convention that would exclude the trial of a minor neither before an international court nor before national jurisdictions. The rules providing guidelines on the conduct of criminal proceedings against children do not establish a range of ages at which it is permissible to try a minor thus contributing to the disparity of standards set out by national legislations. The most important legal instrument ruling on Juvenile Justice, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") states in Rule 4.1:

> "4.1. In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."

The commentary to this Rule adds:

> "The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essential antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent and or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc)."

While Rule 4.1 of the Beijing Rules indicates what are the criteria States must observe when establishing the age of criminal responsibility, there is no reference to what minimum age limit would be acceptable under international law standards. States are therefore left with a wide margin of interpretation in deciding what is "too low" an age.

As seen above, the Optional Protocol to the CRC is silent as to whether prosecution of child combatants is admissible thus not establishing an age of criminal responsibility in case prosecution is possible. There were great hopes that an international standard would be set by the Rome Statute and in fact the final text states that the International Criminal Court (ICC) has no jurisdiction over persons

[25] The SCSL is a hybrid body that resulted of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, pursuant Security Council Resolution 1315 (2000) of 4 August 2000.
[26] Article 1 CRC
[27] Article 40 CRC.

under 18 years of age.[28] In any event this provision on its own does not exclude the possibility of prosecution on a domestic level or even under other international (and internationalised) jurisdictions.

6.2.2 UNTAET Regulation 2000/30

The charges of crimes against humanity against X were brought on the grounds that he/she was 14 years old at the time the facts occurred, therefore was criminally liable under Section 45 UNTAET Regulation 2000/30. This Section reads as follows:

> "(…) any person below 18 years of age shall be deemed a minor. A minor *under 12 years of age shall be deemed incapable* of committing a crime and shall not be subjected to criminal proceedings. A minor *between 12 and 16 years* of age may be prosecuted for criminal offences only in accordance with such rules as may be established in subsequent UNTAET regulations on juvenile justice; provided, however, that minors between 12 and 16 years of age may be prosecuted under the provisions of the present regulation for any offence which under applicable law constitutes murder, rape, or a crime of violence in which serious injury is inflicted upon a victim."[29]

Section 45.2 adds:

> "For the purposes of the present regulation, the relevant time for determining the age of a person is the time at which the suspected crime was committed."

The issue of the age of X seems to have been brought up for the first time in September 2002 by the Defence when it filed an application pursuant section 28.2 TRCP before the court requesting the hearing to be closed to public. The Court noted that it had in its possession three different documents on the age of the defendant. The original indictment did not state a specific date of birth but it declared the accused had been born in 1984. The Court, in accordance with a baptism certificate presented by the defence, would accept March 1985 to be the date of birth of the accused. The Court further pointed out that in any event the accused was a minor at the time the alleged acts were committed and therefore the hearing was to be closed to public.

Section 45 TRCP draws a distinction between children that are under 12 and children between 12 and 16 years of age. Those under 12 cannot be considered criminally responsible under any circumstances. For those aged between 12 and 16, the law provides two types of situations:

- if the offence is of a violent nature, criminal proceedings follow the proceedings set out by Regulation 2000/30.
- if the offence is of a less serious nature, proceedings will be in accordance with juvenile justice laws.

This distinction has several repercussions on the prosecution of minors. The first is that no UNTAET Regulations were adopted concerning juvenile justice for less serious crimes as required by Section 45, so at the moment there are no comprehensive set of criminal procedures that must be observed in proceedings against juvenile offenders in East Timor. Second, and more importantly, for crimes of a violent nature, Regulation 2000/30 is applicable. This Regulation contains the transitional rules of criminal procedure that are to be applied in East Timor for all criminal cases, that is for acts committed during the events of 1999 as well as any ordinary criminal facts. In establishing the age of twelve as the age of criminal responsibility, the TRCP explicitly gives way for prosecutions of crimes against humanity against minors.

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[28] Article 26 of the Rome Statute. It is argued however that this article cannot be regarded as a true principle since it is the result of a compromise between diverging opinions. On this point, please see Amnesty International Report "*Child Soldiers: Criminals or Victims?*", Paragraph 6.2, AI Index: IOR 50/02/00, December 2000 available at www.amnesty.org

[29] Emphasis added.

The age of twelve, when compared to those set out in other national jurisdictions, is not a too low age to establish the age of criminal responsibility. What is striking is that TRCP were drafted to be applied in a post-conflict situation and as a result cover not only ordinary criminal offences but also crimes against humanity. In as far as it covers crimes against humanity, and when compared with the guidelines given by international instruments, in particular in comparison with the Rome Statute that gives the ICC jurisdiction only over 18 year olds, the age of twelve is considerably low. In any event, and in the absence of an international consensus on the matter, UNTAET Regulations clearly allow the prosecution of twelve year olds for crimes against humanity therefore making the prosecution of X in accordance with the applicable law.

7. THE INDICTMENT

7.1 Statement of facts

The statement of facts of the initial indictment accused X of being a member of the militias. No reference was made as to when and under which circumstances X had joined the militia, despite the fact that he/she stated to the police that he/she was forcibly recruited and that witnesses corroborated those allegations. The description of the killings was in accordance with the statement X had given to the police.

7.2. The charges against X

7.2.1 Extermination, attempted extermination and other inhumane acts

The initial indictment charged X with extermination and attempt extermination, a crime against humanity stipulated under Section 5.1 (b) of UNTAET Regulation 2000/15.[30] This Section is an exact reproduction of Article 7 § 2 (b) of the Rome Statute that reads:

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

The Prosecution argued that X together with others was responsible for the extermination of forty-seven men as a part of a widespread or systematic attack against a civilian population. The count on attempted extermination referred to seven specific men that survived the massacre. In alternative, the Prosecution charged X with a third count of inhumane acts for intentionally causing great suffering or serious injury to body or mental or physical health, a crime stipulated under Section 5.1 (k) of UNTAET Regulation 2000/30.

The Prosecution's charges brought against X raise *ab initio* some doubts as to the classification of the facts. It is indisputable that X caused the death of three young men; apart from his/her own statement there is further evidence provided by a statement to the police given by a survivor of the massacre that claims to have seen X murder at least one person. The Prosecution further argued that X had the intent of causing death and had knowledge that his/hers acts were part of a widespread and systematic attack.

The crime of extermination as defined both in the UNTAET Regulations and in the Rome Statute *includes* the intentional infliction of *conditions of life* that are meant to bring about the destruction of a part of the group. The infliction of such conditions of life appears to be but one of the forms under

[30] There are only three other indictments with charges of extermination before the SPSC: *Egidio Manek and Others*, Case no. 9/2003 (Suai Church Massacre), *Herman Sedyono and Others*, Case No. 14/2003 (Covalima Indictment) and *Januario da Costa and Mateus Punef* , Case No. 22/2003 (Oecussi Indictment).

which extermination can take place[31]. In the present case, since it cannot be argued that such conditions were inflicted on the victims one must consider whether the facts nevertheless can be considered as acts of extermination. In the same sense, the *Elements of Crimes*[32] for interpretation of the Rome Statute acknowledge that the killing can be direct or indirect; the possibility of direct killing clearly admitting murder as extermination.

There is no provision under international law that clearly states what are the elements of the crime of extermination. The ICTR was the first tribunal to define the elements of the offence:

1. the accused or his subordinate participated in the killing of certain named or described persons;
2. the act or omission was unlawful and intentional;
3. the unlawful act or omission must be part of a widespread or systematic attack;
4. the attack must be against the civilian population
5. the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.[33]

Contrary to the ICTR's point of view[34], the ICTY has considered that the requirement of the discriminatory element of the attack is not required since extermination is a crime against humanity, which under Article 5 of the Statute of the ICTY covers acts 'directed against *any* civilian population'. Since Section 5 of Regulation 2000/15 has the same wording one can conclude that the same reasoning can be used in the context of the SPSC.

The main problem arising while establishing if the facts of a case amount to extermination is that the definition seems to overlap with the definition of murder as a crime against humanity; both crimes envisage the death as a result and they share the *mens rea* that is, the intent to kill or to cause serious bodily injury to the victim. Attempts to distinguish murder from extermination lie then in the different *mens reus*. In *Vasiljevic*[35] the Trial Chamber of the ICTY found that "*the material element of extermination consists of any one act or combination of acts which contributes to the killing of a large number of individuals*". The relevance of this assertion lies in the fact that it associates extermination with vast scale killing[36].

Like the ICTY, the ICTR in *Akayesu* has equally concluded extermination requires an element of mass destruction that is not required in murder[37]. Although neither the ICC provisions nor the UNTAET Regulations make reference to the mass killing element, according to the *Elements of Crime* of the ICC for a conduct to constitute extermination it must take place in the context of a mass killing[38].

The second issue arising from the assertion made by the Trial Chamber in *Vasiljecic* refers as to whether the conduct of a specific perpetrator must consist in the killing of a large amount of individuals or if, on the contrary and *in extremis*, the killing of a single individual may be qualified as extermination. The jurisprudence of the ICTR points towards the latter. In Kayishima[39] the Trial Chamber concluded that as long as the perpetrator has the knowledge that his acts are part of a mass

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[31] The jurisprudence of the ad hoc tribunals is also clear on this point. For ex. *Krstic* (Case No. IT-98-33) para. 229 when saying that extermination consists of ***anyone act or combination of acts*** which contributes to the killing of a large number of individuals.

[32] Report from the Preparatory Commission of the International Criminal Court, PCNICC/2000/1/Add.2

[33] *Akayesu* Judgement (Case No. ICTR 96-4) , para. 592, available at http://www.ictr.org/default.htm

[34] This point of view was also upheld by the Trial Chamber on *Semanza*, May 2003, para. 326: "A crime against humanity must have been committed as part of a widespread and systematic attack against any civilian population on discriminatory grounds."

[35] Case No. IT-98-32

[36] The landmark case in associating extermination with mass killings is *Attorney-General v Adolph Eichmann*, District Court of Jerusalem, Criminal case No. 40/61

[37] *Akayesu* para. 591 and *Kayishema* (Case No. ICTR-95-1-T) para. 142 : 'extermination can be said to be murder on a massive scale'

[38] Art. 7 (1) (b) § 2 Elements of Crime.

[39] Para 147

killing, he can be guilty of extermination for a single killing. In contrast, and already after Kayishima, the ICTY held that the responsibility for a *limited* number of victims is not sufficient to establish accountability: 'criminal responsibility for 'extermination' only attaches to those individuals responsible for a large number of deaths (…) responsibility for one or for a limited number of such killings is insufficient'[40]. However the position adopted by the Elements of Crimes was in accordance with the ICTR's judgment.[41] In the absence of further case law it is difficult to assess whether courts in future cases would be willing to follow the jurisprudence of the ICTY despite the fact that the Elements of Crime merely requires one killing as an element of the crime.

In this context the case of X is a particular one. As for the elements of the crime, one can argue that there was intent and knowledge of the mass killing attack; 47 men were killed at the same time. But did the actions amount to qualify the facts as extermination that is, can one conclude that three victims – the number of killings carried out by X – is sufficient to amount to extermination or on the other hand should be considered murder? Although UNTAET regulations are largely a repetition of the Rome Statute, there has been no tradition from the part of the Special Panels to refer to the Elements of Crime of the ICC. When upholding that the crime extermination requires the perpetrator to kill a significant amount of victims the Trial Chamber of the ICTY equally recognised that such was not in accordance with the *Elements of Crime*; however since the *Elements of Crime* regard exclusively interpretation of the Rome Statute and therefore apply to the ICC, the Trial Chamber considered that it did not necessarily had to influence its decision[42]. A further argument used by the Trial Chamber was that the adoption of a definition that did not require a large number of victims would be detrimental for the accused. This position is reinforced by the fact that it would always be possible arguing that the facts of the case relate to a crime that occurred in 1999, that is before the Elements of Crime was adopted.

7.2.2 The amended indictment: Murder

During the trial hearing the Prosecution and the Defence reached an agreement on admissions in which X pleaded guilty to murder under Section 338 of the Indonesian Penal Code that reads:

> "The person who with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum imprisonment of fifteen years"

Under UNTAET law the Special Panel has jurisdiction to deal with serious criminal offences committed in the territory of East Timor in the period between 1 January and 25 October 1999.[43] UNTAET Regulations provisions do not rule substantially on murder but instead apply the relevant provisions of the Indonesian Penal Code.[44] Since the understanding of the Court is that Indonesian law applies, the charges brought against X are in accordance with the law. The applicability of Indonesian law refers to murder as described in Section 1.3 (d) Reg. 2000/15, that is murder as a serious criminal offence but not as a crime against humanity.

[40] Vasiljevic para. 227
[41] Article (1) (b) § 1: "The perpetrator killed one or more persons (...)"
[42] Vasiljevic para. 227. Footnote 586
[43] Section 2.3 Regulation 2000/15
[44] Section 8 Regulation 2000/15 under the heading of murder reads ' For the purposes of the present Regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply'. There has been much discussion on which is the applicable Penal code in East Timor. Following a decision of the Special Panel, 'The Public Prosecutor v. Joao Sarmento and Domingos Mendoca, Case 18 a/2001', deciding the applicable law was the Indonesian Penal Code, the Court of Appeal overturned the decision in the much criticised Armando dos Santos case. Despite the decision of the Court of Appeal the Special Panel has continually applied Indonesian Law for disagreeing with the ruling on the Court of Appeal. This seems to be now the uncontested position of the Courts in East Timor.

8. WAS THERE DURESS?

Duress, namely acting under a threat from a third person of severe and irreparable harm to life or limb[45], affords under Section 19 (d) of UNTAET Regulation 2000/15 a complete defence. To exclude criminal responsibility on the grounds of duress, the defendant must be able to prove that his acts were necessary and reasonable to avoid the threat of imminent death or of continuing bodily harm.

It is common for defendants before the Special Panel to admit to the facts of which they are accused while arguing some sort of coercion. In such cases, allegations of duress seek to exclude responsibility for the criminal act in itself. Nevertheless, numerous defendants equally argue to have been forced to join the militias thus creating a double argument of coercion.

X, in the statement to the police, claimed to have been forced to join the militias under threat that if he/she did not his/her father would be recruited. This argument was however never brought up at later stages of the proceedings. Although there has never been a case before the SPSC in which the argument of duress was successful, in Leki the court accepted the defendant had acted under duress but because he had voluntarily joined the militia his criminal responsibility could not be excluded.[46] X, as a minor, could be seen as being in a more vulnerable position than other defendants who argued forcible recruitment. However, the guilty plea prevented the Court from finding whether the accused had or not voluntarily joining the militia and could therefore argue duress as a defence.

The issue of duress in X was only addressed once throughout the trial hearing, when the accused pleaded guilty. In the admission of guilt the accused made before the court he/she claimed to have acted under threat when killing the victims. The Court alerted the Defence that under UNTAET law duress constitutes a complete defence but was eventually satisfied that the accused's statement constituted an admission of guilt in accordance with the requirements set out by Section 29A TRCP.

9. SUPERIOR ORDERS

In X, neither the Prosecution nor the Defence argued superior orders despite the fact that in court it was never contested that the accused was a member of the militias. Nevertheless, the court in its final decision found the accused had "acted on the orders of a superior", which according to Section 21 UNTAET Regulation 2000/15, constitutes a mitigating factor.

The finding that the accused had acted on the superior orders was based on the accused's statement that he/she had received an order from the head of the militia to carry out the murders. In this statement, the accused declared "Because at that time the situation was very scared and we were ordered by (…) as our chief of village as acting also as a commander of the militia (…) and I am young and afraid I didn't have a plan to kill him".

The reference is the accused's statement to being 'scared' and 'afraid' suggests an argument of duress together with superior orders. Although the two can co-exist, and very often are argued together, because in this case the accused had pleaded guilty and duress under UNTAET law is a complete defence, it would not be possible to recognise duress as mitigating factor.

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[45] *Erdemovic*, case number IT-96-22-A, Appeal Decision, Separate Opinion of Judge Cassese, para.14

[46] The *Prosecutor v. Joseph Leki*, Case No. 5/2000, Judgement of 11 June 2001. For a detailed account of the SPSC case law on duress, see S. Linton and C. Reiger, *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 – pp. 1-48. The authors argue that the lack of acquittals on the grounds of duress are due to the Defence's failure to bring corroborating evidence before the Court as well as confusion with the defence of superior orders. (Page 24)

The finding of the court that the accused had acted under the orders of the commander of the militia is significant in acknowledging that the actions of the accused were not voluntary and therefore his/hers criminal responsibility should be reduced.

10. SENTENCING

X was convicted to 12 months imprisonment. Article 338 IPC establishes a maximum sentence of fifteen years imprisonment for manslaughter. Acting pursuant to Section 42.5 TRCP, the Court ordered the 11 months the accused had been in pre-trial detention to be discounted from the term in prison. Pursuant to Article 14 a) IPC the Court ordered the remaining time in prison was not to be served unless the accused committed another offence within the period on one year.

Section 45.3 states that detention of minors should be used as a measure of last resort. In cases in which detention or imprisonment is deemed necessary, the court must take into account the age and special needs of the minor, the gravity of the offence, and the needs of society.[47] In cases in which the minor is convicted to a sentence of imprisonment the court must consider 'a variety of lesser sentencing dispositions, such as care, guidance and supervision orders; counselling, probation, foster care, education, and vocational training programs'.[48]

In convicting X to twelve months imprisonment, the Court considered to be pursuing retribution and deterrence as to dissuade others of committing such serious violations of human rights. Although the court's final decision did not refer to the objective of reintegration of the accused, it did make take into account the particular circumstances of the case when listing the mitigating circumstances.

The court first referred to the age of the accused at the time was committed. The fact the accused was under the eighteen played a decisive role in the sentencing policy having the court described the defendant as 'a tool in the hands of the true responsible'. The court's wording in its final decision showed that it had taken into account not only the age of the accused but also the fact the accused did not act out of his/hers own initiative. This conclusion is reiterated by the court's finding, based on the accused's statement, that he/she had acted on orders of a superior.

The court further noted the accused had no previous convictions and that he/she had pleaded guilty to the charge against him/her.

11. CONCLUSION

In recent years discussions have increased on whether prosecution of minors for serious criminal offences, namely for crimes against humanity, should be accepted under international law. The ICTY and the ICTR have left the question unanswered but the Rome Statute clearly opted for not exercising jurisdiction over persons under the age of eighteen.

The Statute of the Special Court for Sierra Leone, a hybrid tribunal, was the first to clearly state it had jurisdiction over persons over fifteen years of age. So far however no indictments against child combatants have been filed. Section 45 of the TRCP of the Special Panel for Serious Crimes, an internationalised tribunal, potentially lowered this age limit by providing that a minor between 12 and 16 may be tried for criminal responsibility in accordance with UNTAET juvenile justice regulations. As stated above, such a case would be guided by international legal instruments as the Beijing Rules which mandates consideration of factors such as mental, emotional and intellectual maturity. The justification for the establishment of the age of criminal responsibility at twelve may be that the

[47] Section 45.10 TRCP
[48] Section 45.12 TRCP

TRCP are applied to all criminal cases, that is serious crimes committed in 1999 as well as ordinary crimes. Whatever the reason may be, this provision left the door open for prosecution of minors for crimes against humanity thus making the prosecution of X a lawful one. As the accused was finally convicted of manslaughter, however, which is not an international crime, no precedent has been yet set that establishes jurisdiction for international crimes below 15. It remains to be seen whether the Special Panel for Serious Crimes will see fit to exercise their jurisdiction in this area.

Despite the fact that prosecution of minors is allowed, it must nevertheless comply with international standards ruling on juvenile jurisdiction. The child accused enjoys all the rights of an adult and in addition is granted specific guarantees that mean to take into account his/her age and level of maturity. In the case of X, the Panel proved throughout courtroom proceedings to have due care for the accused's age both in the conduct of proceedings, such as taking out robes and conducting the hearings in a smaller room, as well as ensuring the accused was able to follow and understand the proceedings against him/her.

Unfortunately the same care was not observed by the Police nor by the Prosecution during the period of pre-trial detention. From the moment of the first questioning by the police up to the preliminary hearing, the conducting of investigations was plagued by irregularities: the accused gave statement to the police station without the presence of a legal representative or a relative, he/she was held for a period of over 72 hours without being taken before a judge and was hold in pre-trial detention for four months without having the detention order reviewed. It is important to recognise the gravity of the offences which X was suspected to have committed nevertheless considering the accused's young age it would have been desirable to consider alternatives to detention or to have kept him/her in separate facilities from adults and to ensure review hearings were carried out every thirty days as prescribed by law.