



JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

THE GENERAL PROSECUTOR
V
JONI MARQUES AND 9 OTHERS
(THE LOS PALOS CASE)

A JSMP Trial Report

Dili, East Timor
March 2002

“The UN has the mission to restore peace and rebuild the country, which includes to make people believe in the judicial system. We are here together, internationals and Timorese, judges, defenders and prosecutors. All of us are committed to the task of providing East Timor with a justice system that can be respected both among Timorese and among the world.”

Presiding Judge Marcelo Dolzany da Costa during the Los Palos trial

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	4
1.1. Background.....	4
1.2. Methodology	5
1.2.1. Judicial System Monitoring Programme	5
1.2.2. Assessment criteria	5
1.2.3. Structure of the report	6
2. CASE OVERVIEW.....	7
2.1. General Background	7
2.2. The Pre-trial stage.....	7
2.2.1. The indictment	7
2.2.2. Preliminary hearings.....	8
2.3. Trial.....	9
2.3.1. The prosecution case.....	9
2.3.2. The defence case.....	11
2.4. The Decision.....	13
3. SPECIFIC AREAS OF CONCERN	14
3.1. Pre-Trial rights	14
3.1.1. The right to liberty.....	14
3.1.2. Access to public defenders.....	16
3.1.3. Prison facilities.....	17
3.1.4. The right to be tried without undue delay	18
3.2. Rights at trial	20
3.2.1. The right to be tried before an independent and impartial tribunal.....	20
3.2.2. Equality of Arms	22
3.2.3. Public nature of trials and access to public court documents.....	24
3.2.4. The right to an interpreter and translation	25
3.2.5. The right to an appeal	28
4. THE JUDGMENT	29
4.1. The evaluation of witness statements	29
4.2. The "context element" and other aspects of international criminal law.....	29
4.3. Individual Criminal Responsibility	31
4.4. Duress and superior orders	32
4.5. Sentencing.....	32
4.6. The impact of the findings on the Reception, Truth and Reconciliation Commission.....	33
4.7. Appraisal of the judgment	34
5. CONCLUSION.....	35
ANNEX I - CHARGES.....	36
ANNEX II - SENTENCES.....	38

1. INTRODUCTION

1.1. BACKGROUND

East Timor was under Portuguese colonial rule for 450 years and was later invaded by Indonesia in 1975. A quarter-century of brutal military occupation followed, during which Indonesian troops directly or indirectly killed an estimated 200,000 East Timorese people, one-third of the population, and perpetrated widespread and systematic violations of basic human rights, both of pro-independence activists and of the civilian population.

In the wake of continued international pressure, economic crisis and the fall of the Suharto regime, Indonesia in 1999 agreed to a UN organised popular consultation to determine the future status of the territory. Parallel to this development, the Indonesian army established and trained pro-Indonesian militias in East Timor. In early 1999 they initiated an orchestrated campaign of violence, and it later became increasingly clear to many that a well-planned destruction of the territory would take place if the proposal of autonomy within Indonesia was rejected. Despite the environment of fear and intimidation, on 30 August 1999 almost 80% of the East Timorese people implicitly voted for independence by rejecting Indonesia's proposal. After the announcement of the result on 4 September, the situation deteriorated rapidly, forcing nearly all international personnel to leave the territory. The Indonesian army and the pro-Jakarta militias escalated their campaign of killings, rapes, torture, looting and the forceful deportation of a large number of the population to Indonesian West Timor. Security was not restored until the Australian-led military operation (INTERFET) entered East Timor in late September 1999.

Following the arrival of civilian UN personnel, a transitional administration, UNTAET¹, was created, and mandated to “exercise all legislative and executive authority, including the administration of justice.”² UNTAET proceeded to create four District Courts, appointed East Timorese judges, prosecutors and public defenders and put in place a transitional legal system.

In order to try so-called Serious Crimes³ cases that occurred during the Indonesian occupation, Special Panels of the Dili District Court and the Court of Appeal were established. Each Panel consists of one East Timorese judge and two international judges. To date, 14 serious crimes trials have taken place, most of which are individual murder cases against a single defendant, tried under the Indonesian penal code.

Although there will ultimately be several Serious Crimes cases that result from the investigations into the Los Palos region, this report examines the first major case from that area, the *Public Prosecutor v Joni Marques and 9 others*, more commonly known as the *Los Palos Case*.⁴ As the first trial involving crimes against humanity, it can be seen as a litmus test of the fledgling judicial system's ability to conduct major cases in accordance with international fair trial principles.

¹ United Nations Transitional Administration in East Timor

² Security Council Resolution 1272/99, 25 October 1999.

³ 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.

⁴ Case number 9/2000

1.2. METHODOLOGY

1.2.1. Judicial System Monitoring Programme

The Judicial System Monitoring Programme (JSMP) is a non-governmental organisation based in Dili, East Timor that monitors the operation of the Special Panels for Serious Crimes. JSMP was set up in April 2001 in response to a need identified by local and international observers for a consistent and credible monitoring presence for the developing justice system that was independent of the United Nations Transitional Administration. JSMP observers have monitored more than 90% of all other Serious Crimes cases before the Dili District Court. These observations have been supplemented by discussions and interviews with a range of individuals involved in the justice system in a professional capacity, including judges, prosecutors, case managers, public defenders, court staff and others. As the only independent organisation that has consistently monitored the Special Panels for Serious Crimes, JSMP is uniquely placed to draw conclusions that are necessary and appropriate for the system's current stage of development.

JSMP works closely with East Timorese legal and human rights NGOs to contribute to both the developing legal culture within East Timor and the international justice community by providing information and analysis of issues arising from the ongoing process of creating a new justice system. JSMP monitors include an East Timorese human rights worker and international lawyers from both common law and civil law jurisdictions, with international comparative experience in international law, including human rights law. They do not represent the Transitional Administration, any defendant or any other group.

The findings in this report are drawn from direct court room observations and from analysing the detailed notes taken by JSMP observers during all the hearings of the *Los Palos case* ever since the first preliminary hearing took place on 16 February 2001. As there was no formal transcript produced, during the trial hearings JSMP observers recorded as much as possible on laptop computer, which provided a valuable means of later reviewing and searching the proceeding. These notes form the basis of the analysis contained in this report.

There are several reasons why JSMP has chosen to closely monitor the *Los Palos Case*. Firstly, the case is of special importance to the East Timorese, as it was the first opportunity to see whether the new judicial system is able to bring to justice fairly those guilty of past crimes. Secondly, the case is of a complex nature with a large number of accused, several crime scenes and crimes punishable under international criminal law. Thirdly, the case was brought before a judicial system that is still in an early phase of construction. Many of the court actors were inexperienced and previously unfamiliar with aspects of international criminal law, while the accused faced the possibility of receiving the maximum penalty in East Timor. Finally, the case is of international interest as it was the first time the subject matter jurisdiction of the Statute of the International Criminal Court was applied in a court of law.

1.2.2. Assessment criteria

This report assesses the *Los Palos 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 also highlights issues decided upon by the European Court of Human Rights, even though their jurisprudence is not directly applicable in East Timor.

As East Timor rapidly approaches independence, the outcome of the Los Palos trial will in many ways indicate how far the newly created judicial system has come compared to the international standards and benchmarks mentioned above. If the new justice system fails to meet minimum human rights requirements, it will not be able to fulfil its important role in establishing the rule of law and overcome the legacy of impunity and selective justice that characterized the Indonesian occupation.

JSMP acknowledges the difficult situation UNTAET faced upon arrival in 1999, including a totally destroyed infrastructure as well as the continuing problem of scarce human and economic resources. This has been taken into consideration when writing this report and JSMP welcomes the enormous amount of progress that has been made so far. UNTAET has, however, an obligation to observe international minimum human rights standards in the course of its work to help build the newest independent nation, including the work of building the judicial system⁵. UNTAET's legacy will be determined according to whether the system it has put in place is ultimately sustainable for years to come and whether it promotes or undermines the UN's own standards.

1.2.3. Structure of the report

Part two of this report provides a descriptive overview of the facts of the case and its progress through to the end of the trial. Part three examines several specific areas of concern based on JSMP's observations, both at the pre-trial and trial stage. Part four analyses the judgment, and finally some conclusions are drawn about the fairness of the trial in the circumstances in which it took place.

JSMP would finally like to emphasise that this report would not have been possible without the assistance and input of many people, particularly judicial personnel and other Justice Department officers in the Transitional Administration. Similarly, the court officials, staff of the Serious Crimes Unit, public defenders, the Human Rights Unit of UNTAET and others 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 these recommendations in the spirit of contributing to the development of a sustainable and fair justice system for the people of East Timor.

⁵ 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).

2. CASE OVERVIEW

2.1. GENERAL BACKGROUND

Los Palos is the capital of the easternmost district of Lautem in East Timor which has a population of approximately 52 000 people, and comprises an area of 1700 km². During the Indonesian occupation, Lautem was a renowned stronghold for the East Timorese independence movement and as a response to this, the district was heavily militarized, including the permanent deployment of Battalion 745 – one out of two Indonesian infantry battalions based in East Timor. As early as the mid-1980s the Indonesian army started training and arming civilian groups to join them in their fight against the East Timorese independence guerrilla, FALINTIL⁶. The Team Alpha militia was established in 1986 and operated out of the local KOPASSUS⁷ base in Los Palos. The militia members went on joint patrols with TNI⁸ to capture FALINTIL soldiers, and also provided security services for the KOPASSUS base.

In 1999, as a result of the UN-brokered agreement on a popular consultation to determine the future status of East Timor, violence escalated rapidly. As was testified to by Team Alpha members during the trial, the militia group took an active part in the intimidation of the civilian population, and carried out a number of criminal acts both prior to and after the announcement of the result of the ballot on 4 September 1999. When they realised that the international community would send in international troops, several individual Team Alpha militia members were able to escape to West Timor. Another group, however, was ambushed by FALINTIL on 27 September. Some were killed and others were injured and later transferred to INTERFET troops. These detainees, who were not all militia members, were handed over to the civilian justice system in January 2000 and later charged by the General Prosecutor of East Timor with having committed crimes against humanity.

2.2. THE PRE-TRIAL STAGE

2.2.1. The indictment

The original charges were presented to the court in December 2000. At the first preliminary hearing, the court did, however, allow time for the prosecution to amend the indictment, mainly because it was deemed unnecessary to include alternative, lesser charges together with the main charges of crimes against humanity. At the same hearing, charges against one of the accused were severed from the indictment as he was still at large, presumed to be in Indonesia.⁹

The amended indictment was issued on 6 March 2001 and read out at the preliminary hearing that same day. Attached to the indictment was a list of evidence that the Public Prosecutor intended to rely upon, including testimonies from over 70 witnesses. The ten accused were charged under seven different counts with 13 murders committed on four different occasions, one act of torture, deportation or forcible transfer of population and

⁶ Forças Armadas de Libertação Nacional de Timor Leste

⁷ Komando Pasukan Khusus – special forces command

⁸ Tentara Nasional Indonesia – The armed forces who until 1 April 1999 were part of ABRI (Angkatan Bersenjata Republik Indonesia) together with POLRI – the Indonesian police force.

⁹ Syaful Anwar, 1st Lieutenant Infantry of the Indonesian Armed Forces and Deputy commander of KOPASSUS based in Los Palos in 1999. An arrest warrant was filed with Indonesian authorities in February 2001. To date they have failed to comply with their obligations to cooperate in bringing him to East Timor.

persecution. The most publicly known charge was the killing of a group of people that included several nuns on 25 September 1999.

All ten defendants were charged with committing crimes against humanity¹⁰, which are defined in UNTAET Regulation 2000/15 Section 5. The relevant part of the regulation states:

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;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

...

(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;

The charges are attached to this report as ANNEX I¹¹.

2.2.2. Preliminary hearings

The Panel of judges during the preliminary hearings consisted of Judge Luca Ferrero (Italy, presiding), Sylver Ntukamazina (Burundi, rapporteur) and Maria Natercia Gusmao Pereira (East Timor, member). The first preliminary hearing of the case took place on 16 February 2001. Apart from granting the Prosecutor time to amend the indictment, the court ruled on measures to protect witnesses and victims and to extend the detention of nine of the defendants. The last of the ten was conditionally released pending the end of the trial.

The second hearing was held on 6 March 2001. The Presiding Judge tried to ascertain whether each of the accused understood the charges against him and whether he had access to legal counsel. The defendants were then given an opportunity to enter a plea and to make statements if they wished. Although there was some confusion by several of the accused in relation to understanding the charges against them, eight of the ten made a brief statement in which they admitted some level of involvement in the incidents named in the indictment. However, as each of these also claimed they were acting under orders the court did not accept these as admissions of guilt and proceeded to prepare the case for trial. In addition to the ruling on the amendment of the indictment, described above, the court also ruled that it was the responsibility of the Office of the Public Prosecutor to translate all case documents from English into Indonesian, the working language of the East Timorese public defenders. This had not

¹⁰ The definition of crimes against humanity is taken directly from the Rome Statute of the International Criminal Court.

¹¹ The full text of the indictment is available at www.jsmp.minihub.org/Trialsnew.htm

been done at the time, and the court adjourned the preliminary hearings to 3 May in order to give time for the translations to be made.

At the third preliminary hearing on 3 May the public defenders asked the court to further postpone the proceedings, as one of the defenders had gone to Portugal for training. That defender's two clients had to be reassigned to other defenders, which involved a careful assessment of possible conflicts of interest as many of them were already representing other accused. At the time, there were only nine public defenders for all criminal cases in East Timor. The court accepted the request, and postponed the next preliminary hearing to 17 May 2002.

At this last preliminary hearing, counsel for Joni Marques requested the disqualification of Judge Luca Ferrero from hearing the case due to his possible lack of impartiality. The Special Panel decided to transfer the request to the presidency of the Court, while the case was listed for trial on 3 July in order to avoid undue delay. In the end, the issue was not pursued by the Presidency, as Judge Ferrero's contract was due to expire, and he left East Timor before the trial started.

2.3. TRIAL

By the time the trial in fact commenced on 9 July 2001, the Presiding Judge had been replaced by Judge Marcelo Dolzany da Costa from Brazil. The trial took place in the newly furnished courtroom of the Court of Appeal building in central Dili, rather than in the more basic Dili District Court in which all previous Serious Crimes hearings had been held. The new court room features simultaneous translation facilities and the proceedings were recorded on video.

The hearings were adjourned on two occasions for over two weeks, due to illness of counsel and annual leave of the international judges. The trial originally was scheduled to last for approximately three weeks, but ultimately took over four months. For this reason this section will not attempt to cover every aspect of the trial but is intended to provide an overview of the proceedings and the arguments and evidence presented to the court.

2.3.1. The prosecution case

The Deputy General Prosecutor for Serious Crimes, Jean Luis Gillisen, opened the case on behalf of the prosecution. He emphasised that the crimes committed were horrendous, but that the role of the prosecutor was not to ensure that the Court convict anyone, but to assist in finding the truth. "The purpose is to ensure a fair trial and justice, both for the accused and the victims", he said. The prosecutor, Stuart Alford, summarised the three case files that he had presented to both the defence and the court, and later outlined in more detail the facts he wanted to prove and the supporting evidence he intended to present.

2.3.1.1. Prosecution witnesses

During the trial, a total of 29 prosecution witnesses testified before the court to their experiences and observations from 1999 in relation to the alleged acts of each count. Several were former Team Alpha members. In addition there were family members of

the victims, neighbours of the defendants and other eyewitnesses who were brought the long way to court from Lautem district where they still live.

Two witnesses were dismissed before testifying after initial questioning from the presiding judge revealed that they were respectively, brothers of two of the accused. In a controversial interpretation of the Transitional Rules of Criminal Procedure, the Court ruled that close relatives of the accused were not allowed to testify. Another witness was also dismissed when the prosecutor, after an hour and a half of questioning, informed the court that he had eventually realised the witness was not the person identified in the list of evidence, but instead a much older person of the same name and from the same village as the intended witness.

A further 36 witness statements were admitted as evidence by consent of both the defence and the prosecution without the witnesses appearing in court.

2.3.1.2. Physical and Other Evidence

The prosecutor presented a number of items as further evidence to the court. Those items included a sword, sketch maps, photographs, SKS self-loading rifles, ammunition cartridges, metal projectiles taken from the bodies of the victims, the interior roof panel from a car, two videos showing the crime scene and forensic examination and a series of audio recordings. In addition, a number of reports were presented, including three forensic reports and five reports from UN bodies and the Indonesian Human Rights Commission (KPP HAM), each documenting the campaign of violence in East Timor in 1999.

Furthermore, on 3 August the judges, prosecution team, defendants and their counsel, all made a visit by helicopter to the scenes of the various crimes.

2.3.1.3. Prosecution evidence related to the context element

As mentioned above, in crimes against humanity cases the prosecution must prove that the criminal acts were committed as “part of a widespread or systematic attack” directed against the civilian population, and that the accused had knowledge of the attack. In all serious crimes cases to proceed prior to the *Los Palos Case*, the Office of the General Prosecutor had chosen not to charge the accused with international crimes but instead to rely on murder charges alone. They cited as one of the reasons for this the lack of evidence available to prove that such a context element existed, and in particular to prove that the accused had knowledge of it.

As for the Los Palos trial, the main evidence relating to the context in which the individual incidents occurred were the five international reports referred to above. The reports were accepted as evidence by the defence counsel, and not discussed in court except when referred to by the Public Prosecutor in his closing statement. The prosecution also wanted to call the alleged commander of Team Alpha, Jose Pereira as well as two other witnesses to testify to the existence, purpose and structure of Team Alpha and its relationship with KOPASSUS. The prosecutor was not able to locate Jose Pereira when he was due to testify¹², and his earlier statements made to CivPol were not admitted as evidence due to objections from one of the public defenders.

¹² It was stated during the trial that Jose Pereira is residing in Lautem District, East Timor

The other source of evidence relied upon by the prosecution at trial were the statements made in court by the accused themselves. When questioned about their knowledge of other militia activities in East Timor, most of the accused replied they had not heard of other militia groups, and as Joni Marques stated “it was not a Team Alpha plan but that of the political elite.” No specific witnesses were called in order to analyse the role of Team Alpha, nor their possible connections with the Indonesian military or Government. It was, however, obvious from both witness testimonies and the statements of the accused that Team Alpha had their base together with the Indonesian Special Forces, KOPASSUS, and that they performed operations together, including patrols to find and kill FALINTIL soldiers. Manuel da Costa told the court that he had been informed about “Operation Cleansing”, by KOPASSUS officer Syaful Anwar after the referendum in 1999, who had stated that the first step was to kill everyone who voted for independence, the second step to destroy all buildings made by Indonesia.

2.3.1.4. *Prosecution closing statement*

The public prosecutor presented his lengthy closing statement on 6 November 2001. The statement included a detailed description of both the law and the alleged facts, as well as a description of international jurisprudence and comments of the preparatory commission of the International Criminal Court. In his statement, the prosecutor mentioned that “the coalition which existed between KOPASSUS and Team Alpha which not only meant that they shared a base, it was a co-operation which dictated and directed Team Alpha’s very purpose”, and that “they carried out their activities with the support of their Indonesian masters, confident that they would be given impunity from punishment.” On the issue that some accused said they were unaware of other militia groups, and that there was a widespread or systematic attack on the civilian population, the prosecutor said this position was in stark contrast to the witness statements, and that they certainly were aware of the so called “context element”.

Furthermore, the prosecutor maintained all of the accusations of the indictment, with one major exception – he agreed that he could not prove Alarico Fernandes’ participation in the murder of Alfredo de Araujo and Kalisto Rodrigues. On each of the other counts, he requested all the other accused to be found guilty according to the charges against them. No submission was delivered regarding sentence.

2.3.2. *The defence case*

2.3.2.1. *Statements of the accused*

Early in the trial, after the Prosecutor’s opening statements, each of the accused made oral statements. Some refused, however, to give statements for each individual count. Although he had chosen not to enter a plea at the preliminary hearing, Joni Marques attempted to admit guilt for the second count of the charge - the torture of Evaristo Lopes, the sixth count - the murder of Alfredo de Araujo and Kalisto Rodrigues and the seventh count - the murder of a group of clergy, Agus Muliwan and Izino Freitas. The court rejected his plea for the first two acts, as they did not fully match the charges contained in the indictment. Regarding the admission of guilt for the last act, the court reserved its decision for the judgment.

Joao da Costa similarly tried to admit guilt for the torture of Evaristo Lopes as well as one murder during the attack on the group of clergy. He did not, however, admit that he

had knowledge of the “context element”. The court did not accept his attempted admission of guilt.

As was the case during the preliminary hearing, most of the accused again admitted their presence at and even involvement in the event described. However, they denied any criminal responsibility on the whole, claiming they were either ordered or forced to act as they had. Several claimed they were ordinary civilians who were themselves also victims of Team Alpha’s activities. The accused were then questioned by the judges, the prosecution and the defence. Previous statements of the accused, including some made to CIVPOL or Serious Crimes investigators without the presence of legal counsel, were used to refresh their memory. Even though the defence frequently objected to this procedure, it was clearly accepted by the court.

The defendants were given an additional opportunity to address the court after the closing of the evidence. Seven of the defendants gave such statements, while six of them spoke again after the closing statements, essentially reiterating their earlier pleas.

2.3.2.2. Cross examination of prosecution witnesses

Although the public defenders did cross-examine the prosecution witnesses who testified, the questioning was generally confined to challenging the witnesses’ credibility rather than adducing any support for the defendants’ claims. This was despite the fact that some of the witness testimony was consistent with the defences put forward by the accused.

As was the case with the accused, the court did not allow as evidence any prior statements from prosecution witnesses without either the witness testifying in court, or with the consent of all defence counsel.

No witnesses or physical evidence were presented by the defence.

2.3.2.3. Defence closing statements

The six public defenders presented their closing statements on 7 and 8 November 2001. The submission on behalf of Joni Marques comprised a 66 page written statement and, as with the prosecutor’s statement contained extensive references to international criminal law. The counsel for the remaining nine defendants submitted to the court shorter statements, with only minimal references to jurisprudence from the Ad Hoc tribunals for the former Yugoslavia and from Rwanda.

A common element between several of the defence statements was the claim that the witnesses did not identify the relevant accused on the crime scene. The defence counsel often repeated their clients’ claims that their clients had been ordered or even forced by the militia leaders and the Indonesian military to participate. They questioned the credibility of several of the witnesses and one defender claimed that his two clients had not been aware of any widespread or systematic attack against the civilian population in East Timor. Most defenders further stated that the defendants lacked the requisite intent to commit the individual crime they were charged with. Joni Marques’ defender confirmed that he still wished to plead guilty for the murder of the group of clergy. Each of the other defence counsel reaffirmed that no submissions were made in relation to sentencing.

The trial finished at 7.15 pm on 8 November 2001 and was adjourned until 11 December for the delivery of the judgment.

2.4. THE DECISION

The Special Panel managed to remain within its schedule and handed down its decision in the *Los Palos case* at a two hour public hearing on 11 December 2001, only five weeks after the end of the trial hearings. The almost 350 page written decision was originally produced in English and then translated into Bahasa Indonesia, with the English text declared authoritative. The Special Panel set out in detail the submissions of the parties on both fact and law, the evidence presented by the Prosecution – including extensive quotations from witness testimony - and the applicable law. The three judges were unanimous in their findings, which occupied 80 pages of the decision; only this part of the judgment was publicly read to the court prior to the sentencing.

In summary, the Special Panel concluded that each of the accused were guilty as charged, with the following exceptions: first, Joni Marques, Paolo da Costa and Gonsalo dos Santos were acquitted of the murder of Alexio Oliveira; second, Mautersa Monis and Gilberto Fernandes were acquitted of the murder of Evaristo Lopes; and third, Alarico Fernandes was acquitted of the murders of Alfredo de Araujo and Kalistu Rodrigues. The reasoning of the court and the decisions on sentencing are discussed below in section 4 of this report.

3. SPECIFIC AREAS OF CONCERN

While the previous section of the report described the progress of the case, this section of the report analyses several aspects of the proceedings that raise human rights concerns. It is divided into two stages: pre-trial and rights at trial.

3.1. PRE-TRIAL RIGHTS

3.1.1. The right to liberty

According to Article 9(1) of the ICCPR, everyone has the right to liberty and security of person, and deprivation of liberty can only take place according to procedures established by law, a principle which also applies for detention of suspects in criminal cases.

The first five of the *Los Palos* accused to be detained were Joni Marques, Manuel da Costa, Amelio da Costa, Joao da Costa and Paolo da Costa. They were among a larger group that was ambushed on 27 September 1999, allegedly by FALINTIL as a revenge for the murder of the group of clergy two days earlier. Some of these men were held in FALINTIL's custody, while one of the accused sought refuge at a seminary in Los Palos. They were officially detained by INTERFET on 31 October 1999.

The INTERFET Detainee Management Unit (DMU) and the Detainee Ordinance, which created a structure and a legal framework for INTERFET arrests and detentions, had only been established ten days prior to these detentions. JSMP has been informed that while the accused were detained in the Force Detention Centre (FDC), the detention orders were regularly reviewed. Unfortunately, the original detention files are now missing which makes it difficult to assess the legality of this early part of the process.

The first civilian judges in East Timor were appointed on 7 January 2000. Four days later, the DMU transferred all its cases, including those relating to the *Los Palos* detainees, over to the new judges and disbanded itself the following day. The first civilian detention orders for these detainees was issued on 9 February 2000 by the Investigating Judge of the Dili District court¹³.

Lack of proper detention routines in those first early days of the civilian system was not highlighted until the local NGO Yayasan HAK raised the case of the FALINTIL soldier Victor Alvez before the Dili District Court in May 2000. Only a few days earlier UNTAET had already issued Regulation 2000/14, which in Article 12(a) automatically validated all previous arrests and detentions made before 10 May 2000. Judge Rui Pereira dos Santos ruled that the article must be set aside, as it violated international human rights standards.¹⁴ He also stated that the detention of Alvez had been irregular and illegal. The *Los Palos* detainees' detention was reviewed and extended almost on the same dates and in the same procedural manner as Alvez, and it is unclear why their detentions were not affected by the Victor Alvez ruling. It is, however, worth mentioning that at the time, the Court of Appeal had no judges appointed to it, and that the Alvez judgment could therefore not be effectively appealed.

¹³ At the time neither an existing court house existed, nor was any UNTAET regulatory framework in place.

¹⁴ Decision number 01/Pen.Pra/2000/PD Dil.

In early June 2000 the Serious Crimes Unit was established and it received the *Los Palos* files from the East Timorese prosecutors towards the end of June. Five of the accused had by this time been in detention for 6 months, the maximum deadline for pre-trial detention reviews and extensions from the Investigating Judge. Further detention can only be approved by a panel of judges.¹⁵ Confusion arose regarding the Serious Crimes cases, as Special Panels with exclusive jurisdiction over such cases had been established by regulation at the same time as the Serious Crimes Unit yet no Special Panel yet existed.¹⁶ The acting Special Representative of the Secretary General issued a written order for the ordinary panels to handle the detention cases. A number of judges were at that time sent overseas for training, and even an ordinary panel was not able to process the *Los Palos* detainees. In any event, there was still a question about the nature of the Special Panel's exclusive jurisdiction and whether it covered detention issues. The question was first presented in the Joao Bosco case, but not resolved as the Court of Appeal released the suspect and said there was no evidence that he had committed a serious crime.¹⁷ The confusion therefore continued.

Nevertheless, the Dili District Court issued a further 30 day detention order on 27 July 2000. The next review hearing was listed for 29 August 2000, one day before the detention order was due to expire. Despite repeated requests from the Public Prosecutor to the Court, the review hearing was postponed several times due to judicial absence and holidays. Finally, at a hearing on 19 October, a new detention order was made. JSMP understands that this order purported to validate the time spent in detention since the expiry of the previous order.

The first of the Special Panels for Serious Crimes was finally constituted on 11 December 2000 when Italian Judge Luca Ferrero was appointed to the Dili District Court by the Transitional Administrator, joining Judge Sylver Ntukamazina (Burundi) and Judge Maria Natercia Gusmao Pereira (East Timor). By then, the number of accused in detention in the *Los Palos Case* had reached 10, as 5 more had been arrested based on information received during the investigations.

In mid-January 2001, the prosecutors again realised that several detention orders had expired, or were due to expire. These included Hilario Da Silva, who had been illegally detained since 2 January 2001, Gonsalo Dos Santos who had been illegally detained since 27 December 2001, and Alarico Fernandes and Gilberto Fernandes who both had been illegally detained since 8 January 2001. On 11 January, the prosecutor requested that the Special Panel extend the detention of a number of Serious Crimes accused persons, including all of the *Los Palos* detainees. The Special Panel ruled the following day that it could not issue detention extensions when the detention had already expired. However, the court decided to simply issue new arrest warrants, even though the accused, with one exception, were already in detention.

Not surprisingly, the Court Of Appeal, in an appeal hearing observed by JSMP on 14 February 2001, decided to overrule the Dili District Court decision. The judgment was issued in Portuguese only, something which at the time created considerable confusion. It was unclear whether the Court of Appeal ordered the immediate release of all

¹⁵ UNTAET Regulation 2000/15 article 20.10 and 20.11 prior to the amendments made 18 September 2001.

¹⁶ UNTAET Regulation 2000/15, 6 June 2000.

¹⁷ Public Prosecutor v Joao Bosco, Case of Appeal No 2 2000.

suspects, and by the time an unofficial translation of the judgment was ready, the *Los Palos* detention orders had been individually reviewed by the Special Panel for Serious Crimes and extended until the end of the trial. Hilario da Silva, who was conditionally released, was the only exception.

On the basis of the information outlined above, it seems as though several of the accused were unlawfully detained at least from 30 August to 19 October 2000, and possibly for considerably longer.. Even though the judicial system was in the process of being developed, it is surprising that it took so long to establish adequate detention review procedures and administrative structures within the Dili District Court. It is unclear why the accused were not released when their apparently illegal detention was finally reviewed, but it seems that the practice of retrospectively “backdating” detention extensions has occurred quite regularly in East Timor without protest from defence counsel.

3.1.2. Access to public defenders

According to international fair trial standards, everyone facing a criminal charge has the right to a lawyer, both during the pre trial stage as well as during the actual trial itself.¹⁸ This has also been reflected in the Transitional Rules of Criminal Procedure which grant the suspect the right to legal representation.¹⁹

Access to lawyers in East Timor is often difficult as there are currently less than 100 East Timorese with legal qualifications. Few of these practise as private lawyers, while the majority work within the judicial system, for NGOs or in public administration. There are only twelve East Timorese public defenders for the whole of the UN administered territory, including all serious crimes proceedings, all ordinary crimes proceedings and all civil proceedings.

JSMP has been informed that while in INTERFET detention, the *Los Palos* detainees were regularly visited by military lawyers. Although after their cases were handed over to the civilian system they were appointed legal representatives, these changed a number of times prior to trial. The limited number of public defenders forced the three appointed East Timorese defence lawyers in the *Los Palos Case* to take on a collective total of five clients. In addition, three international lawyers represented the other five accused. A situation where defenders represent multiple accused in major cases potentially threatens the quality of the defence provided to an individual. Although it was never identified in the Los Palos trial, the potential existed for a conflict of interest to arise for the defenders who represented more than one accused on the same charge as detailed in the following table:

¹⁸ See the UN Basic Principles on the Role of Lawyers, Principle 1

¹⁹ UNTAET Regulation 2000/30 Section 6,

Table 1. Multiple defendants

Count	Defender	Defendants
1 and 2	Nuno Torres	Joao Da Costa, Gilberto Fernandes
3 and 4	Beatriz Sanches	Alarico Fernandes, Paolo Da Costa
6	Beatriz Sanches	Alarico Fernandes, Paolo Da Costa
7	Cancio Xavier	Amelio Da Costa, Manuel Da Costa
7	Lisete Quintao	Hilario da Silva, Gonsalo dos Santos

The situation worsened when both Nuno Torres and Cancio Xavier went to Portugal during the later stages of the trial, necessitating the transfer of their clients to Lisete Quintao and Marcia Sarmento.

Furthermore, as a result of the limited number of public defenders, several of the defendants in the *Los Palos Case* made statements to CivPol without legal counsel being present during the interviews. One of the East Timorese defence lawyers informed the court that due to time constraints, a standardized letter was sent to the investigators stating that the questioning could take place without his presence. The letter included a list of rights to be read to the accused prior to the interview. The defence lawyer further stated that he trusted the investigators as they were experienced and working under the UN flag, and he therefore expected them to act in accordance with international regulations and entrusted them not to violate the rights of his clients. After a motion was raised by other defence lawyers, wanting to clarify the use of statements taken under such circumstances, the court deemed that the accused had himself waived his right to counsel by being interviewed.²⁰ The Special Panel held that he had been advised of his right to a lawyer according to standard interview procedures but the lawyer had chosen not to be present. The statement was therefore allowed to be used to refresh the memory of the defendants, as well as for the purpose of assessing the consistency and veracity of his statements during cross-examination. During the entire trial, both the accused and witnesses claimed their statements to CivPol investigators were not correctly recorded or translated, and there were frequent differences between their testimony to the court and that contained in the statements to CivPol.

These issues highlight the concern over the low number of public defenders in East Timor. Unless the situation improves, the number of pending cases is likely to increase and create a backlog which in turn may impact on other basic rights, such as the right to a hearing without undue delay.

3.1.3. Prison facilities

Most of the prisons were destroyed in 1999 and when INTERFET arrived almost all prisoners had escaped. Until late 2000, there was a shortage of prison facilities in East Timor. The situation has improved as there are now functioning prisons in Gleno, Baucau and Becora/Dili run by New Zealand prison guards and management.

The *Los Palos* accused, with one exception, were all in Becora prison. JSMP monitors have visited the prison and can confirm that the prison facilities are basic but good. Amnesty International noted in a recent report that “*although work remains to be*

²⁰ Decision made by the Special Panel 27 July 2001

done.....the penal institutions are a testimony to successful planning and capacity building. Amnesty International was pleased to note the skills brought to East Timor by the New Zealand prison staff in order to ensure genuine capacity building for the East Timorese prison officials.”²¹

However, during the first days of the trial it was a continuing problem that the prisoners did not receive sufficient food during the trial proceedings. They had been given only frozen bread rolls for lunch by the prison authorities and at one stage threatened to not cooperate with the courts unless they were given proper lunch. During one hearing, the presiding judge opened his wallet, took out a 10 dollar bill and asked the public defender to go and buy food for the accused. The problem was later resolved.

3.1.4. The right to be tried without undue delay

Article 14(3)(c) of the ICCPR guarantees the right to a trial “without undue delay”. The UN Human Rights Committee has 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”. To make this right effective, a procedure must be available in order to ensure that the trial will proceed “without undue delay”, both in first instance and on appeal.²²

The first five of the *Los Palos* accused were officially detained on 31 October 1999. The first preliminary hearing of the case took place on 16 February 2001 and the last on 17 May the same year. The trial commenced on 9 July and lasted until the judgment was handed down on 11 December 2001, more than two years after their arrest. When evaluating whether the accused were tried without undue delay other aspects than the objective time period must also be taken into consideration. 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 authorities and the defendant’s own conduct.

The complexity of the *Los Palos Case* has already been discussed and was undeniably a complicated case, both by local as well as international standards. It was also evident that a lot was at stake for the accused. They were charged with the most serious crimes, and faced the maximum penalty in East Timor. In addition, the case was widely seen as a first test of the justice system’s ability to implement international human rights standards and it has the potential of playing an important role in the ongoing reconciliation process.

As for the conduct of the 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. It is the state’s obligation to organise the administration of justice in such way that the courts meet the requirements of the minimum fair trial standards. Even after the detention hearings discussed above, the *Los Palos Case* was postponed a number of times due to lack of administrative routines in

²¹ Amnesty International: “East Timor, Justice past, present and future”, AI-index: ASA 57/001/2001

²² UN Human Rights Committee General Comment 13, 13 April 1984, at paragraph 10.

place in East Timor. It was originally planned to start in mid 2000 before an ordinary panel of judges at the Dili District court. After Regulation 2000/15 was issued, however, the Justice Department decided to delay the trial until a Special Panel for Serious Crimes had been established. Even after the first preliminary hearing commenced in early 2001, the case suffered from a number of delays. The first was due to the necessity of amending the indictment, while the second delay of one month and three weeks was due to unclear procedures for translation of documents.

During the trial itself, a delay of three weeks occurred due to the international judges going on vacation. It is also well known that both the public defenders, judges and prosecutors are heavily overburdened in the East Timorese judicial system, and that not just the *Los Palos Case*, but almost all other Serious Crimes cases have been postponed due to capacity problems.²³

The European Court of Human Rights has, however, 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.²⁴ The situation in East Timor is of an exceptional character with UNTAET arriving in a country totally devastated by Indonesian military and militia groups. The courthouses had been looted and destroyed, virtually all legal documents were burned and the lack of available legal personnel with knowledge of Indonesian law was acute. A justice system is now in the process of being created from scratch with limited resources. In such a situation, it is inevitable that delays will happen and that lack of domestic jurisprudence on procedural issues further challenges the performance of court actors. As for the *Los Palos* trial, neither the time spent in detention nor the delays during trial seem to be longer than may be expected under such circumstances.

²³ For more details, see *Justice in Practice – Human Rights in Court Administration JSMP Thematic Report No 1* (December 2001), www.jsmp.minihub.org.

²⁴ See e.g. the Milasi Judgment, A.119, p.47

3.2. ***RIGHTS AT TRIAL***

3.2.1. **The right to be tried before an independent and impartial tribunal**

The right to a trial before an independent and impartial tribunal is a fundamental and institutional requirement of international fair trial standards. Article 14 (1) of the ICCPR states that

"...In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."

The UN Human Rights Committee has further elaborated this by saying that

"The right to trial by an independent and impartial tribunal is so basic that the Human Rights Committee has stated that it "is an absolute right that may suffer no exception".²⁵

Securing an independent and impartial judiciary is indispensable given the historical context of East Timor. To overcome a past legacy of corruption, nepotism and a politically-controlled judiciary, efforts need to be taken to rebuild trust in an institution that is invaluable for a nation built upon the rule of law. The *Los Palos Case* offered a unique opportunity for the transitional authorities to set a good example in this context.

3.2.1.1. ***Independence of the Judiciary***

It is of great concern that several organisations and individuals have reported cases of political interference in judicial and prosecutorial matters in East Timor. These include Amnesty International's report "East Timor and Justice – Past, Present and Future"²⁶, reports from the well-respected human rights organisation Yayasan HAK²⁷ and comments from former acting General Prosecutor Carlos Vasconcelos.²⁸ They have all made allegations of direct political interference from either previous officials of the Justice Department, or from senior political figures in East Timor. JSMP has not, however, received any reports of interference in the *Los Palos Case*.

International standards relating to an independent judiciary also require the governing authority to provide adequate resources to enable the judiciary to properly perform its functions independently of the executive.²⁹ JSMP monitors have noted certain recurring resource-related problems in the administration of the Special Panels, including in the *Los Palos Case*. If left unchecked, these have the potential to directly affect the extent

²⁵ *González del Río v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993

²⁶ See Amnesty International Report AI-index: ASA 57/001/2001

²⁷ See for example article "Serious concerns regarding the independence of the judiciary" available at www.jsmp.minihub.org/News/26-7.htm

²⁸ Paper delivered at the International Association of Prosecutors, Sydney, Australia, September 2001.

²⁹ See Principle 7 of the UN Basic Principles of Independence of the Judiciary; see also UN General Assembly Resolution 54/163, 23 February 2000 reflected in Section 34 of UNTAET Regulation 2000/11 that states that "[d]uring the transitional period, UNTAET shall provide the necessary financial and technical support to the courts in East Timor."

to which the right to a trial before an independent tribunal is enjoyed by those accused appearing before the Panels.³⁰

3.2.1.2. *Impartiality of the Tribunal*

Judicial impartiality

The issue of impartiality of judges is another fundamental principle included in the right to a fair trial. The UN Human Rights Committee has clearly stated that “*Judges must not harbour any preconceptions about the matter put before them*”³¹ The principle is incorporated into UNTAET Regulation 2000/11, which states that “*Judges shall perform their duties independently and impartially, and in accordance with applicable law in East Timor...*”

The impartiality of one of the judges of the Special Panel was questioned at the final preliminary hearing of the *Los Palos case*. One of the public defenders initially asked the court to disqualify presiding judge Luca Ferrero, as he claimed the judge had been discussing the case in private with the Public Prosecutor. According to UNTAET Regulation, the decision on disqualification of judges was to be made by the Court Presidency³². The basis of the claim and the court’s response was, however, never taken any further as the judge in question declared that he would be leaving East Timor prior to the commencement of the trial.

Another equally important concern about the impartiality of the court derives from statements made by the very same panel in case 5/2000, *The Public Prosecutor v Joseph Leki*. Although the issue was not raised during the *Los Palos* trial, international commentators³³ have questioned the impartiality of the Special Panel as it could be seen as having prejudged certain crucial issues regarding state involvement in crimes against humanity cases. In the *Leki* judgment, which did not involve crimes against humanity, the panel stated that:

“...the plan outlined and executed by Indonesian military forces and its supported local militia groups was the forced deportation of hundreds of thousands of East Timorese. Those facts do not call for any formal evidence in the light of what even the humblest and the most candid man in the world can assess.”

Without any evidence having been produced in court on the relationship between militia groups and the Indonesian Government, the panel also stated:

“[the accused] acted to carry out an order from a government who was supporting militia groups in East Timor as reprisal to the Popular Consultation who decided by the independence of this territory.”

³⁰ For more details, see *Justice in Practice – Human Rights in Court Administration JSMP Thematic Report No 1* (December 2001), www.jsmp.minihub.org.

³¹ UN Human Rights Committee, *Karttunen v Finland*, UN Doc. CCPR/C/46/D/387/1989, para 7.2

³² UNTAET Regulation 2000/11 section 20. The regulation has since been amended by UNTAET Regulation 2001/25, and it is now the Judge Administrator, or in the case of judges of the Court of Appeal the President of that court, who shall decide upon issues of disqualification of judges.

³³ See Suzannah Linton, “Cambodia, East Timor and Sierra Leone: Experiments in International Justice” (2001) *XII Criminal Law Forum*.

These elements were all relevant to proving the context element in the *Los Palos Case*. In the event, however, none of the public defenders seemed to contest that there was a “widespread and systematic attack” in East Timor in 1999, but merely disputed their client’s knowledge of it.

Impartiality of court interpretation services

Little international jurisprudence exists regarding the impartiality of court interpreters.³⁴ Case law from the European Court of Human Rights clearly shows that the principles with regard to independence and impartiality apply as well to professional judges and lay judges as to jurors, but does not mention interpreters. It is, however, clear from Section 23 of UNTAET Regulation No. 2000/11 that it is the court’s responsibility to appoint interpreters. If the court allows an interpreter to be used in court who might be viewed by the public or others as partial, this might also affect the perception of judicial impartiality.

Of the total numbers of witnesses in the *Los Palos Case*, almost two thirds spoke either the languages of Makasa’e or Fataluku. Except for the four official languages of the court, the Justice Department had no interpreters available for these other East Timorese languages. This led to the confusing situation where the prosecutor has been required to identify interpreters for his own witnesses who speak these two languages. At one point, the prosecutor claimed it was impossible to find any qualified Makasa’e speaking interpreters other than one who was working for the Serious Crimes Unit. Despite protests from the defence, the court ruled that the interpreter was allowed to interpret for the court. In its decision, the Panel notes the fact that impartiality has to be presumed, and that by taking the oath, the interpreter swears to work impartially. The Court did not address the fact that an important criterion for considering impartiality is the potential risk of public perception of bias.

3.2.2. Equality of Arms

Of the various underlying principles of the rights to a fair trial, although not directly articulated in the ICCPR, the most important is the right to “equality of arms”. This term encompasses the idea that each party to a proceeding should have an equal opportunity to present their case and that neither party should enjoy any substantial advantage over their opponent. The principle underpins a number of other, separate rights, such as the right to call and examine witnesses, the right to be present at trial and adequate time and facility to prepare a defence, as well as access to an effective and competent counsel.

3.2.2.1. *The right to examine witnesses*

The ICCPR guarantees that in the determination of any criminal charge, an accused is entitled “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”³⁵ Even though it is not in dispute that the right to examine witnesses was recognised and respected by the Special Panel, important concerns were

³⁴ For court interpreting jurisprudence from USA, see the National Association of Judiciary Interpreters and Translators news magazine “Proteus” Vol.IX, No 4 “Interpreter Issues on Appeal” by Virginia Benmaman

³⁵ Article 14(3)(e) of the ICCPR. See also Article 6(3)(d) of the European Convention; Article 8(2)(f) of the American Convention; and Article 67(1)(e) of the ICC Statute.

raised by the defence in relation to the practical application of this right during the Los Palos trial.

As mentioned above, no defence witnesses were called at the trial. This may be due to several reasons, of which one relates to the prosecutor's duty to present all relevant witnesses whose testimony may either incriminate or exonerate the accused. Secondly, a large number of witnesses who hypothetically may have been able to testify in support of the defence are presumed to still be in Indonesian West Timor and not able to be brought to court.

Even though these are important factors, the defence raised other reasons for not calling witnesses for the trial, of which one was the lack of resources. They frequently stated that they lacked both cars and the time to travel to the districts to speak to potential witnesses, to provide transport to court and to pay for the witness expenses such as food and lodging while being in Dili.³⁶

3.2.2.2. *Qualifications and competence of Public Defenders*

In most criminal systems, the prosecution usually has an inherent advantage in criminal cases by having the state machinery at its disposal, including the control over the investigation. In East Timor, the serious crimes prosecution unit also has the advantage of having a pool of highly qualified international prosecutors and investigators. This exacerbates the importance of providing an effective defence, a fundamental aspect of the principle of equality of arms. The UN Basic Principles on the Role of Lawyers clearly highlights in Article 6 that the lawyer should be of experience and competence that correspond with the offences allegedly carried out by the accused.

All East Timorese public defenders in the *Los Palos* trial only recently completed their law degrees from universities in Indonesia and none of them had practised as lawyers prior to their appointments in 2000.

The *Los Palos Case* is, as mentioned above, a complex case by both East Timorese and international standards. The indictment charges ten accused with a total of 13 murders carried out in four different incidents, in addition to the attack and burning of a number of villages and subsequent deportation of their inhabitants. It raises difficult issues of international criminal law, of which neither the defenders, judges or prosecutors in the *Los Palos Case* had any previous experience. Furthermore, the East Timorese defenders have not received a single training session on the theory or practical application of laws relating to crimes against humanity. Of the international lawyers recruited to act as mentors to the East Timorese, one had no previous experience in criminal law while the other had a background as a civil servant in her home country. Only one international defender was able to provide some kind of information on international criminal law, even though he was not originally recruited as a legal mentor. Unfortunately, all these three had also taken on their own clients in the case, something which limited the possibility of actual mentoring.

The result was readily apparent in court, where both international and East Timorese lawyers revealed their lack of knowledge of international criminal law. Examples such

³⁶ A new system of covering witness expenses has recently been introduced, and will improve the situation in regard to upcoming cases

as repeated objections on the basis of relevance when the witnesses or accused were questioned on the context element of the crimes against humanity charge were commonplace. One of the defenders stated that one of the witness statements should not be allowed, “*as it is not relevant to the indictment, but only regarding the general situation in East Timor in 1999*”. The defender further stated that “*What happened in 1999 was orchestrated by high ranking members of the Indonesian military who are located in Jakarta and the military hierarchy. Not by these men. If an international tribunal were to be set up in the future then I would very much support the use of the statement but I don’t see that it’s relevant to this case.*” This was despite the fact that his client had raised the issues of duress and superior orders.

Reliance upon inexperienced defence lawyers, both East Timorese and international, who are representing multiple clients in a complicated crimes against humanity case is a clear violation of the defendant’s right to a competent counsel as outlined by the United Nations Basic Principles for Lawyers.³⁷

3.2.3. Public nature of trials and access to public court documents

Article 14(1) of the ICCPR guarantees the right to a public hearing.³⁸ Primarily, the right to a public hearing means that the accused person has the right to be tried in public and that the public has a right to attend such trials. The principle is “an essential safeguard of the fairness and independence of the judicial process, and a means of protecting public confidence in the judicial system.”³⁹ This right is recognised in the Transitional Rules of Criminal Procedure which state that trial hearings are open to the public, subject to circumstances where national security, sexual offences or the interests or justice would be prejudiced.⁴⁰

In order to make this right effective the public needs to know when and where trial hearings will take place. The UN Human Rights Committee has declared that the court must make information about the time and venue of the public hearing available, and to provide adequate facilities for attendance by interested members of the public in addition to allowing the public and the press to attend the hearings freely.⁴¹ Ever since JSMP observed the first preliminary hearing of the *Los Palos Case* on 16 February 2001, no court dates have been listed or publicised by the court. The only way JSMP has been able to attend the proceedings is by enquiring directly of judges and prosecutors.⁴² While all of the hearings, including the preliminary hearings, were monitored by JSMP and the trial itself was attended by a representative of the UNTAET Human Rights Unit, there were seldom more than a few East Timorese present in the public gallery. The lack of publicity regarding the trial dates might be one reason why public attendance was minimal.

³⁷ Three new international public defenders have now been assigned to the Public Defenders office in order to relieve the East Timorese defenders of their caseload.

³⁸ See also Article 10 of the Universal Declaration of Human Rights; Article 6(1) of the European Convention; Articles 64(7) and 67(1) of the ICC Statute.

³⁹ Chapter 14, Amnesty International *Fair Trials Manual*

⁴⁰ Section 28 of Regulation 2000/30; these limited exceptions to the public nature of a trial are in accordance with the international standards mentioned above.

⁴¹ *Van Meurs v the Netherlands* (215/1986) 13 July 1990, Report of the UN Human Rights Committee

⁴² As far as JSMP is aware of, the only public available court schedule for Serious Crimes is at the JSMP web pages www.jsmp.minihub.org/Courtschedule.htm

Those who were able to find out when the *Los Palos Case* was listed faced more problems. During the first few days of the trial, several East Timorese people were not allowed into the court building by the security personnel as they did not have UN Identity Cards.⁴³ Even a legal observer from the East Timorese Jurists Association was denied access although he identified himself by showing a membership card of the association. The problem with the security officers was discovered by the presiding judge who repeatedly tried to instruct the guards to let everyone into the courtroom. One of the international observers from JSMP was also stopped and asked for UN identification some days later, but was later allowed into the court room. This problem occurred several weeks later when another JSMP observer was refused access to the court room by a new UN CivPol. She was only allowed in after having argued the right to a public trial with the UN police. No East Timorese were allowed access that morning, which was noted by the presiding judge one hour after commencement of the trial. He promptly ordered the CivPol to let them in.

The press had general access to the court room, and a number of television crews were allowed to film, on the condition that they did not reveal the identity of witnesses. The witnesses' identities were, according to a court order, to be protected. Even so, East Timorese media photographed both the accused and witnesses on several occasions during trial. The Court attempted to avoid such episodes. A clear line of policy from both legislators, the Justice Department and the Court would also provide guidelines for both the press and other court reporters.

Even if the public were able to track down the Los Palos hearing dates and were allowed into the court room, they would face further problems if they tried to obtain public court documents such as an indictment. Even JSMP initially had problems of getting a copy of the original Los Palos indictment and there is still no established system for access to public documents from any of the East Timorese courts. The Los Palos judgment has not yet been published by the Ministry of Justice in any official publication and neither have any previous judgments or decisions.

3.2.4. The right to an interpreter and translation

The *Los Palos Case* was the first Special Panel trial that took place in the newly refurbished Court of Appeal building. The courtroom is of modern design and equipped with simultaneous translation facilities. Even though this constitutes a major improvement from the Dili District Court, JSMP observers recognised a number of recurring problems related to interpretation and translation facilities.

The courts of East Timor operate in not only a bi-lingual, but a multilingual society. During the Los Palos trial, not less than six languages were spoken: Bahasa Indonesia, English, Tetun, Portuguese, Makasa'e and Fataluku. This evidently makes court interpretation extremely important, and provisions for interpretations has been incorporated into UNTAET Regulation 2000/11 article 23 which state: "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 that court." In addition the right to an interpreter has been listed

⁴³ The security personnel were responsible for both the Ministry of Justice and the court room, since they share the same building. UN identity cards are only issued to UN and ETPA staff, as well as a limited number per registered NGO.

as a fair trial guarantee in ICCPR article 14(3)(f). Even so, the Justice Department's arrangements to provide court interpretations in the *Los Palos Case* did not reflect the multitude of languages used.

3.2.4.1. English – Bahasa Indonesia

During the trial, three of the Ministry of Justice's English – Bahasa Indonesia translators/interpreters (one of whom is also qualified to translate to Tetun) were available, although two were on holiday at the same time during the trial. None of the translators at that time were legally trained, nor had any specialised training in court interpretation. The Court decided early in the trial to borrow part time from ETPA⁴⁴ an Australian Bahasa Indonesia – English interpreter with a legal background. Unfortunately, he had to leave the trial mid-way after an official request from the court to use him for the rest of the trial was turned down by the ETPA central administration translation unit⁴⁵.

3.2.4.2. Fataluku/Makasa'e – Bahasa Indonesia

Of the witness testimonies, only 10 were directly from Bahasa Indonesia to English, while 19 of the witnesses spoke the Lautem languages Makasa'e or Fataluku. Their testimonies were translated into Bahasa Indonesia by one interpreter, and from Bahasa Indonesia to English by another.

The court has no interpretation service available for any other languages than Bahasa Indonesia/Tetun/Portuguese, and contrary to the procedures outlined in section 23 of Regulation 2000/11, the prosecutor and not the court, had to organise the interpretations to the languages of Makasa'e and Fataluku⁴⁶.

3.2.4.3. English – Portuguese

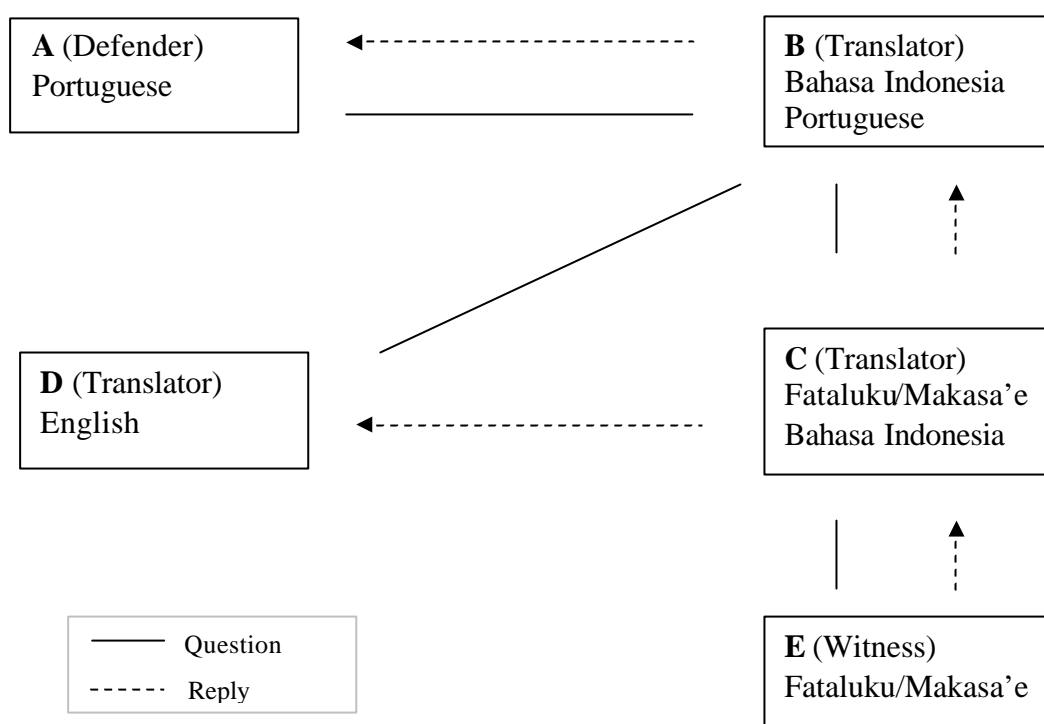
As one of the international public defenders had limited knowledge of both English and Bahasa Indonesia, a Portuguese – Bahasa Indonesia interpreter was made available. This resulted in episodes where three interpreters were needed. From the point at which question was asked until the defender received a reply, six interpretations were made. The table underneath illustrates the path of interpretations.

⁴⁴ East Timor Public Administration

⁴⁵ The request was later granted and the interpreter has worked for the Department of Justice on a full time basis since 1 November 2001.

⁴⁶ See more under section 3.2.1.2

Table 2



3.2.4.4. *Impact on court proceedings*

There were some technical problems with the recently donated simultaneous interpretation equipment, but as a whole it improved the flow of communication considerably compared to the preliminary hearings. Simultaneous interpreting is, however, an exhausting exercise and in court, the pressure on the interpreters was obvious during the trial proceedings. One person sometimes interpreted for many hours without a break as there was no-one available to take over. The situation may have led to inaccurate interpretation, especially when keeping in mind the complicated process of multilingual interpretations in East Timor. Everyone in the courtroom had problems following the dialogue at one stage or another. Sometimes the private interpreter of Joni Marques would interrupt and clarify sentences. Other times the mistakes were not made clear to the Panel of Judges. One example was when the Portuguese defender asked a question in English regarding the “hitting of Evaristo Lopez”. Due to his linguistic background he did not pronounce the “h” at the beginning of words, and it was translated to Bahasa Indonesia as the “eating (makanan) of Evaristo Lopez”.

3.2.4.5. *Communication between defence and defendant*

Another aspect of the right to translations is the ability for the defendants to communicate with their lawyers in a language they understand. In the *Los Palos Case*, two of the public defenders used English as a working language and were dependent upon interpreters when communicating with their clients. Even so, no permanent system was in place to provide such services. The counsel of Joni Marques was on an ad hoc basis able to borrow an interpreter from the UNTAET Language and Training Unit, while the two other international lawyers were dependant on either borrowing another Portuguese – Bahasa Indonesia interpreter from the Ministry of Justice, or receive

assistance from the other defenders. At times they even asked members of the public for assistance.

3.2.5. The right to an appeal

An important safeguard of a fair trial is the right to appeal to ensure judicial scrutiny of a court's decision at a higher level. This is recognised in Article 14(5) of the ICCPR which states that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”.⁴⁷

Having access to an accurate transcript of the proceedings is essential for the parties when preparing for any appeal, and for the judges during the appeal hearing. If the reasoning or outcome in the decision of the court at first instance is challenged, an accurate transcript is the primary basis upon which the appeal court is able to assess the challenge.

In the design of the court system in East Timor UNTAET recognised the importance of this particular aspect of court administration. Section 26.1 of UNTAET Regulation 2000/11 states that “the court shall ensure that, in each hearing by a judge or panel of judges, written or recorded notes of the proceedings are taken...”

Prior to the Los Palos trial, a video recording system was installed in the newly refurbished courtroom and functioned for the majority of the hearing sessions that stretched to almost 60 days over a four month period. Furthermore, an audio recording system was used that stored the recording on compact disc. JSMP fears that it may be extremely difficult for an appeal court to find a particular section of the record for review, as they are only stored by date. Furthermore, the complexity of the audio recording of multiple interpretations cannot be underestimated.

JSMP has been informed that the panel of judges did not use any of these recordings when writing the *Los Palos* judgment, but instead referred to the typed notes produced by the presiding judge on a portable computer. JSMP does question the practice of a judge, who should be focusing on leading the proceedings, typing the notes as an alternative to official court transcripts. The accuracy of the documents must also be questioned, as the judge is neither a native English speaker nor a trained transcriber.

⁴⁷ See also Article 2 of Protocol 7 of the *European Convention*; Article 8(2)(h) of the *American Convention*.

4. THE JUDGMENT

This final section of this report highlights some of the main issues arising from the Los Palos judgment relating to the Special Panel's treatment of witness statements, sentencing and its interpretation and application of the relevant laws relating to crimes against humanity. Although JSMP has been informed that the Public Prosecutor and counsel for at least one defendant have filed notices of appeal from aspects of the decision, this report is not intended to prejudice any such proceedings.

4.1. *THE EVALUATION OF WITNESS STATEMENTS*

In a case such as this, the evaluation of witness testimony and prior statements requires particular caution. Many of the witnesses were old and illiterate peasants for whom it was difficult to express themselves verbally in the unfamiliar surrounds of a Dili courtroom. Furthermore, the trauma of their experiences, most recently during 1999, no doubt psychologically affected some witnesses, as was the case with one woman who admitted that she had lost her memory since her son was killed. Although the Special Panel did acknowledge all of these difficulties in the introduction to its findings⁴⁸, the court nonetheless seems to have attached considerable weight to exact quotes of witnesses and defendants, reproducing large extracts of testimony as recorded by the Presiding judge at the time.⁴⁹ In addition, the complicated nature of the court interpretation and the lack of a proper court transcript exacerbated the dangers in over-reliance on literal interpretations.

4.2. *THE "CONTEXT ELEMENT" AND OTHER ASPECTS OF INTERNATIONAL CRIMINAL LAW*

As mentioned in earlier sections of the report, an important aspect of the crimes against humanity aspect of the *Los Palos Case* involved establishing whether there was in fact a widespread or systematic attack on the civilian population, and if so, whether the accused had the requisite knowledge that their acts were part of any such attack. The Public Prosecutor referred to this as "the context element" during the trial.

The Special Panel found that it was "beyond reasonable doubt that there was an extensive attack by pro-autonomy armed groups supported by Indonesian authorities targeting the civilian population in the area, namely those linked with political movements for the self determination of East Timor"⁵⁰. The findings of the Special Panel were based mainly on the report of the UN International Commission of Inquiry, whose report was directly quoted at length in the judgment and was admitted as evidence with the consent of the defence. The court also found that witness testimonies and physical evidence supported the findings of the Commission.

However, before reaching this point, the Special Panel devoted a section of its findings to deciding whether or not an armed conflict existed in East Timor during 1999. It seems that the Special Panel understood that there was a requirement that the criminal

⁴⁸ Paragraph 673 of the Judgment

⁴⁹ A significant proportion of the lengthy judgment was made up of such long, purportedly verbatim extracts.

⁵⁰ Paragraph 686 of the Judgment

acts in question be “closely related to the armed conflict”⁵¹. The inclusion of such considerations suggests an unfamiliarity with and lack of understanding of the applicable law, namely UNTAET Regulation 2000/15 and its basis in international law. In the Statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY), the existence of an armed conflict is a pre-requisite element of crimes against humanity. However, Regulation 2000/15 is taken directly from the Statute for the International Criminal Court which contains a different definition of crimes against humanity that does not require any armed conflict context. Although similar judgments from the ICTY generally contain such a section in their written reasons, that court is applying a different law.

Although the finding was ultimately not relevant for the outcome of the *Los Palos Case*, it may still be regarded as important *obiter dicta* which may affect future cases involving war crimes. Furthermore, it provides an insight into the level of international legal knowledge demonstrated by the Special Panel. For these reasons the findings deserves further analysis.

First of all, it is surprising that the Panel’s arguments seem not to be based upon international jurisprudence. The *Tadic* appeal case is regarded as the leading authority in outlining the elements of an armed conflict, but was not mentioned by the Panel in its analysis.⁵²

The Panel also stated that “there was an armed conflict in East Timor between paramilitary groups openly supported by Jakarta and others dedicated to the independence of this half-island”⁵³. They do not mention that East Timor was illegally occupied by Indonesia, and that the main conflict existed between the Indonesian military and the East Timorese guerrilla group FALINTIL. Neither did they discuss the legal implications of the ceasefire signed on 21 April 1999. The Special Panel simply states that “the parties agreed that, at least some months before and after the popular consultation on 30 August 1999, there was an armed conflict in East Timor”⁵⁴. At no time during the trial, in either written or oral submissions, did either the prosecution or the defence rely on any such contention. The only mention of an armed conflict was made by the Public Prosecutor in his closing submissions when examining the legal definition of “attack on a civilian population”. He submitted that international jurisprudence supported his contention that “civilian population” did not need to be construed by reference to an armed conflict.

The Special Panel also stated that each of the accused relied on their involvement in an armed conflict as a mitigating factor for their actions.⁵⁵ Although virtually all of the accused claimed they were acting under orders of either senior militia members or of the Indonesian military, this does not prove the existence of an armed conflict. Furthermore, in support of its finding the Special Panel relies on some conclusions and recommendations made by the UN Special Rapporteurs in their report of December

⁵¹ Paragraph 684 of the Judgment

⁵² Prosecutor v Tadic, ICTY Case No IT-94-1-A

⁵³ Paragraph 686 of the Judgment

⁵⁴ Paragraph 681 of the Judgment

⁵⁵ Paragraph 690 of the Judgment

1999⁵⁶. However, the quotes referred to for this purpose do not mention the existence of an armed conflict at all, rather they contain assessments about the level of Indonesian state responsibility for the actions of the militias in their attack on the civilian population only.

4.3. *INDIVIDUAL CRIMINAL RESPONSIBILITY*

A number of the accused denied that they were individually criminally responsible for the acts charged, primarily it seems because they were charged according to UNTAET Regulation 2000/15 with having “aided, abetted or otherwise assisted” in the commission of the crime but not as the main perpetrator. International jurisprudence has further elaborated on the level of involvement sufficient for conviction. In the *Tadic* case, Trial Chamber II of the ICTY stated that the act must have *substantially* and *directly* contributed to the commission of the crime. It was contested by some of the defence lawyers that their client’s involvement fulfilled these requirements.

In particular, the issue was raised in relation to Hilario da Silva’s involvement in the murder of the group of clergy (Count 7) and Alarico Fernandes’ involvement in the murders of Alfredo de Araujo and Kalistu Rodrigues (Count 6). The evidence presented to the court was consistent with the contention that Alarico Fernandes had merely been present at the crime scene and did not take any active part in the murder of the two men. In that instance, the Special Panel accepted that, pursuant to *Tadic*, mere presence was not sufficient to hold the accused liable for murder and consequently acquitted Fernandes of the charge. However, Hilario da Silva admitted to having placed one stick of wood on the roadblock and helped to push the car containing the victims into the river. As a result, the court found this sufficient to show that he had “directly and substantially” contributed to the murders. Furthermore, the Court also found that da Silva possessed the required intent as he also had admitted that at the time he believed that the roadblock was constructed to capture and kill FALINTIL, that is, a criminal purpose.

A final point of interest in relation to the Special Panel’s assessment of individual criminal responsibility relates to Count 5, the murder of Alexio de Oliveira. The Prosecutor alleged that Joni Marques, Paulo da Costa and Gonsalo dos Santos had forced the victim to come to the base, where he was later murdered. Each of the accused were acquitted of this charge on the basis that the nature of their involvement in taking the victim to the military base was insufficiently clear to find them guilty of aiding, abetting or otherwise assisting the murder. The court found that it was not proved beyond reasonable doubt that the victim had not come to the base voluntarily. In addition, in relation to Joni Marques the Special Panel also stated that “in order to make Joni Marques criminally responsible...the main perpetrator has first to be identified.” Although these comments are probably only *obiter dictum*, and were not made in relation to the other two accused, this point could become significant in future cases before the Special Panel, particularly where the primary perpetrator is either not in custody or their identity cannot be confirmed.

⁵⁶ Special Rapporteurs’ report UN Doc A/54/660 (1999). The court refers to this report as the “Report of the Security Council Mission”.

4.4. DURESS AND SUPERIOR ORDERS

As with the majority of cases heard by the Special Panel to date, in the *Los Palos Case* most of the accused claimed that they were either ordered or forced to participate in the criminal acts with which they were charged. However, it is unclear whether the accused, and even their counsel, recognised the legal difference between being ordered or being forced. According to section 21 of UNTAET Regulation 2000/15, superior orders do not constitute a defence but may be considered as a mitigating factor in sentencing. In contrast to this, being forced, if it can be shown to be of such a nature as to constitute duress, is a complete defence. Section 19.1(d) of UNTAET Regulation 2000/15 states that the duress must result

“from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person's control.”

For each accused, the court found that no evidence had been presented that the accused had been under duress and that in any event no accused could claim duress when they themselves were carrying guns at the time. In its reasoning the Special Panel relied on its previous decision in the case of the *Public Prosecutor v Joseph Leki*⁵⁷ in which duress was also claimed. In that case, although the Court accepted that the accused had a gun pointed at his head at the time he shot the victim, it held that duress could not be invoked as a defence as the accused had previously joined the militia voluntarily and had participated in the criminal purpose of that organisation. This decision seems to exclude the possibility of any militia members successfully relying on duress as a defence. The *Leki* decision has been appealed but the appeal has not yet been heard.

4.5. SENTENCING

The sentences imposed ranged from 4 years to 33 years and 4 months imprisonment.⁵⁸ When determining the terms of imprisonment, the Panel referred to UNTAET Regulation 2000/15, section 10.1(a) 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”. The same section sets the maximum penalty for crimes against humanity in East Timor to 25 years. The panel stated in their judgment that it imposed the penalties both as retribution against the said accused, as deterrence for others who may be tempted in the future and finally, to avoid impunity regarding the events of 1999 and thereby “promote national reconciliation and the restoration of peace.”

The general level of sentences is higher than in previous judgments handed down by the Special Panel. This may not be surprising as all previous cases have been tried under the Indonesian Penal code, while the *Los Palos Case* was the first in which an East Timorese court established violations of international criminal law. By handing down long sentences, the court may have wanted to manifest a clear non-tolerance policy from the international community against such acts. In addition, the Court emphasised the horrifying manner in which many of the crimes were committed and the defenceless

⁵⁷ Case No 5/2000, Decision 11 June 2001.

⁵⁸ Details of the sentence awarded to each accused is contained in ANNEX II to this report.

positions of the victims as aggravating factors. However, the Court also noted that mitigating factors existed, including family responsibility, having acted under superior orders, cooperation in the proceedings and the guilty plea of Joni Marques.

One of the most interesting aspects of the judgment is the way in which the court has calculated sentences when there was a conjunction of punishable acts. The court chose to use the calculation system from the Penal Code of Indonesia which in Article 65(2) states that sentences are to be served cumulatively but not to exceed one third more than the most severe maximum punishment. By using this model, Gonsalo Dos Santos received 23 years imprisonment after being sentenced to 5 years for counts 3 and 4 and 18 years for count 7. Using the same reasoning, the court calculated the sentences of Joni Marques, Paol Da Costa and Joao Da Costa to be one third higher than the maximum sentence in East Timor of 25 years⁵⁹. By awarding them 33 years and 4 months imprisonment, the court chose to disregard 12(3) and (4) of the same calculation system which state that temporary imprisonment may not exceed 15 years, and in cases with conjunction of punishable acts the total maximum is 20 years imprisonment. If a sentence is to exceed these limits, it must be classified as life imprisonment, which no longer applies in East Timor⁶⁰.

4.6. THE IMPACT OF THE FINDINGS ON THE RECEPTION, TRUTH AND RECONCILIATION COMMISSION

The work of the Special Panels for Serious Crimes is widely seen as closely linked to the ongoing reconciliation process in East Timor. The Panel itself stated in the Los Palos judgment that “[f]inally, the objective of prosecuting and punishing the perpetrators of the serious crimes committed in East Timor in 1999 is to avoid impunity and thereby to promote national reconciliation and the restoration of peace.”

As a part of this process, steps have been taken to establish an East Timorese Commission for Reception, Truth and Reconciliation. In its proposal to donors, the Commission mentions that it will have three main functions:

- To seek the truth regarding patterns of human rights abuses from 1974 to 1999
- To facilitate community reconciliation
- To report to the government and make recommendations for further actions.

The Commission further emphasises that it will complement the formal justice system, and that it will not handle Serious Crimes but refer those to the courts. Frequently cited examples of such cases include “less serious crimes such as looting, burning and minor assaults”. The Commission does not evaluate whether these acts, when seen in the context of East Timor during the occupation, may be viewed as violations of international criminal law, and thereby should be under the jurisdiction of the Special Panels. Such examples were, however, the subject of charges in the *Los Palos Case*.

⁵⁹ UNTAET Reg. 2000/15 Section 10.1 (a) provides for “Imprisonment for a specified number of years, which may not exceed a maximum of 25 years”. The Court has interpreted this to mean a maximum for each count rather than the total: “This penalty is limited to 25 years of imprisonment for each count, pursuant to Sect. 10.1.(a) of UR-2000/15.” The Judgment Para 882

⁶⁰ Section 10 of UNTAET Regulation 2000/15 states that the penalty for crimes against humanity must be for a specified number of years.

Joni Marques, Paolo da Costa, Alarico Fernandes and Gonsalo dos Santos were all found guilty of deportation/forcible transfer of population and persecution, based on the allegations that they had taken part not only in burning of houses but also in stealing money, burning personal belongings and stealing chickens, pigs and goats. It is not entirely clear from the judgment how the court divided up the two crimes, which both qualify as crimes against humanity. It is, however, clear that the court regarded burning of houses as an act meant to spread fear among the population which ultimately caused people to leave their villages. In addition, the court found that burning of houses and personal belongings as well as stealing deprived the people of their fundamental rights. The Special Panel was quite clear that the acts were committed as part of a widespread campaign of violence against civilians, and that all the accused were aware of this.

It would not be surprising if the large majority of cases of burning and looting that will be presented to the Reception, Truth and Reconciliation Commission would fit into the definition of crimes against humanity either as deportation/forcible transfer or linked with persecution which has been outlined by the Special Panels for Serious Crimes in the Los Palos judgment. It remains to be seen how similar cases are handled should they come before the Commission and if they are referred to the Serious Crimes Unit, whether or not the Prosecutor chooses to prosecute them as serious crimes.

4.7. APPRAISAL OF THE JUDGMENT

Compared to the quality of previous judgments produced by the Special Panel for Serious Crimes, the Los Palos judgment is a significant improvement. Despite the complexity and size of the case, including the number of charges, defendants and witnesses, the Court has ultimately produced a reasonably comprehensive public record of the history of the case, the trial process and the Special Panel's own reasoning. In the circumstances in which the Special Panel was operating, this should be recognised as a major achievement as well as an important contribution to jurisprudence internationally and within East Timor.

5. CONCLUSION

The *Los Palos Case* was the first crimes against humanity case to be heard by the Special Panel for Serious Crimes, and the very first time the law of the forthcoming International Criminal Court was applied in practice. It is therefore not surprising that the trial can be regarded as a litmus test of the emerging judicial system's ability to try cases in accordance with international fair trial standards. The objective of this report has been to critically review the proceedings of the Los Palos trial and to assess whether these minimum standards have been met.

In drawing conclusions, JSMP has taken into account the context in which the court actors operate. The East Timorese judiciary is still under construction, and continues to suffer from the impact of the physical destruction in 1999 and the lack of both human and financial resources. Keeping this in mind, substantial progress has been made since the first preliminary hearing of the *Los Palos Case* commenced in January 2001.

The findings of this report, however, show that international minimum standards have not been met in a number of specific areas. There is an urgent need to improve the performance of court actors as well as the court administration. One of the most pressing needs is to provide the defendants in serious crimes cases with defence lawyers of experience and competence which correspond with the alleged offences. Other shortcomings identified by the observers correspond with the findings contained in JSMPs first thematic report *Justice in Practice – Human Rights in Court Administration*. No listings of court dates, lack of translators, limited support staff for judges and poor communication between the court and the prison authorities were all issues which endangered the defendant's right to a fair trial.

The mandate of the United Nation mission to East Timor included the responsibility to create structures and build capacity in a way that would enable East Timorese self-governance. The findings of the Los Palos report, however, demonstrate that there is still a long way ahead before a sustainable judicial system has been established in East Timor.

ANNEX I - CHARGES

I. Torture and Murder of Evaristo Lopes, 21 April 1999

By their acts and omissions in relation to events described under C and E I of this indictment **JONI MARQUES, JOAO DA COSTA alias LEMORAI, MAUTERSA MONIS and GILBERTO FERNANDES** committed:

Count 1: Murder, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(a) of UNTAET Regulation 2000/15

On or about 21 April 1999, in Los Palos Sub-District, Lautem District, **Joni Marques, Joao da Costa alias Lemorai, Mautersa Monis and Gilberto Fernandes** did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Evaristo Lopes, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(a) of UNTAET Regulation 2000/15.

Count 2: Torture, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(f) of UNTAET Regulation 2000/15

On or about 21 April 1999 in Los Palos Sub-District, Lautem District, **Joni Marques, Joao da Costa alias Lemorai, Mautersa Monis and Gilberto Fernandes** did with intention commit, aid, abet or otherwise assist in inflicting severe pain or suffering upon Evaristo Lopes, a person in the custody or under the control of the accused, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(f) of UNTAET Regulation 2000/15

II. Attacks on Leuro and other villages and the deportation and forcible transfer of the civilian population, 8 to 30 September 1999.

By their acts and omissions in relation to events described under C and E II of this indictment **JONI MARQUES, ALARICO FERNANDES, PAULO DA COSTA and GONSALO DOS SANTOS** committed:

Count 3: Deportation or forcible transfer of population, a **CRIME AGAINST HUMANITY** punishable under section 5.1(d) of UNTAET Regulation 2000/15.

On days between the 8th and 30th September 1999 at Leuro and other villages, Los Palos Sub-District, Lautem District, **Joni Marques, Alarico Fernandes, Paulo da Costa and Gonsalo dos Santos** did, without grounds, commit, aid, abet or otherwise assist in the forcible displacement of persons by expulsion or coercive acts from the area in which they were lawfully present in violation of section 5.1 (d) of UNTAET Regulation 2000/15.

Count 4: Persecution, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(h) of UNTAET Regulation 2000/15

On days between the 8th and 30th September 1999 at Leuro and other villages, Los Palos Sub-District, Lautem District, **Joni Marques, Alarico Fernandes, Paulo da Costa and Gonsalo dos Santos** did intentionally commit, aid, abet or otherwise assist in the severe deprivation of fundamental rights of persons by reasons of the identity of their group or collectivity in violation of section 5.1(f) of UNTAET Regulation 2000/15

III. Abduction and Murder of Alexio Oliveira, 11 September 1999

By their acts and omissions in relation to events described under C and E III of this indictment **JONI MARQUES, PAULO DA COSTA and GONSALO DOS SANTOS** committed:

Count 5: Murder, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(a) of UNTAET Regulation 2000/15

On or about 11 September 1999, in Los Palos Sub-District, Lautem District, **Joni Marques, Paulo da Costa** and **Gonsalo dos Santos** did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Alexio Oliveira, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(a) of UNTAET Regulation 2000/15.

IV. Murder of Alfredo Araujo alias Jose Lemorai and Kalistu Rodrigues, 21 September 1999

By their acts and omissions in relation to events described under C and E IV of this indictment **JONI MARQUES, ALARICO FERNANDES and PAULO DA COSTA** committed:

Count 6: Murder, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(a) of UNTAET Regulation 2000/15

On or about 21 September 1999, near Ira-Ara Sub-Village, Parlamento Village, Lautem District, **Joni Marques, Alarico Fernandes** and **Paulo da Costa** did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Alfredo de Araujo alias Jose Lemorai and Kalistu Rodrigues, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(a) of UNTAET Regulation 2000/15.

V. Murders of a group of clergy, Agus Muliawan and Izno Freitas, 25 September 1999

By their acts and omissions in relation to the events described under C and E V of this indictment, **JONI MARQUES, JOAO DA COSTA, PAULO DA COSTA, AMELIO DA COSTA, MANUEL DA COSTA, HILARIO DA SILVA and GONSALO DOS SANTOS** committed:

Count 7: Murder, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(a) of UNTAET Regulation 2000/15

On or about 25 September 1999, in Los Palos Sub-District, Lautem District, **Joni Marques, Joao da Costa alias Lemorai, Paulo da Costa, Amelio da Costa, Manuel da Costa, Hilario da Silva** and **Gonsalo dos Santos** did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Brother Jacinto Xavier, Brother Fernando dos Santos, Brother Valerio da Conceicao, Sister Erminia Cazzaniga, Sister Celeste de Carvalho, Agus Muliawan, Cristovao Rudy Barreto, Titi Sandora Lopes and Izino Freitas Amaral, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(a) of UNTAET Regulation 2000/15.

ANNEX II - SENTENCES

Defendant	Found guilty of crimes against humanity	Acquitted of	Total sentence
Joni Marques	Torture of Evaristo Lopes	Murder of Alexio Oliveira	33 years 4 months
	Murder of Evaristo Lopes		
	Forcible transfer or deportation of civilian population and persecution		
	Murders of Alfredo Araujo and Kalistu Rodrigues		
	Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others		
Joao da Costa	Torture of Evaristo Lopes		33 years 4 months
	Murder of Evaristo Lopes		
	Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others		
Paolo da Costa	Forcible transfer or deportation of civilian population and persecution	Murder of Alexio Oliveira	33 years 4 months
	Murders of Alfredo Araujo and Kalistu Rodrigues		
	Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others		
Manuel da Costa	Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others		19 years
Amelio da Costa	Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others		18 years
Mautersa Monis	Torture of Evaristo Lopes	Murder of Evaristo Lopes	4 years
Gilberto Fernandes	Torture of Evaristo Lopes	Murder of Evaristo Lopes	5 years
Alarico Fernandes	Forcible transfer or deportation of civilian population and persecution	Murders of Alfredo Araujo and Kalistu Rodrigues	4 years
Gonsalo dos Santos	Forcible transfer or deportation of civilian population and persecution	Murder of Alexio Oliveira	23 years
	Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others		
Hilario da Silva	Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others		17 years