JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

THE PAULINO DE JESUS DECISIONS

DILI, TIMOR LESTE
APRIL 2005

The *Judicial System Monitoring Programme* (JSMP) was set up in early 2001 in Dili, Timor Leste. 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 Timor Leste. For further information see www.jsmp.minihub.org

JSMP wishes to acknowledge the support of our donors in the production of this report: AusAID, USAID, The Asia Foundation, and New Zealand Aid.

Judicial System Monitoring Programme
Rua Setubal, Kolmera, Dili – Timor Leste
Postal address: PO Box 275, Dili, Timor Leste
Tel/Fax: (670) 390 323 883
Mobile: +670 7246227
Email: info@jsmp.minihub.org

TABLE OF CONTENTS

I INTRODUCTION

On 4 November 2004, the Court of Appeal found Paulino de Jesus, an Indonesian TNI soldier, guilty of Crimes against Humanity murder and Crimes against Humanity attempted murder. This decision overturned the trial decision of the Special Panel for Serious Crimes ('SPSC') on 26 January 2004 to acquit Paulino de Jesus of both charges. On 19 November 2004, defense counsel for Paulino de Jesus filed an appeal against the Court of Appeal decision to the Supreme Court of Justice, although this court has not yet been established. On 17 December, the Court of Appeal decided that it was the court of last instance in Timor Leste, and that its decisions are therefore definitive and cannot be the object of a new appeal.

The *Paulino de Jesus* decisions are significant because this was the first time that an accused was acquitted of all charges by the SPSC,[1] and it is the only acquittal to have been overturned by the Court of Appeal. This report provides a critical analysis of the decisions, and identifies a number of issues within the decision making process. Chapter 2 discusses the original charges against the accused and the amendment of those charges, and notes with particular concern the court's approach to the amendment of the first indictment. Chapter 3 critiques the SPSC's analysis of the evidence used to reach their conclusion. Chapter 4 addresses the manner in which the Court of Appeal inappropriately usurped the role of the Trial Court to deliver a decision that draws incorrectly on domestic law murder provisions to deliver a verdict about Crimes against Humanity (an offence under international criminal law). The unsatisfactory nature of the Court of Appeal's legal reasoning suggests that the Court was erroneous in its application of the law in this instance. Chapter 5 demonstrates the necessity for the establishment of the Supreme Court to provide for judicial review of the Court of Appeal's decisions.

JSMP writes with this report with the aim of assisting to improve the justice system in Timor Leste. We do recognize the hard work and the progress of the Court system so far, and this report is offered as a means of constructive criticism by which to further this process.

2 THE ORIGINAL AND AMENDED INDICTMENT

2.1 The Indictment

A The Charges

The written indictment, issued on 24 June 2002, charged Paulino de Jesus with the murder of Lucinda Saldanha (under s 8 of *UNTAET Regulation 2000/15* and article 340 of the *Indonesian Penal Code*) and the attempted murder of Juvita Saldanha (under s 8 of *UNTAET Regulation 2000/15* and articles 53[2] and 340 of the *Indonesian Penal Code*). These charges were for domestic crimes, not Crimes Against Humanity.

[1] See JSMP News, 'Special Panel Trial Ends With An East Timorese TNI Soldier Being Acquitted Of Crimes Against Humanity' 8 December 2003, <http://www.jsmp.minihub.org/News/dec03/08dec_SCU_paulinodejesus_eng.htm>. Since then two other accused parties have been acquitted of all charged by the SPSC: *SCU statistics*, current at 8/12/2004.

[2] Article 53 (Attempt) states '(1) Attempt to commit a crime is punishable if the intention of the offender has revealed itself by a commencement of the performance and the performance is not completed only because of circumstances independent of his will. …'

B The Statement of Facts

The charges alleged that: Paulino de Jesus, an Indonesian, was a soldier in the Indonesian military forces (TNI) carrying out operations in Timor Leste in 1999; on 10 September 1999, at about 6pm, a convoy of members of the militia and TNI arrived in the village of Lourba in the Bobonaro District; Paulino de Jesus, together with TNI soldiers Pedro Mau and Sabino (last name unknown), attacked the family of Juvita Saldanha and Dinis Cardosa; they allegedly abducted Juvita and Dinis' 12 year old daughter Lucinda, and that Paulino killed Lucinda by stabbing her in the back while Pedro Mau and Sabino held her arms; Pedro Mau shot Juvita in the leg. Juvita survived and ran away.

C The Applicable Law

According to s 8 of *UNTAET Regulation 2000/15*, for a charge of murder 'the provisions of the applicable Penal Code in Timor Leste shall, as appropriate, apply.'[3] The applicable Penal Code in Timor Leste is the *Indonesian Penal Code*.[4] Article 340, defines murder as the act of a person who 'with deliberate intent and with premeditation takes the life of another person'. This law was applied in relation to the death of Lucinda Cardosa. Since the indictment alleged that it was Pedro Mau who shot Juvita Saldanha, the charge against Paulino de Jesus for the attempted murder of Juvita Saldanha must be based on him aiding, abetting or otherwise assisting the commission of attempted murder, or by contributing to the attempted murder by a group acting with a common purpose.[5]

2.2 Interlocutory Decision of Special Panel for Serious Crimes

The hearing of prosecution and defence witnesses in the trial before Judges Dora Martins de Morais, Antonio Helder Viana do Carmo and Francesco Florit of the SPSC began on 5 August 2003 and concluded on 8 September 2003. The charges against the accused at this time were those contained in the written indictment of murder and attempted murder. On 13 August 2003, the Prosecutor put forward a motion to amend the original indictment to murder and attempted murder as Crimes Against Humanity in breach of s 5(a) of *UNTAET Regulation 2000/15*.

A Definition of s 5(a) Crime Against Humanity Murder

For murder to constitute a Crime against Humanity under s 5 it must have been 'committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack.'[6] The elements of 'murder' under s 5(a) were defined by the SPSC in the

[3] *UNTAET Regulation 2000/15* s8.
[4] See *UNTAET Regulation 1999/1* s3.1, and *Law* 10/2003. The Timor Leste Draft Penal Code is currently being considered by the Council of Ministers. For a commentary on this see JSMP Report 'Analysis of the Draft Penal Code' at www.jsmp.minihub.org
[5] A person can be criminally responsible, amongst others ways, if he/she (a) commits the crime (individually, jointly, or through another), (c) aids, abets or assists the commission of a crime, or (d) in any other way contributes to the commission of such a crime by a group of persons acting with a common purpose. See *UNTAET Regulation 2000/15* s14.3.
[6] *UNTAET Regulation 2000/15* s5.

case of *Joni Marques*,[7] which considered the *Preparatory Committee for the Rome Statute of the International Court Elements of Crimes* and case law from the ICTY and ICTR[8] in deciding this definition. It stated that the offence of murder as a Crime against Humanity is comprised of four elements which require that:

> i) The victim is dead.
> ii) The death of the victim is the result of the perpetrator's act.
> iii) The act must be a substantial cause of the death of the victim.
> iv) At the time of the killing, the accused must have meant to cause the death of the victim or was aware that it would occur in the ordinary course of events.[9]

The SPSC emphasized that 'in a murder, as a Crime against Humanity, there is no requirement of premeditation as the mental element for murder as there is for a crime pursuant to s 340 of Penal Code of Indonesia (KUHP). The required *mens rea* is either deliberate intent to cause the death of the victim or that such result would occur in the ordinary course of events.'[10]

B Decision of SPSC to Allow the Indictment to be Amended

The SPSC did not announce its decision regarding the amendments until the final day of the trial on 8 September 2003, following testimony from all but one of the witnesses. The Panel decided that amending the indictment to charges of Crimes against Humanity murder and Crimes against Humanity attempted murder did not prejudice any right of the defendant or his defence. Since the accused defended himself by denying having been in Lourba when the crime was committed the Panel reasoned that 'changing the name of the crime or asserting that the conduct ascribed to the defendant may also be qualified as a Crime against Humanity will bring no prejudice whatsoever to the line of defence developed thus far.'[11]

The SPSC's decision to allow the indictment to be amended to Crimes against Humanity charges resulted in more appropriate charges being tried. However, it raises procedural considerations about the exercise of the discretion of the court when amending indictments, an issue that was not necessarily dealt with well by the Court as the judgment failed to accurately record the process.

i) Appropriateness of the Charge

In several previous cases before the SPSC that seemed to be prima facie cases of Crimes against Humanity murder, the Prosecution charged the accused with s 8 domestic murder instead, in order, it has been said, to obtain 'a quick justice'.[12] Commentators have noted that a problem with charging such offences as domestic murder is that the judgments therefore do not assess the wider context of what occurred in Timor Leste in 1999.[13] The facts alleged in the original indictment in

---

[7] *General Prosecutor v Joni Marques* and nine others, Special Panel for Serious Crimes (9/2000) 11 December 2001, 209-10. See also *General Prosecutor v Damiao Da Costa* No.1/2003) 10 December 2003, 14-15.

[8] That is, the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda respectively.

[9] *General Prosecutor v Joni Marques*, above n 8, 210.

[10] Ibid.

[11] Legal proceeding 06/2002, 8 September 2003.

[12] *General Prosecutor v Joao Fernandes*, Case No 001/00.C.G.2000 (25 January 2000) 3. For a discussion of this, see Suzannah Linton, 'Prosecuting Atrocities at the District Court of Dili' (2001) *Melbourne Journal of International Law* 414.

[13] Linton, ibid.

Paulino de Jesus (that in September 1999 members of the TNI and militia arrived to the village of Lourba and began attacking civilians) certainly suggest that the murder and attempted murder alleged against the accused were 'committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack' Therefore, it is desirable and logical that the charges against the accused be for Crimes Against Humanity.

ii) 'The Evidence at Trial Establishes Qualification of the Crime'

The procedure for amendment of an indictment is covered by s32 of *UNTAET Regulation 2001/25*. According to s 32.2, (which deals with amendments after the trial has begun and prior to the final decision in the case) 'the Court may, at the request of the prosecutor, allow amendment of the indictment if the Court determines that the evidence at trial establishes qualification of the crime or crimes which is different than that which appears in the indictment. The accused and his or her legal representative have the right to be immediately informed by the Court of the new qualification of the criminal offence for which he or she may be convicted.'

Amendments under s 32.2 are intended when 'the evidence at trial establishes qualification of the crime or crimes which is different than that which appears in the indictment'. This provision is intended to address situations such as that which arose in the ICTR case of *Akayesu*.[14] In that case the original charges were of 13 counts of genocide and Crimes against Humanity (murder), but substantial evidence of sexual violence emerged during the hearing.[15] The indictment was then amended to include three new counts of rape and sexual violence, under the equivalent provision for amending an indictment in the ICTR Rules.[16] The amendment in *Paulino de Jesus* seems to differ from the situation in *Akayesu* because here the very facts alleged in the original indictment raise questions as to whether the offences committed were Crimes against Humanity.

In deciding whether to exercise its discretion to amend an indictment at the request of the prosecution once the trial has begun, JSMP recommends that the court should consider the ease with which the prosecution could have gathered sufficient evidence of the proposed amendment at the time the original indictment was issued or prior to the commencement of trial. In the case of *Paulino de Jesus*, the fact that the prosecutor who sought to amend the indictment was not handling the case when the original indictment was filed explains why it was not possible for her to have included the proposed amendment in the original indictment. However, in future cases the court should consider whether there has been delay between when evidence of the qualified crime arose and when the Prosecutor applied to amend the indictment, as a relevant factor in deciding whether to allow the amendment.

iii) Transparency of the Amendment

A major difficulty concerning the amendment to the indictment is that it is not evident from the written final decision or the written indictment that the indictment was amended at all. The written decision states, somewhat ambiguously, 'the request of the prosecution to amend the

[14] *Prosecutor v Akayesu*, Case No ICTR-96-4-T (2 September 1998); 37 ILM 1401.
[15] See eg Coalition for Women's Human Rights in Conflict Situations, Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal, amicus curiae brief regarding rape in Rwanda, Prosecutor v Akayesu, May 1997, <http://www.hri.ca/doccentre/violence/amicus-brief.shtml>.
[16] ICTR Rules Procedure and Evidence Art 50.

indictment so as to include the charge against the defendant of a Crime against Humanity was *dismissed*'.[17] This is obviously a mistake, and ought to read 'allowed'.[18]

The written decision does not mention that the case commenced trying the accused for s 8 domestic murder and attempted murder. The fact that the Prosecution was not required to file an amended written indictment adds to confusion.[19] This lack of clarity in the written decision and written indictment with respect to the amended charges may have contributed to the Court of Appeal's uncertainty about which offences the accused had been charged with and the distinction between s 5 and s 8 of *UNTAET Regulation* 2000/15. It would be beneficial for the SPSC to explain clearly any key interlocutory motions in the written decision and take care to avoid misleading typographical errors, to ensure that such procedures are apparent to the appellate court and general public.

3. FINAL DECISION OF SPECIAL PANEL FOR SERIOUS CRIMES

On 8 December 2003, the SPSC acquitted Paulino de Jesus of the charges of Crimes against Humanity murder and attempted murder. The 13 page written decision was handed down on 26 January 2004. JSMP applauds the Court's careful reasoning regarding the guilt of the defendant. The Court made an explicit distinction between the certainty that Crimes against Humanity were committed in Timor Leste and the certainty that those crimes were committed by the defendant. The Court divided their analysis into two issues: firstly, whether the defence had established that Paulino De Jesus had traveled to Atambua on the morning of 10 September 1999, rendering the prosecutions' allegations insupportable, and secondly, if the first thesis failed, whether Paulino de Jesus could indeed be correctly identified as the person who stabbed Lucinda Saldanha and the person who was complicit with Pedro Mau when the latter shot Juvita Saldanha. By clearly separating these issues, the court was able to methodically approach the question of guilt and provide a well reasoned judgment.

3.1 The Prosecution Case

The Prosecution called six witnesses: Juvita Saldanha and Dinis Cardosa, eyewitnesses to the attack; militia members Marques Henriques, Lourenco Marques Martins and Abrao de Jesus; and Felinciano Verdial, who assisted Juvita after the attack but did not know any details about the attack or the accused.

Juvita Saldanha and Dinis Cardosa gave evidence that their family fled when they saw soldiers and militia members arriving at about 6pm. They stated that Pedro Mau and Sabino caught Lucinda and held her by the arms. Paulino then arrived and killed Lucinda by stabbing her in the back with a knife. Pedro Mau then shot Juvita, hitting her on the leg. No other witnesses to the attack were called.

The evidence of militia members Marques Henriques, Lourenco Marques Martins and Abrao de Jesus related to whether Paulino de Jesus was present in Lourba. None of the militia witnesses called were themselves present in Lourba on the day of the attacks, but Marques and Lourenco gave evidence that they had seen Paulino leaving Bobonaro to go to Lourba. Abrao also gave evidence that Paulino was in Bobonaro on that day, though he was unable to say whether Paulino had gone to Lourba.

[17] *Paulino de Jesus* Trial (No.06/2002) 26 January 2004, 94 (emphasis added).
[18] Written Appeal Statement of the Prosecutor, *Paulino de Jesus* (6/2002) 26/3/2004, 25-26.
[19] Public Hearing Record, (6/2002) *Paulino de Jesus*, 8 September 2003, 24.

3.2 The Defence Case

The Defence called four witnesses who gave evidence that Paulino de Jesus went to Atambua early in the morning of 10 September and did not return to Bobonaro until the following day. All four witnesses were relatives of the accused: Maria Soares, his daughter, Joao da Concepçao Govealete, his brother-in-law, Giriamina Monis Nunes, his mother-in-law, and Luiza de Jesus, his daughter.

The defence also called Filismina da Conceiçao, who worked with Fokupers, a private organization supporting female victims of violence, which provided counseling to Juvita Saldanha. Documents by Fokupers recording discussions with Juvita contained the names of Pedro Mau and Sabino but did not mention Paulino de Jesus

3.3 SPSC Factual Findings

i) SPSC Findings of Whether Accused was in Lourba

The SPSC accepted that the accused had traveled to Atambua on the morning of 10 September 1999 with his family.[20] The SPSC noted that the 'assumption' that Paulino had been in Lourba in the afternoon of 10 September would be supported by the testimony of militia members Marques Henriques and Lourenco Marques Martins. In their discussion of whether Paulino was in Lourba, the SPSC did not mention the evidence of Juvita Saldanha and Dinis Cardosa, who both testified that they witnessed Paulino on the evening of 10 September in Lourba. It is unclear why the SPSC only assessed Juvita and Dinis' testimonies in relation to the narrower question of whether Paulino stabbed Lucinda, and not whether Paulino was present in Lourba. In any case, the Court did not accept that this provided a complete alibi. They suggested that the proximity of Atambua and Bobonaro meant it would not have been impossible for Paulino to have left Atambua for Bobonaro in the early afternoon and have returned to Atambua later.[21] Accordingly the Court felt it necessary to address the issue of whether Paulino De Jesus was responsible for the alleged criminal acts in Lourba.

ii) SPSC Findings of Whether Accused Committed the Alleged Acts

If Paulino De Jesus was present at the scene of the crimes, it would not necessarily be difficult to establish Paulino de Jesus's guilt. This is because the interrelation between the issues of the accused's presence in Lourba and commission of the crimes is particularly strong when one considers the numerous means by which an individual may be criminally responsible under s 14.3 of *UNTAET Regulation* 2000/15. A person will be criminally responsible and liable for punishment for:

(a) committing a crime,[22]
(b) ordering soliciting or inducing a crime;[23]
(c) aiding, abetting or otherwise assisting in a crime; [24]

---

[20] Ibid 100.
[21] Ibid.
[22] 'commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible': *UNTAET Regulation* 2000/15 s14.3(a).
[23] 'orders, solicits or induces the commission of such a crime which in fact occurs or is attempted': *UNTAET Regulation* 2000/15 s14.3(b).
[24] 'for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including

(d) in any other way contributing to the commission of a crime by a group of persons acting with a common purpose.[25]

Whether the accused actually stabbed Lucinda is not decisive, since he could be liable for aiding, abetting, assisting or in any other way contributing to her murder. Moreover, since the attempted murder charge alleged that Paulino was complicit with Pedro Mau, who shot Juvita Saldanha, the critical fact for this charge for the Prosecution to prove was whether the accused was present and participated in the attack.

The Court decided, however, that it was unable to make a conclusive finding that Paulino De Jesus had been present at and participated in the alleged criminal acts. This was because the prosecution allegations were undermined by several factors: contradictions in the evidence of the witnesses, doubts raised as to the visibility of the accused by the witnesses, and evidence sequestered from the women's rights organization, Fokupers, which put in question Juvita's evidence regarding the presence and participation of the accused.

Contradictions within the Witnesses' Prior Statements

Although the Prosecution brought forward a number of witnesses in an attempt to establish the correctly identified presence of Paulino at the scene of the attack, contradictions in the evidence given by Juvita Saldanha and Dinis Cardosa during investigations were held to substantially decrease the weight of that evidence. The Court stated that neither of the original statements of Dinia and Juvita mentioned the accused as being the author of the death of their daughter, Lucinda', where Pedro Mau was named as solely responsible.[26] It was only in Dina's second and third statements and Juvita's second statement, that they mentioned the accused.[27] Because of contradictions within the judgment it is difficult to state with certainty the dates upon which these statements were taken, but instead are referred to in the order that they were taken.
Nevertheless, the SPSC, in their decision did seem to overlook the fact that in Dinis' s first statement he *did* name Paulino as a co-perpetrator of the attack with Pedro Mau and Sabino. Dinis' earliest statement says that Paulino, Pedro Mau and Sabino grabbed Lucinda and dragged her away. Dinis is recorded as having said that he saw Sabino rape Lucinda, and that Pedro Mau stabbed Lucinda — comments which Dinis later, in his interview on second statement, denied having said. Similarly, in Juvita's first statement she explicitly refers to Pedro Mau, Sabino and Paulino being in Lourba. She is recorded as having described how Sabino grabbed Lucinda by the hair and Pedro Mau and Paulino grabbed her hands. She is then recorded as having said that Pedro Mau shot at her when she tried to save Lucinda, and that she herself then ran to the road at the front of the house. Juvita is recorded as having said that she had not seen who stabbed Lucinda, but that her other daughter Serafina told her she had witnessed Pedro Mau stab Lucinda. How the SPSC reconciled these facts with those it alleges are the basis for its decision is a problematic omission which JSMP considers detracts from the conclusive nature of the Court's argument.

---

providing the means for its commission': *UNTAET Regulation* 2000/15 s14.3(c).
[25] 'in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or
(ii) be made in the knowledge of the intention of the group to commit the crime': *UNTAET Regulation* 2000/15 s14.3(d).
[26] Ibid.
[27] Ibid.

Visibility of the Alleged Attack by the Acccused

The Panel also doubted Dinis and Juvita's visibility of the attack of Lucinda and held that Dinis had given contradictory accounts (ranging from 4-30 metres) about how far he was from the site where Lucinda was killed.[28] The Panel mentioned contradictory accounts during the investigatory stage of the size of the knife used to stab Lucinda.[29] Juvita was also held to have given contradictory statements as to whether she was shot and ran away before or after Lucinda was stabbed.[30] In light of these contradictions, the Panel concluded that Juvita and Dinis did not see exactly how the facts took place.[31]

Fokupers' Counseling Records Regarding the Alleged Attack

The Fokupers' document records that Juvita Saldanha named Pedro Mau and Sabino in her discussion with Fokupers staff about the attack, but did not mention Paulino de Jesus.[32]

There was a preliminary issue as to whether the Fokupers counseling records could be admitted as evidence. The Prosecution submitted that the Fokupers document should not have been admitted as evidence.[33] This argument was based on two submissions. First, the Prosecution submitted that the document was a record of Juvita's counselling session with Fokupers and therefore inadmissible. According to s 35.5(c) and s 35.7 of *UNTAET Regulation* 2001/25, counsellors can only testify with the consent of the victim in relation to information obtained from the victim in the delivery of services to the victim. Second, the Prosecution submitted that the defence had obtained the document by misrepresenting to Fokupers that the document was to be used by the Serious Crimes Unit for information concerning victims rather than by the defence in litigation. Under s 34.2 of *UNTAET Regulation* 2001/25 no evidence shall be admitted if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. The Prosecution submitted that the manner in which the defence obtained the document from Fokupers was in breach of s 34.2. These submissions were, however, rejected and the document was admitted as documentary evidence. The SPSC majority did not give reasons for admitting this evidence in the final written decision.

In their substantive analysis of the Fokuper's evidence, the Court was concerned that Juvita failed to mention Paulino de Jesus's name during her counseling with Fokupers, to the extent that they doubted that Paulino De Jesus was at the scene of the crime. In her testimony to the court, when Juvita Saldanha was asked by the Prosecution whether she told Fokupers that Paulino de Jesus stabbed Lucinda Saldanha she replied 'I had to mention Paulino's name because he was there, how could I not mention it.'[34] However, the SPSC decided that it was unlikely that Fokupers staff would fail to write down the name of Paulino de Jesus and only record the names of Pedro Mau and Sabino if Juvita Saldanha had actually mentioned all three names.[35] They also did not accept that traumatic distress had caused Juvita Saldanha to name Pedro Mau and Sabino and unintentionally omit Paulino de Jesus.[36]

[28] Ibid.
[29] Ibid.
[30] Ibid 103.
[31] Ibid.
[32] Ibid 104.
[33] Trial Transcript 6 October 2003.
[34] Transcript of Proceedings 21 October 2003.
[35] Ibid 104.
[36] Ibid 104.

For the aforementioned reasons, the SPSC concluded that 'the set of evidence contained in the records does not prove with transparency and certainty the authorship of the facts imputed to the defendant.'[37] JSMP regards the decision making process conducted by the SPSC as thorough and decisive.

4. DECISION OF THE COURT OF APPEAL

The decision of the SPSC was, however, overturned by the Court of Appeal, comprised of Judges Claudio de Jesus Ximenes, Jose Maria Calvario Antunes and Jacinta Correia da Costa, who instead convicted the accused of Crimes of Humanity murder and attempted murder. The Court sentenced him to twelve years imprisonment. The decision of the Court of Appeal addressed three issues: first, a reassessment of the facts, second, a discussion of the applicable law, and third, a determination of sentence.

Before considering the decision of the Court of Appeal, it is important to consider its role. The significance of the Court of Appeal in the Timor Leste judicial system is that it provides an avenue of review from decisions made at first instance. A second level of judicial review allows significant errors of law and fact to be corrected, avoids the establishment of erroneous precedents, and plays a key role in the maintenance of the integrity and natural independence of the judicial system. An appeal, however, does not provide an opportunity to hear the case again, or *de novo*. This is because the trial court has had the best opportunity to examine the evidence and the witnesses and draw conclusions from this. Rather, an appeal hearing must be limited to specific allegations of factual or legal error. These issues can then be re-examined and clarified for future reference. It is very important for appeal court decisions to be clearly and correctly reasoned and focused specifically on the issues which are the subject of appeal in order that these decisions serve their purpose. It is JSMP's strongly held opinion that the Court of Appeal's decision in this case did not serve this purpose. The decision not only fails to appreciate (and therefore demonstrate) the distinction between a hearing at first instance and appeal, but fails to apply the correct law to the allegations at hand, and thus only serves to confuse the legal issues, both in this case and in the developing Timor Leste jurisprudence. It is disappointing that the Court of Appeal in this case performed so dismally in its role as the only current functioning court of review in Timor Leste. Decisions such as this severely compromise the quality of the justice that is being delivered in Timor Leste.

It is important to note at this point that the judgment of the Court of Appeal was written in Portuguese only, with no official translation into the other working languages of the courts in Timor Leste (Tetum, Bahasa Indonesia and English.)[38] This commentary of the Court of Appeal decision is therefore based on an unofficial English translation of the Portuguese. The fact that the defence counsel had to arrange his own unofficial translation of the judgment highlights the practical problems arising from the Court of Appeal's inability or unwillingness to translate judgments into working languages understood by all parties and their legal representatives.

4.1 Grounds for Appeal

[37] Ibid 104. para 44.

[38] For a discussion of why the Superior Council of the Judiciary *Directive on the Use of Official Language in the Judicial System* (purporting to restrict the working languages of the Court of Timor Leste to Portuguese and Tetum) has no power to amend Article 25 of *UNTAET Regulation 2001/*25, see JSMP Report 'The Impact of the Language Directive on the Courts in Timor Leste' August 2004, 25-26.

UNTAET Regulation 2001/25 allows for an appeal from the SPSC on specific matters. The relevant grounds of this appeal under s 40.1[39] were:

> (a) a violation of the rules of the criminal procedure; and
> (d) material error of law or fact.

The written appeal statement of the Prosecutor stated four reasons for the appeal. These were that the SPSC:

> a) violated the rules of Criminal Procedure and materially erred in law and in fact in its analysis and conclusions in relation to the testimony of Prosecution witnesses Dinis Cardosa and Juvita Saldanha;[40]
> b) materially erred in law in relying on the accused's statement that was not admitted as evidence during the trial;[41]
> c) materially erred in law and in fact in admitting and relying on the report from Fokupers;[42] and
> d) materially erred in law and in fact in admitting the testimony of the defence witnesses Marques Henriques, Lourenco Marques Martins and Abrao de Jesus; and Felinciano Verdial;[43]

In the written decision, however, the Court of Appeal did not state which s 40.1 grounds the appeal was based on, and failed to address all issues submitted by the Prosecutor as grounds for appeal (for example, whether the SPSC had violated the rules of criminal procedure, had materially erred in law in relying on the accused's statement that was not admitted as evidence, and materially erred in law and in fact in admitting the report from Fokupers). JSMP has previously recommended that the Court of Appeal should identify in its written decisions which of the s 40.1 grounds the appeal has been brought under.[44] Stating in the written decision the grounds for appeal can help clarify which types of issues can be appealed and what issues are relevant in the case.

4.2 Errors of Fact found by the Court of Appeal

The Court of Appeal took it first upon itself to reassess the factual evidence provided to the trial Court. It commenced by referring to Dinis Cardosa and Juvita Saldanha's declaration that it was the accused who shot at Juvita Saldanha and stabbed Lucinda Saldanha, and stating that '(t)he Prosecution alleges that the SPSC erred in not convicting the accused as, in its understanding, there is more than enough evidence to convict the defendant'.[45] This misstates the Prosecutor's submission in the written appeal statement. The Prosecutor actually submitted that '(t)he analysis of evidence by and the conclusions of the Special Panel is such that it could not be accepted by any reasonable tribunal of fact and the evaluation of the evidence by the Special Panels is "wholly

[39] *UNTAET Regulation 2001/25*
[40] Written Appeal Statement of the Prosecutor, *Paulino de Jesus* (6/2002) 26/3/2004, 4- 14
[41] p 14-15
[42] p15-21
[43] p21-25
[44] JSMP Report, *Overview of the Jurisprudence of the Court of Appeal in its First Year of Operation Since Timor Leste's Independence*, Dili, Timor Leste August 2004, pg. 7.
[45] Appeal, Judgement p1. The detail that Paulino shot Juvita is presumably an unintentional mistake and should instead say that Paulino was complit with Pedro Mau when the latter shot Juvita, since neither Juvita, Dinis nor the facts alleged in the indictment claimed that Paulino himself had shot Juvita.

erroneous"'.[46] The Prosecutor's submission is based on jurisprudence of the Appeal Chambers of both the ICTY and the ICTR, which have repeatedly held that '(o)nly where the evidence relied on by the Trial Chamber could not been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.'[47]

Decisions of the ICTY and ICTR, which have drawn on a wide body of domestic law jurisprudence from civil and common law systems, provide useful guidance to the Court of Appeal in developing an appropriate standard to determine whether the SPSC has made a material error of fact.[48] According to ICTY authority, the standard of unreasonableness applies to both appeals of fact by the accused against a conviction and by the Prosecutor against an acquittal.[49] The Appeal Chambers have held that it is possible that different judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[50] The appellate body should not 'lightly disturb findings of fact by a Trial Chamber'[51] which has had the advantage of observing witnesses in person enabling it to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer.[52]

The Court's first substantive criticism of the SPSC findings related to whether Paulino was in Lourba on 10 September 1999. The Court of Appeal stated that they did not agree nor understand how the SPSC could admit that the accused might have been at the crime scene but not consider him to be the perpetrator.[53] This seems to misstate what the SPSC actually held. As noted above,[54] the SPSC held that the defence had proven that Paulino traveled to Atambua in the morning of 10 September, and then suggested that it was *not impossible* for him to have gone to Lourba in the early afternoon. However, the SPSC did not make a positive finding that Paulino was in Lourba. In fact, the SPSC concluded on this issue that '[i]t is not known for sure whether Paulino was present at that location, at the time the events occurred'[55] and 'nor was this Panel convinced that the defendant was with Pedro Mau whether the latter fired a shot at Juvita.'[56]

In the oral decision, the Court of Appeal also challenged the SPSC's finding that the accused had gone to Atambua on 10 September. They stated that they doubted the credibility of testimony

[46] Appeal Statement, p4.
[47] See eg, *Prosecutor v Zoran Kupreskic et al,* Appeal Judgement [2001] ICTY 11 (23 October 2001) para 28-47; *Prosecutor v Tadic*, Appeal Judgement Case No: IT-94- 1-A, 15 July 1999, para. 64; *Celebici Appeal Judgement* Prosecutor v Delalic et al., Case No.: IT-96-21-A, Judgement, 20 February 2001.
[48] The Appeals Chamber of the ICTY and the ICTR can hear appeals of Trial Chamber decisions where (among other grounds) there has been '(b) An error of fact which has occasioned a miscarriage of justice': *ICTR Statute* Article 24(1)(b), *ICTY Statute* Article 25(1)(b). Despite some differences in the wording of the ICTY and ICTR provisions and UNTAET provisions, ICTY and ICTR discussion provide helpful guidance to the East Timorese Court of Appeal.
[49] See above n 54.
[50] *Prosecutor v Tadic,* Appeal Judgement Case No: IT-94- 1-A, 15 July 1999.
[51] *Alfred Musema v The Prosecutor*, case no. ICTR-96-13-A, 16 November 2001 (ICTR Appeals Chamber), para. 18; *The Prosecutor v. Zlatko Aleksovski*, case no. IT-95-14/1-A, 24 March 2000 (Appeals Chamber) para. 63.
[52] *Prosecutor v Zoran Kupreskic et al,* Appeal Judgement [2001] ICTY 11 (23 October 2001), para 32; see *The Prosecutor v. Dragoljub Kunarac et al*., case no. IT-96-23 & IT-96-23/1-A, 12 June 2002 (Appeals Chamber) para 40.
[53] *Paulino de Jesus* Appeal (No.29/2004) 4 November 2004, 2.
[54] See above '2.3 SPSC Findings on Whether Accused was in Lourba'.
[55] Trial, 99
[56] Trial 98.

given by Paulino de Jesus' relatives because they were excessively precise in certain details.[57] This is not mentioned in their written decision. Without the benefit that the SPSC had of hearing these witnesses give testimony, it is dangerous for the Court of Appeal to cast doubt on the credibility of witnesses based on the degree of precision in their testimony.

The Court of Appeal then re-characterised the testimonies of Juvita and Dinis. The Court stated that they gave clear statements and in a way which convinced the Court that Paulino de Jesus was in Lourba, stabbed Lucinda and saw Pedro Mau shoot Juvita.[58] This opinion was based on the written record of the trial, the Court of Appeal did not re-hear either Juvita or Dinis in person before the Court. The Court of Appeal did not refer to the grounds of argument advanced by the Prosecutor in support of their submission that the SPSC decision was 'wholly erroneous'.

The Court of Appeal also thought it was strange that the SPSC had found that the Fokupers report raised doubt as to Paulino de Jesus' guilt. The Court of Appeal concluded that the absence of Paulino de Jesus' name in the report could be explained because the Fokupers staff member could not confirm whether or not she had asked Juvita about Paulino de Jesus and had written the report after her meeting with Juvita Saldanha. It is important to note here that Judge Carmo issued a separate opinion on the matter of the Fokupers evidence stating that it should not have been admitted.[59]

It appears that the Court of Appeal in *Paulino de Jesus* overturned the factual finding of the SPSC simply because the appellate court would have reached a different conclusion if it were hearing the evidence *de novo*. The Court overturned the conclusion of the SPSC by substituting its own opinion on the credibility of witnesses and its own reasoning on certain facts. JSMP believes that the Court of Appeal's reassessment of the facts decided by the SPSC in *Paulino de Jesus* adopts a significantly lower standard than that imposed by asking whether or not a reasonable trier of fact could have made the challenged finding. An over willingness to overturn the trial court's factual conclusions can undermine the work of the trial court, which has the advantage of hearing the witness testimony delivered in court. JSMP recommends that the Court of Appeal should not overturn factual findings of lower courts unless these findings are 'unreasonable' according to standards laid down by international jurisprudence. Additionally, particular care must be taken by the Court of Appeal when substituting a guilty verdict in a criminal matter where the SPSC has acquitted the accused on the facts.

In JSMP's opinion a material error of fact was not established on the reasons given by the Court of Appeal. However, the written appeal statement of the Prosecutor submits several grounds upon which the Court of Appeal would have been justified in finding that the SPSC had committed a material error of fact. In particular, the Court of Appeal would have been entitled to overturn the SPSC's decision if they had held that the SPSC's finding that Dinis and Juvita 'did not mention the accused as being the author of the death of their daughter' at their first interview was a material error of fact, because both Juvita and Dinis did give evidence in their first interviews that Paulino de Jesus was present with Pedro Mau and Sabino and participated in the attack of Lucinda.

[57] Based on JSMP observations of the Court of Appeal oral decision. See also JSMP Justice Update, 'Court Of Appeal Overturns Decision Of Acquittal Of The Special Panel for Serious Crimes' 4 - 9 November, Issue 11/2004.
[58] Judgment, Appeal, 2.
[59] http://www.jsmp.minihub.org/courtmonitoring/spsccaseinformation2002.htm

4.3 Court of Appeal Discussion of the Applicable Law

The Court of Appeal commenced their legal analysis by discussing the meaning of 'the laws applied in Timor Leste prior to 25 October 1999' in *UNTAET Regulation 1999/1* s 3.1.[60] The Court noted that, although they had previously held that this should be Portuguese law,[61] *Parliamentary Law* 10/2003 has settled that this means the Indonesian law that was de facto applicable in Timor Leste prior to 25 May 1999. The Court of Appeal's recognition that s3.1 of *UNTAET Regulation 1999/1* refers to Indonesian law is a welcome development.[62]

It is also significant that the Court departed from its previous finding that the Crimes against Humanity murder provisions in *UNTAET Regulation* 2001/15 were unconstitutional because they breached the principle of non-retrospectivity (*nullum crimen sine lege*).[63] It is assumed from the Court of Appeal's application of s 5 *UNTAET Regulation* 2001/25 in *Paulino de Jesus* that the Court of Appeal is affirming the legality of s 5. This is an encouraging advancement by the Court of Appeal, since it implicitly recognizes that the codification of offences that were contrary to customary international law in 1999 in *UNTAET Regulation 2000/15* does not breach the principle of non-retrospectivity. This is an acknowledgment of the significance of customary international law and is consistent with the *nullum crimen sine lege* provision in *UNTAET Regulation 2000/15* s 12.1, that '(a) person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under *international law* or the laws of East Timor.'[64]

However, it is respectfully submitted that the Court of Appeal's discussion of the elements of Crimes against Humanity murder indicates some confusion in their judgment about the distinction between Crimes against Humanity murder (s 5.1(a)) and murder (s 8). The Court of Appeal's confusion as to the offences with which Paulino de Jesus was charged could have arisen from the manner in which the original indictment was amended. As noted above, the accused was originally charged with murder and attempted murder as domestic offences under s 8 of *UNTAET Regulation* 2000/15, and this charge was then amended at trial to charges of murder and attempted murder as Crimes Against Humanity in breach of s 5 of *UNTAET Regulation* 2000/15. The Court of Appeal decision commences by stating that Paulino de Jesus was accused of Crimes against Humanity (one count for murder and one count for attempted murder), punishable under s 5 *and* 8 of *UNTAET Regulation* 2000/15. [65] Crimes against Humanity are an offence under s 5 alone. Section 8 deals with the different offence of domestic murder. These are two separate offences. This is reflected in *UNTAET Regulation* 2000/15. For example, the SPSC have universal jurisdiction under s 5 and more limited jurisdiction under s 8,[66] and when imposing a prison sentence under s 5 the Panel should have recourse to the practice of Timor Leste's courts and international tribunals but for s 8 offences apply the provisions of the *Indonesian Penal Code*.[67] These differences stem from the different sources of the two offences, Crimes against Humanity murder being an offence under international law, and domestic murder being an offence under the national laws of Timor Leste.

---

[60] *Paulino de Jesus* Appeal (No.29/2004) 4 November 2004, 5.
[61] See for example, *Public Prosecutor v Armando dos Santos*, Court of Appeal (16/2001) 15 July 2003.
[62] See JSMP Report 'Report on the Court of Appeal Decision in the Case of Armando dos Santos' (2003).
[63] *Armando dos Santos*, above n #.
[64] Emphasis added.
[65] *Paulino de Jesus* Appeal (No.29/2004) 4 November 2004, 1.
[66] *UNTAET Regulation* 2000/15 s2.
[67] *UNTAET Regulation* 2000/15 s10.1(a).

The Court of Appeal continues to merge these two offences in their discussion of the elements of Crime against Humanity murder.[68] The Court turns to s 8 of *UNTAET Regulation* 2000/15[69] to define Crimes against Humanity murder, rather than considering the international jurisprudence discussed in *Joni Marques*.[70] Contrary to the conclusion of the SPSC in *Joni Marques*, that murder as a Crime against Humanity does not require premeditation,[71] the Court of Appeal applied the *Indonesian Penal Code* definition of 'murder' which does require premeditation. Curiously, the Court of Appeal then discussed the meaning of 'premeditation' under Portuguese domestic law. While of course the court is entitled to refer to other jurisdictions by way of analogy, it is important for the Court to clearly indicate that Portuguese law is not an authoritative source for Timor Leste in light of past decisions indicating the opposite.

4.4 Discussion of Sentencing

This confusion between the offence under s 5(a) and s 8 continues in the Court's discussion of sentencing.

In determining the terms of imprisonment for the crimes of Genocide, Crimes against Humanity, War Crimes or Torture,[72] the panel shall have recourse to the general practice regarding prison sentences in the courts of Timor Leste and under international tribunals.[73] This is in contrast to the crimes of s 8 murder and s 9 sexual offences, where the penalties prescribed in the respective provisions of the applicable Penal Code in Timor Leste shall apply,[74] the relevant Penal Code in Timor Leste here meaning the *Indonesian Penal Code.*[75]

Therefore, in considering an appropriate prison sentence in *Paulino de Jesus*, where the accused was convicted on Crimes against Humanity murder and Crimes Against Humanity attempted murder, the Court of Appeal should have had recourse to the general practice of courts in Timor Leste and international tribunals. This would be consistent with the practice in previous SPSC cases for determining the terms of imprisonment for Crimes against Humanity.[76] However, the Court of Appeal in *Paulino de Jesus* refer only to the *Indonesian Penal Code*. They state that '(t)he crime of murder is punished with a sentence of imprisonment up to twenty years (Art.30)' and 'the crime of attempted murder is punishable with imprisonment up to 13 years and 4 months' (Art. 340 and Art. 53). As international criminal offences, Crimes against Humanity are part of a body of international criminal jurisprudence, to which the court in Timor Leste should be turning to for guidance in sentencing rather than applying the *Indonesian Penal Code* sentencing provisions which apply only for domestic crimes. Although the length of imprisonment itself is not objected to, the process by which the Court of Appeal decided this sentence indicates a misunderstanding of *UNTAET Regulation* s 10.1(a), a failure to appreciate the differences between the offences of domestic murder and Crimes against Humanity murder,

[68] Appeal Judgment p7
[69] See above '*1.1.1 Definition of s8 Murder*'.
[70] (discussed above in '*1.2.1 Crime Against Humanity Murder*')
[71] Ibid.
[72] See *UNTAET Regulation 2000/15* ss4-7 respectively for definitions of these crimes.
[73] *UNTAET Regulation 2000/15* s10.1(a)
[74] Ibid.
[75] See *UNTAET Regulation 1999/1* s3.1, and *Parliamentary Law* 10/2003.
[76] See eg *General Prosecutor v Joni Marques and nine others*, SPSC (9/2000) 11 December 2001; *General Prosecutor v Joao Franca da Silva*, SPSC (4a/2001) 5 December 2002; *General Prosecutor v Anastacio Martins and Domingos Goncalves*, SPSC (11/2001) 13 November 2003; *General Prosecutor v Da Costa*, SPSC (1/2003) 10 December 2003.

and is inconsistent with the manner of determining sentencing adopted by the SPSC in previous cases.

5. APPEAL TO THE SUPREME COURT OF JUSTICE

One further turn in the case of *Paulino de Jesus* is that on 19 November 2004 the defence counsel filed an appeal against the Court of Appeal's decision to the Court of Appeal sitting in its capacity as the Supreme Court of Justice. The appeal was based on the grounds that there were major inconsistencies in the decision of the Court of Appeal, and also, given that it effectively conducted a *de novo* review on the record, major factual and legal errors.

The Constitution makes provision for the Supreme Court of Justice as the highest court of law to administer justice on matters of legal, constitutional and electoral nature.[77] However, the Supreme Court has not yet been established.[78] Until the Supreme Court is established, the Court of Appeal therefore has the competence to exercise the powers and functions of the Supreme Court of Justice.[79] This raises the issue of whether the Court of Appeal's exercise of Supreme Court jurisdiction includes the power to hear appeals against its own decisions.

This is the second time that such a motion has been filed with the Court of Appeal exercising Supreme Court functions against a Court of Appeal decision. The first motion, filed on 23 July 2003 by the Prosecutor in *Armando dos Santos*, was never processed by the Supreme Court.

On 17 December 2004 the Court of Appeal issued a decision on the defence counsel's appeal against the Court of Appeal's decision. The Court said that it is the Court of Appeal which exercises the functions of last instance court in Timor Leste. The Court based this decision on Article 164.1 of the Constitution, which gave the powers of the Supreme Court to the Court of Appeal until the Supreme Court is established, and Article 110 of the Law of Judicial Magistrates (Law 8/2002) which confirmed that the Court of Appeal exercises the competencies of the Supreme Court until its activities begin. The Court then said that Court of Appeal decisions are therefore definitive, and cannot be the subject of a new appeal. The Court therefore decided not to admit the appeal from Paulino de Jesus's defence counsel.

The case of *Paulino De Jesus* highlights a fundamental deficiency in the justice system of Timor Leste. The ignorance of the appropriate laws as demonstrated by the Court of Appeal's reasoning indicates the pressing need for a superior court to be established to hear appeals in such cases. The Court of Appeal's decision in this case (where it has deprived a person of his liberty by sentencing him to 12 year's imprisonment with very dubious legal reasoning) indicates an urgent need for a review of its performance to date.[80] In JSMP's view, at the very least the case highlights a need for training for Court of Appeal judges in the fundamentals of international criminal law.

[77] Constitution, s124.
[78] See JSMP Report, 'The Right to Appeal in Timor Leste' October 2002, 7-8 for a discussion of the causes of the delay in establishing the Supreme Court of Justice.
[79] Constitution s164(2), Judicial Magistrates Law s 110
[80] See also JSMP's Report "Overview of the Justice Sector: March 2005"

6. CONCLUSION

As one of the few acquittals to be handed down at first instance Paulino De Jesus is an important case in the jurisprudence of the SPSC. While the amendment to the indictment raised a small number of procedural issues, the clear and methodical process which the SPSC employed to reach their verdict was a sound example of the SPSC's respect for the evidentiary process, the rights of the accused, and the rule of law. The process came apart, however, upon reaching the Court of Appeal.

JSMP wishes to emphasise that we do not necessarily take issue with the overturning of the verdict. Rarely will decisions of courts of any kind be wholly undisputed on the facts or issues or receive unanimous approval. On some occasions, those disputes may be appealed to a higher court of review. On others, those disputes must lie undisturbed. The adjudicative nature of the law and its concern to safeguard the fundamental rights of those who come before it are precisely the reason why a system of appellate courts and laws regulating the appeal issues exist.

However, while it is clear that legal systems will always contain some inherent disharmony, the Court of Appeal's decision in *Paulino De Jesus* strays outside the bounds of acceptable variation. The Court of Appeal has failed to apply not only the correct law in relation to the charges, but also to follow the appropriate protocols regarding their jurisdiction to hear appeals. The lack of a Supreme Court of Justice deprives Timor Leste of an effective means of addressing important legal issues of the type which arose in *Paulino de Jesus* and has negative implications for the justice system as a whole. JSMP submits that the lack of judicial review of Court of Appeal decisions must be urgently addressed in order to remedy the injustice which has been rendered in by the Court in cases such as that of *Paulino de Jesus*.