

THE EVOLVING JURISPRUDENCE AND PRACTICE OF EAST TIMOR'S SPECIAL PANELS FOR SERIOUS CRIMES ON ADMISSIONS OF GUILT, DURESS AND SUPERIOR ORDERS¹

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1. INTRODUCTION

After 24 years of occupation by Indonesia and nearly 500 years of Portuguese colonisation, East Timor gained its independence on 20 May 2002 when the United Nations formally handed over the reins of power to a popularly elected President. Justice for the immense suffering of the people of East Timor while under Indonesian rule is a major issue for the local and international communities. Of particular importance is the question of individual criminal responsibility for atrocities committed during the last year of the occupation, when the weeks following the referendum on independence held on 30 August 1999 saw unparalleled devastation wreaked upon the civilian population and infrastructure.

On 6 June 2000, the United Nations Transitional Administration in East Timor (UNTAET)³ passed Regulation 2000/15 establishing Special Panels within the District Court of Dili, each to be composed of two international judges and one East Timorese, with jurisdiction to hear cases of Serious Crimes (Regulation 2000/15').⁴ These are defined as genocide, war crimes, crimes against humanity, torture, and also sexual offences and murder under the Indonesian Penal Code if

1. (c) S. Linton and C. Reiger, 2002.

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3. UNTAET was established by the Security Council under Chapter VII of the UN Charter, UN Doc. S/Res/1272 (1999). For the purposes of this article, references to UNTAET shall include the East Timor Transitional Administration.

4. UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000 ('Regulation 2000/15').

committed between 1 January 1999 and 25 October 1999.⁵ The international crimes are defined in detail, following almost verbatim the subject matter jurisdiction of the Rome Statute of the International Criminal Court (ICC Statute).⁶ Thus, the East Timor experiment is in some ways a trial run of many of the substantive legal provisions that will be applied at the ICC. Other substantive legal provisions, such as most of the defences and the procedure for a guilty plea, also replicate the ICC Statute.⁷

The Special Panels apply the laws applicable in East Timor, that is, those of Indonesia as amended or replaced by UNTAET and, where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the law of armed conflict.⁸ These are supplemented by a uniform code of criminal procedure, the Transitional Rules of Criminal Procedure, which regulates the conduct of all criminal proceedings.⁹

Trials in relation to atrocities committed during 1999 have been held before the Special Panels for Serious Crimes at the District Court of Dili since early 2001.¹⁰ One of the most interesting and unique features of these cases is the fact that almost every accused person admits to being involved in some aspect of the crime with which he is charged, for example, that he killed.¹¹ But they usually claim that they did so because they were 'ordered' to or because they were forcibly coerced by someone perceived to have influence, be it a village leader, militia leader or Indonesian military official. The frequency of these claims indicates a pattern of coercive behaviour by pro-Jakarta forces, the low rank of the militia members who have been tried to date, as well the desire of many of them to acknowledge their involvement in crimes and be reconciled with their communities.

This paper examines how the issues of the guilty plea, superior orders and duress have been handled by the Special Panels, and explores whether their practice and

5. Kitab Undang-Undang Hukum Pidana (KUHP, or Indonesian Penal Code), available in Bahasa Indonesia at <http://www.asiamaya.com>.

6. Rome Statute of the International Criminal Court, opened for signature 17 July 1998, UN Doc. A/CONF.183/9 (entered into force 1 July 2002), adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

7. A notable exception is superior orders, where UNTAET's drafters chose to revert to the positions adopted by the *ad hoc* Tribunals for Yugoslavia and Rwanda; see discussion at section 5.1 *infra*. The procedure for a guilty plea is contained in Regulation 2000/30 on Transitional Rules of Criminal Procedure, 25 September 2000, UNTAET/REG/2000/30 ('Transitional Rules of Criminal Procedure').

8. S. 3, UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/REG1999/1, 27 October 1999.

9. Transitional Rules of Criminal Procedure, *supra* n. 7

10. Regulation 2000/15 envisaged several panels operating simultaneously. However, for virtually the entire period covered by this study, there has been just one panel of judges, although its composition has varied in part. We use the singular in relation to specific cases and the plural when referring to the general practice.

11. There are no indications that the confessions arise from improper conduct of the investigative authorities and this has never been an issue in Serious Crimes cases thus far. However, the lack of legal representation for suspects during police questioning has been an ongoing problem, due to the few defence counsel available.

jurisprudence in these respects are consistent with international standards of due process and fair trial, and the practice and jurisprudence of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as earlier case-law from the post-World War II prosecutions.

The study opens with a brief examination of international law and jurisprudence on admissions of guilt and allegations of coercion, whether in the form of superior orders or duress. As the relevant historical and legal developments in East Timor have been extensively covered elsewhere,¹² including in the Correspondents' Reports sections of the 2000 and 2001 volumes of the *Yearbook of International Humanitarian Law*,¹³ they will not be examined here. The practice of the Special Panels concerning admissions of guilt, duress and superior orders will be examined in Parts 2, 3 and 4, respectively. Finally, some conclusions are offered.

2. ADMISSIONS OF GUILT, DURESS AND SUPERIOR ORDERS IN INTERNATIONAL LAW

2.1 International law and admissions of guilt

The guilty plea procedure *per se* derives from common law practice, which places a particular importance on the entering of a plea to the charge, enabling the accused to plead innocent or guilty at the start of the proceedings. Civil law jurisdictions, on the other hand, treat an admission of guilt as part of the evidence to be considered and evaluated in the course of a trial. The advantages of the guilty plea procedure are considered to include minimising costs, the saving of court time and avoiding the inconvenience and trauma of a trial, particularly to victims and witnesses.

An admission of guilt is a matter of procedural law that can involve issues of substance, for example, when an equivocal plea (a guilty plea that is accompanied or qualified by words describing facts which may negate criminal responsibility) is made. A court faced with a plea in such circumstances will need to distinguish two

12. See generally J. Dunn, *Timor: A People Betrayed* (Brisbane, Jacaranda Wiley 1983); C. Budiardjo and Liem Soei Liong, *The War Against East Timor* (London, Zed Books Ltd. 1984); J. Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (London, Zed Books Ltd. 1991); Catholic Institute for International Relations and the International Platform of Jurists for East Timor, *International Law and the Question of East Timor* (London and Leiden, CIIR and IPJET 1995); J. Taylor, *East Timor: The Price of Freedom* (London, Zed Books Ltd. 1999); S. Linton, 'Rising From The Ashes: The Creation Of A Viable Criminal Justice System In East Timor', 25 *Melbourne Univ. LR* (2001) p. 122; S. Linton, 'Prosecuting Atrocities At The District Court Of Dili', 2 *Melbourne JIL* (2001) p. 414; S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', 12 *Criminal LF* (2001) p. 185; S. Linton, 'New Approaches to International Justice in Cambodia and East Timor', *IRRC* No. 845 (2002) p. 93; M. Ruffert, 'The Administration Of Kosovo and East Timor by the International Community', 50 *ICLQ* (2001) p. 613; H. Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', 95 *AJIL* (2001) p. 46.

13. See 3 *YIHL* (2000) pp. 471-482 and in this volume at pp. iii-iii.

separate issues: (1) what it is that the accused is seeking to achieve with his statement – to be excused from responsibility or to have his punishment reduced; and (2) whether the applicable law accepts the situation raised by the accused as a complete defence or simply a mitigating factor. If the answer is one that requires evidence to be brought to prove the assertion, the case may be better dealt with by way of a full trial.

This common law institution has found its place in international criminal fora, which deal with cases that are by their nature complex and necessarily involve lengthy hearings. Article 20(3) of the ICTY's (Art. 19(3) ICTR's) Statute provides that

'the Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.'

The jurisprudence of the *ad hoc* International Criminal Tribunals indicates that, if accepted, a guilty plea should in principle give rise to a reduction in the sentence,¹⁴ but this depends on the circumstances of the case.¹⁵

At the ICTY, the admission of guilt provision was first tested in the *Erdemović* case. Rule 62 of the then-applicable Rules of Procedure and Evidence provided, *inter alia*, that upon transfer to the Tribunal, the accused was to be brought before the court as soon as possible and permitted to enter a plea; if the plea was guilty, the Chamber was to instruct the Registrar to set a date for the pre-sentencing hearing.

Neither Rule 62 nor Article 20(3) gave the judges of the ICTY adequate guidance on how to deal with a guilty plea, and the Trial Chamber's acceptance of the guilty plea made by *Erdemović* on 31 May 1996 was eventually overturned by a majority of the Appeals Chamber for being flawed.¹⁶ Guidance on how to deal with a guilty plea came in the form of a test identified by Judges McDonald and Vohrah:

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

14. *Prosecutor v. Stevan Todorović*, case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001.

15. *Prosecutor v. Jean Kambanda*, case No. ICTR 97-23-A, Judgement, 19 October 2000, where despite the former Prime Minister's guilty plea, a Trial Chamber of the ICTR imposed the maximum penalty, a life sentence. This was upheld on appeal.

16. *Prosecutor v. Drazen Erdemović*, case No. IT-96-22-T, Trial Chamber II, Judgement, 29 November 1996; *Prosecutor v. Drazen Erdemović*, case No. IT-96-22-A, Appeals Chamber, Judgement, 7 October 1997, with Joint Separate Opinion of Judge McDonald and Judge Vohrah ('Joint and Separate Opinion of Judges McDonald and Vohrah'), and Separate Opinions from Judges Cassese, Stephen and Li ('Separate Opinion of Judge Cassese', 'Separate Opinion of Judge Stephen', 'Separate Opinion of Judge Li'). By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li), the Appeals Chamber found that the guilty plea was not informed; By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li), the Appeals Chamber held that the case must be remitted to a Trial Chamber, other than the one which sentenced the Appellant, so that the Appellant could enter a fresh plea in full knowledge of the nature of the charges and the consequences of his plea.

- (b) The guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know what he is pleading guilty to;
- (c) The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.¹⁷

The judges recognised that an accused who pleads guilty waives certain crucial fair trial rights. This waiver may therefore only be admitted under very stringent conditions and it is the duty of the Trial Court to ensure that an accused understands and readily accepts the consequences. For example, by pleading guilty, the accused waives the presumption of innocence, the right to a full trial and to test the prosecution case through the cross-examination of witnesses and calling evidence in his defence. A court faced with a guilty plea is therefore required to be particularly vigilant. This test was eventually adopted with amendment in both the ICTY and ICTR Rules of Procedure and Evidence.¹⁸ It has since been successfully applied by ICTY Trial Chambers in the cases of *Jelisić*¹⁹ and *Todorović*,²⁰ and *Plavšić*,²¹ without being appealed to the Appeals Chamber. At the ICTR, former Prime Minister *Jean Kambanda* pleaded guilty to the charges against him and was sentenced to life imprisonment. His appeal, challenging, *inter alia*, the Trial Chamber's acceptance of his guilty plea and sentence, was rejected by the Appeals Chamber.²² The current procedure for the handling of an admission of guilt therefore appears to provide satisfactory guidance to the judges of the ICTY and ICTR.

Drawing on this, Article 64(8)(a) of the ICC Statute provides that '[t]he Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accor-

17. *Erdemović* Appeal Decision, Joint and Separate Opinion of Judges McDonald and Vohrah, *ibid.*, para. 8.

18. Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (adopted 11 February 1994 and subsequently amended), Doc. IT/32/Rev.20 ('ICTY Rules of Procedure and Evidence') ('ICTY Rules of Procedure and Evidence') and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (adopted 29 June 1995 and subsequently amended), ('ICTR Rules of Procedure and Evidence').

19. *Prosecutor v. Goran Jelisić*, case No. IT-95-10-T, Judgement, 14 December 1999.

20. *Prosecutor v. Stevan Todorović*, *supra* n. 14.

21. On 2 October 2002, Biljana Plavšić, former Bosnian Serb President, pleaded guilty to persecution on political, racial and religious grounds as a crime against humanity. At her first appearance before the tribunal, she had entered a not-guilty plea. The Prosecution dropped all other charges in its Amended Consolidated Indictment of 7 March 2002. The parties filed a plea agreement that set out in detail what it was that Ms Plavšić agreed to. She agreed to the legal elements of the crime of persecution based on political, racial and religious grounds which the Prosecution was required to prove beyond reasonable doubt, and the specific rights that she was waiving by pleading guilty. It also emphasized that she had taken full legal advice and entered into the agreement voluntarily and without undue influence; her legal advisors also entered the agreement.

22. *Prosecutor v. Jean Kambanda*, *supra* n. 15.

dance with Article 65 or to plead not guilty'. Article 65 sets out in detail the procedure for proceedings on an admission of guilt. These provisions have been adopted in East Timor and will be examined later.

2.2 International law and duress

Duress, namely acting under a threat from a third person of severe and irreparable harm to life or limb, entails that no criminal responsibility is incurred by the person acting under that threat.²³ To qualify as duress, this physical threat must be 'imminent, real, and inevitable'.²⁴ Duress is often termed 'necessity', but necessity is in fact a broader heading than duress, encompassing threats to life and limb generally and not only when they emanate from another person.²⁵ International law on the issue of duress resulting in the taking of human life reflects the fundamental division between common and civil law jurisdictions. In civil law countries, duress in such situations affords a complete defence; in common law countries it does not.

Neither the Charter of the International Military Tribunal at Nuremberg (IMT)²⁶ nor Control Council Law No. 10²⁷ addressed the issue of duress as a defence, leaving it up to the respective judges to decide what international law actually provided. The general position in relation to duress adopted in the post-World War II cases was set out in *Einsatzgruppen*:

'Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment.'²⁸

In adopting the ICTY and ICTR Statutes, the Security Council left open the question whether duress is available in international law as a defence. It fell to the judges to make this determination.

The opportunity arose in 1997 in *Erdemović*. There, a majority of the Appeals Chamber found that duress does not afford a complete defence to a soldier charged with a crime against humanity or a war crime involving the killing of innocent

23. *Erdemović* Appeal Decision, Separate Opinion of Judge Cassese, *supra* n. 16, para. 14.

24. *Trial of Otto Ohlendorf et al.*, ('*Einsatzgruppen*'), Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, (US Govt. Printing Office, Washington DC 1950) Vol. IV, p. 480

25. *Erdemović* Appeal Decision, Separate Opinion of Judge Cassese, *supra* n. 16, para. 14.

26. Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945, 82 *UNTS* p. 280 ('IMT Charter').

27. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 *Official Gazette Control Council for Germany* 50-55 (1946) ('Control Council Law No.10').

28. *Einsatzgruppen*, *supra* n. 24, p. 480.

human beings.²⁹ However, each of the judges expressed different views in separate or dissenting opinions. Judge Cassese was adamant that the only logical conclusion in the absence of a specific international rule was that the general rule that duress could amount to a defence in certain limited situations must prevail.³⁰ Judge Stephen concluded that 'despite the exception which the common law makes to the availability of duress in cases of murder where the choice is truly between one life or another, the defence of duress can be adopted into international law as deriving from a general principle of law recognized by the world's major legal systems, at least where that exception does not apply'.³¹ In contrast, Judges McDonald and Vohrah embarked upon a detailed investigation of 'practical policy considerations' of national jurisdictions in relation to pleas of duress, and concluded that 'duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives'.³² Judge Li rejected duress as a complete defence to the massacre of innocent persons but accepted that it could constitute a mitigating circumstance.³³

The majority's choice of the term 'soldier' may suggest that this ruling is limited to members of the regular armed forces, and does not apply to irregular combatants such as militias or paramilitaries. Also notable is the use of the term 'innocent life', which could be interpreted to suggest that a value judgement may be made by the soldier as to whether a victim is innocent or not.

In contrast, the ICC Statute recognises duress as a full defence. Article 31(1)(d) provides that a person shall not be criminally responsible if:

'the conduct which is alleged to constitute a crime within the jurisdiction of the panel has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may be: made by other persons; or constituted by other circumstances beyond that person's control.'

This provision has been adopted in East Timor.

29. *Erdemović* Appeal Decision, *supra* n. 16, para. 19.

30. *Erdemović* Appeal Decision, *ibid.*, Separate Opinion of Judge Cassese, paras. 41 and 49.

31. *Erdemović* Appeal Decision, *ibid.*, Separate Opinion of Judge Stephen, para. 64.

32. *Erdemović* Appeal Decision, *ibid.*, Joint and Separate Opinion of Judges McDonald and Vohrah, paras. 77 and 88.

33. *Erdemović* Appeal Decision, *ibid.*, Separate Opinion of Judge Li, para. 5.

2.3 *International law and obedience to superior orders*

International law is unsettled on the consequences of international crimes committed pursuant to superior orders.³⁴ There are two divergent legal positions: (1) that obedience to superior orders is not a defence and may only lead to a mitigated sentence (conviction); and (2) that obedience to superior orders provides a complete defence to charges if proved (acquittal).

2.3.1 *Superior orders as a mitigating factor*

Article 8 of the Charter of the IMT prohibited the use of superior orders as a defence but permitted its application as a mitigating factor.³⁵ The Tribunal's judgement found

‘that a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though as the Charter here provides, the order may be urged in mitigation of the punishment’.³⁶

The IMT judgement also introduced the concept of moral choice – whether the subordinate faced a situation where there was no moral choice, that is, where he did not have freedom to choose between actions that were right and wrong without suffering serious harm.³⁷

Superior orders requires the existence of an order given by someone with the competence to issue orders to the recipient, who in turn must be legally bound to obey the order. As the earlier cited IMT judgement made clear, if the order is manifestly unlawful there is no duty to obey. The Statutes of the ICTY and ICTR have adopted the IMT's absolutist position of principle and deny recourse to superior orders as a defence. However, the Secretary-General's Report on the ICTY Statute stresses, the court may ‘consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice’.³⁸ Although the ICTY/ICTR position has drawn criticism for failing to take into account the more nuanced approach adopted by the post-World War II war crimes tribunals, literature and manuals of military law, which indicated that superior orders could in

34. For a concise identification of the main issues, see A. Eser, ‘Defences in War Crimes Trials’, in Y. Dinstein and M. Tabory, eds., *War Crimes in International Law* (Dordrecht, Martinus Nijhoff 1996) pp. 251-173.

35. IMT Charter, *supra* n. 26, Art. 8: ‘The fact that the Defendant acted pursuant to orders of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that Justice so desires.’

36. *Trials of the German Major War Criminals, Proceedings of the International Military Tribunal, Sitting at Nuremberg, Germany 1947* (London, H.M. Stationery Office 1950) Vol. 22, p. 447 (‘IMT Judgement’).

37. *Ibid.* ‘The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.’

38. Report of the Secretary-General, UN Doc. S/25704, para. 57.

certain limited situations amount to a defence,³⁹ it is this concept of superior orders as a mitigating factor that is applied in East Timor.

2.3.2 *Superior orders as a complete defence, but in limited circumstances*

The alternative legal position is that obedience to superior orders is or should be a defence because it is a key element of the hierarchical nature of the military command structure which relies on the maintenance of discipline within it, and also because commanding officers are made responsible for the acts of subordinates by way of the doctrine of command responsibility. Policy reasons aside, its proponents claim that, despite the sanctified position of the IMT Charter in international law, the law in fact applied then was a recent change and State practice and *opinio juris* have now moved away from the IMT rule towards the earlier position – some of the post-World War II jurisprudence is certainly accommodating of superior orders as more than a mere mitigating factor.⁴⁰ For example, in the *Hostages* case, the tribunal found that if the illegality of the order was not known to the subordinate, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the subordinate will be excused.⁴¹ In the 1950s, the influential US Army Field Manual reverted to the pre-1944 position that recognised superior orders as a defence in limited situations.⁴² The International Law Commission too gradually moved away from the absolutist position of total denial towards one recognising that it may be available in limited circumstances.⁴³

In 1998, the drafters of the ICC Statute opted for a limited recognition of a superior orders defence. Article 33 stresses the basic principle that orders from a superior are not a defence. It then sets out a stringent test for determining what international law recognises as ‘superior orders’ and permits this to be raised as a defence where: (a) The person was under a legal obligation to obey the orders of

39. T. Meron, *War Crimes Law Comes of Age* (Oxford, Oxford University Press 1999) p. 224. Also generally on the development of the law since 1945, see Y. Dinstein, *The Defence of Obedience to Superior Orders in International Law* (Leiden, Sijthoff 1965); L.C. Green, *Superior Orders in National and International Law* (Leiden, Sijthoff 1976).

40. Meron, op. cit. n. 39, at p. 101, see also L.C. Green, ‘Superior Orders and the Reasonable Man’, in *Essays on the Modern Law of War*, 2nd edn. (Ardsley, Transnational Publishers Inc. 1999) pp. 245-282.

41. *US v. Wilhelm List et al.* (Hostages), Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (US Govt. Printing Office, Washington DC 1950) Vol. XI, p. 1236.

42. See para. 509(a) of US Army Field Manual 27-10 (1956): The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, *unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.* (emphasis added).

43. See for example, Report of the International Law Commission on the work of its Thirty-Ninth Session, 4 May -17 July 1987 (1987), 2 *YILC*, Part, 1 and 7, and commentary on superior orders at UN doc. A/42/10 (1987) p. 9.

the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. Under paragraph 2, an order to commit genocide and crimes against humanity (but not war crimes), is manifestly unlawful. A superior order to commit such offences would thus not be accepted as a defence.

This test has the effect of distinguishing between superior orders and ‘orders’. For the former, custom requires that there must be an order, either oral or written, addressing the accused or a group to which the addressee belongs, requiring certain actions or omissions leading to the commission of an international crime.⁴⁴ Furthermore, there has to be a superior-subordinate relationship, although not necessarily a military one, with the person giving the order having the right to demand obedience by the subordinate.

Under customary law, an accused who willingly joins a criminal enterprise cannot then raise the issue of superior orders.⁴⁵ *Einsatzgruppen*⁴⁶ and *Milch*⁴⁷ confirmed that voluntary membership in a criminal or illegal enterprise prohibits the availability of duress as a defence. This established a line of jurisprudence that duress or necessity cannot excuse from criminal responsibility the person who freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.⁴⁸ Moreover, superior orders cannot mitigate if the accused was prepared to carry out the unlawful act anyway.⁴⁹

The moral choice test continues to apply in custom: the accused must have not have had freedom to choose between actions that were right and wrong.⁵⁰ Article 33 of the ICC Statute is felt by some to reflect the changes in customary international law and to have incorporated an understanding of some of the realities of combat situations and the demands of military discipline.⁵¹ Its detractors claim that

44. O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article* (Baden-Baden, Nomos, 1999) p. 582.

45. In illustrating how to use the superior orders doctrine, the tribunal in *Einsatzgruppen* raised an example of a sailor who voluntarily joins a pirate ship. He ‘must not be heard to answer that he was ignorant of the probability he would be called upon to help in the robbing and sinking of other vessels. He who willingly joins an illegal enterprise is charged with the natural development of that unlawful undertaking. What SS man could say that he was unaware of the attitude of Hitler toward Jewry?’, *Einsatzgruppen*, *supra* n. 24, p. 92.

46. *Idem.*, p. 91.

47. Trial of Erhard Milch, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (US Govt. Printing Office, Washington DC 1950) Vol. III, p. 964.

48. *Erdemović* Appeal Decision, *supra* n. 16, Separate Opinion of Judge Cassese, para. 17.

49. *Erdemović* First Trial Chamber Judgment, *supra* n. 16, para. 53.

50. The question of the moral choice was considered by the trial chamber and the five appellate judges as key in the *Erdemović* case, *supra* n. 16.

51. C. Garraway, ‘Superior Orders and the International Criminal Court: Justice delivered or justice denied?’, 81 *IRRC* (1999) No. 836, pp. 785-794.

it overturns the cherished Nuremberg position and flies in the face of customary international law in permitting superior orders as a defence.⁵²

2.4 Distinguishing duress from superior orders

Superior orders and duress are often confused because of their common element of coercion and the mistaken belief that soldiers are obliged to obey all orders of their superiors. Duress can arise as a result of an extreme degree of pressure from anyone whilst superior orders only arise from someone with whom one has a superior-subordinate relationship which legally obliges the recipient to obey the order.

Particular difficulty has arisen where there are threats going beyond the inherent coercion in a relationship of unequal power. The question is whether such extra coercion by a superior could amount to duress and thus possibly a defence. The *Erdemović* case illustrates the difficulties that courts face with coercive situations involving orders, and the need for the two legal concepts of superior orders and duress to be clearly distinguished. The first Trial Chamber stressed the now well-established position that the overriding duty of a soldier faced with a manifestly unlawful order is to disobey; this duty only recedes in the face of the most extreme duress.⁵³ It also found that while a complete defence based on moral duress and/or a state of necessity stemming from superior orders is not absolutely excluded, its conditions of application are particularly strict.⁵⁴ More precisely, it said that these must be sought not only in the existence of a superior order – which must first be proven – but also and especially in the circumstances characterising how the order was given and how it was received.⁵⁵ The Chamber felt that this called for a case-by-case approach which assesses the objective and subjective elements characterising duress or the state of necessity and examination of whether the accused in his situation did not have a duty to disobey, and whether he had the moral choice to do so or try to do so.⁵⁶

This seemed to merge the concepts of duress and superior orders. On the Appeals Chamber, Judges Cassese, McDonald and Vohrah were clear about the need to separate the two. Judges McDonald and Vohrah rejected the submission that when duress is accompanied by a superior order that is a reason against allowing duress as a defence because obedience to superior orders *per se* had been specifically rejected as a defence in the Statute.⁵⁷ The judges were clear that obedience to superior orders is merely a factual circumstance to be considered

52. P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law', 10 *EJIL* (1999) pp. 172 et seq.

53. *Erdemović* Trial Chamber Judgment, *supra* n. 16, para. 18.

54. *Ibid.*, para. 19.

55. *Idem.*

56. *Idem.*

57. *Erdemović* Appeal Decision, Joint Separate Opinion Judges McDonald and Vohrah, *supra* n. 16, para. 36.

when determining whether the defence of duress is made out on the merits; the fact that the Appellant obeyed an order of a superior does not go to the preceding legal question of whether duress may ever be pleaded as a defence.⁵⁸ They rejected the possibility of a hybrid defence of the sort suggested by the Trial Chamber, stressing that the two were distinct and duress could occur without superior orders.⁵⁹ Judge Cassese stressed that there is no necessary connection between the two and that superior orders may be issued without being accompanied by any threats to life or limb.⁶⁰ He raised the situation of a subordinate faced with an order from his superior. Ordinarily, he would be obliged to obey. But if the order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey it. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised. Superior orders would become legally irrelevant although it would come into play again as a mitigating factor if the duress is rejected. Equally, duress may be raised entirely independently of superior orders, for example, where the threat issues from a person of the same or lower rank. Judge Cassese concluded that where duress is raised in conjunction with manifestly unlawful superior orders, the accused may only have a defence if he first refused to obey the unlawful order and then only carried it out after a threat to life or limb.⁶¹

3. ADMISSIONS OF GUILT BEFORE EAST TIMOR'S SPECIAL PANELS

3.1 The law of East Timor

Section 29A of the Transitional Rules of Criminal Procedure is taken directly from Article 65 of the ICC Statute and provides that an accused may make an admission of guilt either before or during trial.⁶² In deciding whether such a plea is valid and can be accepted by the court, the Special Panel must determine that the following criteria are satisfied:

- (a) The accused understands the nature and consequences of the admission of guilt;
- (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
- (c) The admission of guilt is supported by the facts of the case that are alleged in the indictment and admitted by the accused; any materials presented by the prosecutor which support the indictment and which the accused accepts; and any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused.

58. *Idem.*

59. *Ibid.*, para. 35.

60. *Ibid.*, Separate Opinion of Judge Cassese, para. 15.

61. *Idem.*

62. Transitional Rules of Criminal Procedure, *supra* n. 7, s. 29A.

If the Special Panel accepts the guilty plea and convicts the accused, it can proceed directly to conviction and sentencing.⁶³ If, on the other hand, the Special Panel is not satisfied that the criteria have been established, or if it decides that the interests of justice so require, 'it shall consider the admission of guilt as not having been made' and proceed to trial in the ordinary way.⁶⁴

3.2 Issues arising from admissions of guilt made to the Special Panels

3.2.1 Introduction

In 2001, the first year of operation, the Special Panels took a cautious approach and accepted an admission of guilt only once, in the very first case.⁶⁵ The cases where the admissions were rejected involved partial admissions, confessions that did not entirely match the allegations of the Prosecutor, or allegations that someone 'forced' or 'ordered' the accused to commit the crime.⁶⁶ Up to May 2002, the panels had accepted another two such admissions, possibly marking the start of a more flexible approach.⁶⁷ Interestingly, faced with guilty pleas by the lead defendant at the commencement of the trial in a multiple-accused, multiple-incident crimes against humanity case, the panel only made its decision to accept that plea after concluding the trial and assessing evidence and the submissions of the parties.⁶⁸

3.2.2 Admissions accompanied by allegations of coercion

Confronted with claims of coercion that seem to crisscross from duress to superior orders in almost every case, the Special Panels are rarely able to decide at the plea stage whether the allegations are of duress or superior orders. Rather than make a wrong decision, they have preferred to err on the side of caution and refused to accept the admission as a guilty plea and proceeded to determine the matter by way of a full trial. This is consistent with the guidance given by Judge Stephen in the *Erdemović* Appeals Chamber judgment. He noted that the Trial Chamber had

63. *Ibid.*, s. 29A.2.

64. *Ibid.*, s.29A.3 and s.29A.4.

65. *General Prosecutor v. Joao Fernandes*, Judgement of 25 January 2001, Special Panel for Serious Crimes, case No. 001/00.C.G.2000 (English) ('Joao Fernandes Trial Judgement').

66. This occurred in cases such as *Julio Fernandes*, *Yoseph Leki*, *Manuel Leite Bere*, *Jose Valente*, *Agustinho da Costa*, *Gaspar Leite* and *Lospalos*, all of which are discussed at later stages of this paper.

67. *Public Prosecutor v. Marcurious de Deus*, case No. 13/2001, Decision, 18 April 2002, and *Public Prosecutor v. Augusto dos Santos*, case No. 6/2001, Decision, 15 May 2002.

68. *Public Prosecutor v. Joni Marques & Ors*, case No. 9/2000 ('*Lospalos Case*'), Decision, 11 December 2001.

rejected the plea of duress because of a lack of supporting evidence and proceeded to the sentencing stage.⁶⁹ He cautioned that at the plea stage, a Trial Chamber should not place the onus of proof upon an accused.⁷⁰ If the claim by the accused alerts the court to circumstances that may in the course of a trial form a sufficient basis for a defence of duress, the Trial Chamber should enter a plea of not guilty and set a date for trial. At the plea stage, matters of proof or evidence do not and cannot arise; the absence of evidence of duress is not a ground for rejecting the plea of duress and regarding the guilty plea as unambiguous.⁷¹

The case of *Joao Fernandes*, in which an admission was accepted by a Special Panel as a guilty plea, illustrates the confusion caused by admissions accompanied by allegations of coercion in Serious Crimes cases.⁷² The first to come before the Special Panel, it is also the only case in which there has been a detailed consideration of the Section 29A procedure. Fernandes was charged with murder in violation of Article 340 of the Indonesian Penal Code for the killing of a village chief, Domingos Goncalves Perreira, during a massacre at the police station in Maliana on 8 September 1999.⁷³ Like the original ICTY Trial Chamber in *Erdemović*, the Special Panel judges (Italian, Burundian and East Timorese) were faced in their first case with an admission of guilt. Fernandes admitted to killing Perreira but said that he did so on the orders of the Indonesian Army and the local militia leader. From the judgment, it is clear that the Special Panel had no doubt that he was making an admission of guilt; that what he was saying was that he committed the crime because he was ordered to do so. To the panel this was not about a defence but about mitigation. It therefore accepted that the guilty plea satisfied Section 29A and on 25 January 2001 sentenced him to 12 years imprisonment.⁷⁴

On appeal, Fernandes both challenged his sentence and complained that the Special Panel had failed to consider the fact that he was forced to kill on the basis of superior orders as duress. In its decision of 29 June 2001, the Court of Appeal unanimously rejected the appeal as groundless.⁷⁵ There was little to discuss on the duress-superior orders issue as Regulation 2000/15 clearly provides that superior orders are not a defence, and if accepted by the court, may only serve to mitigate sentence. Duress on the other hand, if proven, is a complete defence. The Special Panel was found to have correctly regarded what the accused told them as an

69. *Erdemović* Appeal Decision, Separate Opinion of Judge Stephen, *supra* n. 16, para. 22.

70. *Ibid.*, para. 22.

71. *Ibid.*, para. 18.

72. *Erdemović* Appeal Decision, *ibid.*, *Joao Fernandes* Trial Judgement, *supra* n. 65.

73. Penal Code of Indonesia, *supra* n. 5, Art. 340: '[t]he person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished by capital punishment, life imprisonment or a maximum imprisonment of twenty years'.

74. *Joao Fernandes* Trial Judgement, *supra* n. 65, para. 6.

75. *Joao Fernandes v. Prosecutor General*, Criminal Appeal No. 2 of 2001 (29 June 2001), 'Ruling of the Court of Appeal of East Timor'. The decision of the majority is hereafter referred to as '*Joao Fernandes Appeal – Majority Decision*' and the Separate Opinion of Judge Frederick Egonda-Ntende is referred to as '*Joao Fernandes Appeal – Judge Egonda-Ntende Separate Opinion*'.

admission of guilt; the allegation that he was ordered to commit the crime amounted simply to a call for mitigation of sentence.

The fact that the case was appealed indicates several possibilities. The 12-year sentence could have prompted the defence to attempt to use the appeal as a chance to obtain trial *de novo* and a lighter sentence or acquittal. Also, in the course of proceedings, it seemed as if defence counsel were confused about the distinction between superior orders and duress, a distinction clearly set out in UNTAET Regulation 2000/15.⁷⁶ It is also possible that there was a genuine and serious misunderstanding between the Bench and the accused about what he was saying as a result of inadequate translations.⁷⁷ That the accused was himself confused cannot be discounted because virtually every Serious Crimes accused (and sometimes counsel too) seems to believe that (1) every instruction is a superior order and must be obeyed; (2) whenever there is a superior order, there is duress; (3) duress and superior orders negate any criminal responsibility.⁷⁸

One of the crucial issues that was not addressed by the Court of Appeal majority was how the Special Panel could have been so certain about what Joao Fernandes was trying to tell them when it did not investigate whether: (1) he and his counsel knew the difference between duress and superior orders; (2) he and his counsel knew the difference between a defence and a mitigating factor under the new law of East Timor or the consequences of pleading to one or the other; and (3) what was actually being sought with the claim of duress in the form of orders was not a lighter sentence but an acquittal. The quality of questions put by the Special Panel to the accused was raised in the Separate Opinion of Judge Egonda-Ntende, discussed in the following section.

In the two 2002 cases in which the Special Panel accepted guilty pleas, the accused also claimed that they were acting under orders, raising the possibility of an equivocal plea. However, both *Marcurious de Deus*⁷⁹ and *Augusto dos Santos*⁸⁰ made clear in their respective statements to the court that they were not forced to commit the crimes charged. Although the Special Panels did not question either of the men about their understanding of the different implications of this distinction,

76. JSMP trial observation notes, on file with Caitlin Reiger.

77. The languages used in the courts of East Timor are Tetum, Bahasa Indonesia, English and Portuguese as the official languages; other East Timorese languages are also used. The inability of the administrators of the courts to provide adequate translation has been the focus of concern for the detrimental impact on due process and fair trial: see Judicial System Monitoring Programme, *Justice in Practice: Human Rights in Court Administration*, Thematic Report No. 1, November 2001.

78. In several cases, defence counsel have argued that the existence of superior orders proves that the accused could not have had the requisite intent. In *Jose Valente*, an international public defender claimed that the attempted plea of guilty could in fact only be a plea to manslaughter and not murder, with which the accused was charged. *The Public Prosecutor v. Jose Valente*, case No. 3/2001, Decision, 19 June 2001. In the *Lospalos* case, one of the defence counsel, in closing submissions, claimed that her client could not be found guilty as he had been ordered to participate in the crimes charged. *Supra* n. 68.

79. *Supra* n. 67.

80. *Supra* n. 67

the judges did take care to confirm that the accused had discussed their admissions with defence counsel. In its judgment in the *dos Santos* case, the Special Panel noted that, as part of his admission of guilt, the accused stated that he was scared and followed the orders of his superior, the local militia commander Horacio de Araujo.⁸¹ The Court also accepted that the accused ‘lived in a very coercive environment’ that put many young men under pressure ‘to join criminal activities’, yet it still held that the plea was unequivocal.⁸²

3.2.3 *The duty of the court to accept only informed admissions of guilt*

A diligent court cannot just accept the word of an accused person at face value.⁸³ This is the guidance given by Judge Egonda-Ntende in *Joao Fernandes*, the sole voice on the Appeal Chamber who spoke out against the Special Panel’s procedural handling of the guilty plea. The official record of the trial indicated to him that the Presiding Judge of the Special Panel had not taken sufficient care to ensure that the accused genuinely understood the consequences of agreeing with the charges.⁸⁴ Fernandes was an illiterate farmer and the Presiding Judge had simply reiterated the words of Section 29A.1 to him. As there was nothing in his answers to indicate a problem, the court accepted the admission as a guilty plea meeting the requirements of Section 29. However, Judge Egonda-Ntende found that the judge had not ascertained if Fernandes had actually understood what he was saying and that by pleading guilty he was giving up rights such as the presumption of innocence, the right to a trial and the right to challenge witnesses. This is reminiscent of criticism by Judges McDonald and Vohrah of the ICTY Appeals Chamber of the first *Erdemović* Trial Chamber’s handling of his guilty plea.

A trial court is expected to take great care to ensure the fairness of the proceedings, and to be particularly diligent when the accused are uneducated or otherwise labouring under disadvantages that put them in a weaker position than their accusers. In the *Fernandes* case, it seemed to Judge Egonda-Ntende that reasonable enquiries had not been made of the accused. The case had come to the Court of Appeal on a point that suggested lack of understanding and/or miscommunication between the accused and the Special Panel on whether he was making an admission of fact with duress being raised as a defence or an admission of guilt with superior orders being raised as a mitigating factor. Judge Egonda-Ntende read Section

81. *Ibid.*, at para. 60(c).

82. *Ibid.*, at para. 60(d).

83. *Joao Fernandes* Appeal, Judge Egonda-Ntende Separate Opinion, p. 30, *supra* n. 75.

84. *Ibid.*, pp. 28-31. There is often confusion about the official record. Clarification by simply examining the transcripts offers no remedy, for there continues to be no transcription facilities in the courts of East Timor. The official record is compiled by a rapporteur judge who makes notes on a laptop computer, relying on multiple levels of translation that are often of poor quality and sometimes third-hand. In his Separate Opinion, Judge Egonda-Ntende raised the problem of the inconsistent reporting contained in the court record and the judgments of the Special Panel. Similarly, whilst they do not seek rectification by way of corrigenda, both prosecution and defence privately complain that the judgments of the Special Panel contain many factual inaccuracies and mistakes.

29A.1 to mean that it is not enough for a court merely to repeat the words of a statute without complying with the intent of those provisions and that proactive questioning was needed to fulfil the duty.⁸⁵ He found that what was required was a set of questions that could elicit responses from the accused to show whether he understood the nature and consequences of an admission of guilt.

Judge Egonda-Ntende's imposition of a strict duty is consistent with the jurisprudence of the ICTR/ICTY Appeals Chamber, in particular the guidelines agreed to by the majority in *Erdemović*, and the overriding concern to ensure that proceedings are fair.⁸⁶ When rejecting the appeal of *Jean Kambanda*, the ICTR Appeals Chamber stressed that '[t]he duty of a Trial Chamber to inform an accused person of the possible sentence is not to be mechanically discharged. The proceedings have to be read as a whole, inclusive of the submissions of the parties'.⁸⁷ An unresolved issue is whether a trial court is required to explain in detail the elements of the crimes with which the accused is charged, and each and every consequence of making a guilty plea, or whether the trial court's obligations are satisfied if it simply makes reasonable enquiries or provides a basic explanation. This was raised by Judge Shahabuddeen, a member of the Trial Chamber to which the *Erdemović* case was remitted. He observed that both the Statute of the ICTY⁸⁸ and the Appeals Chamber left the Trial Chamber discretion as to the way that it complies with its obligations. He did not feel that a detailed parsing of the elements of the crime was required but, like Judge Egonda-Ntende of the East Timor Court of Appeal, stressed that the court has to make sufficient enquiries to ensure that the accused understands the charge. He suggested that an explanation of the elements of the charge, or of relevant elements, should only be necessary where something in the status or condition of the accused (such as his being legally unrepresented), or something in what he says when making his plea or some critically important element or other special reason alerts the trial judge to a need to give such an explanation in order to ensure that the accused understands what he is pleading to.⁸⁹

In the *Leite* case, the Special Panel discovered the importance of adequate questioning just in time. At the preliminary hearing, the accused, an East Timorese former member of the Indonesian Army (TNI) in Aileu district, admitted that he fatally shot the victim who was hiding in bushes, and pleaded guilty to the charge of murder. The court initially accepted the plea. During further questioning at the next hearing, as part of the application of the Section 29A procedure, the accused elaborated that while he had been ordered to shoot anything that moved, he first thought he had shot only an animal in the bushes. As the presence of the requisite

85. *Joao Fernandes Appeal*, Judge Egonda-Ntende Separate Opinion, p. 31, *supra* n. 75.

86. *Erdemović Appeal Decision supra* n. 16: Joint Separate Opinion, para. 7; Separate Opinion of Judge Cassese, para. 10.

87. *Jean Kambanda v. The Prosecutor, supra* n. 15, para. 76.

88. Statute of the International Tribunal of the Former Yugoslavia, SC Res. 827, 48 UN SCOR (3217th mtg) (1993), 32 *ILM* p. 1203.

89. *Prosecutor v. Erdemović*, case No. IT-96-22-*Tbis*, Sentencing Judgment, 5 March 1998; Separate Opinion of Judge Shahabuddeen, p. 3.

element of deliberate intent to commit murder was thrown into doubt, the court abandoned the procedure and the matter proceeded to trial.⁹⁰

3.2.4 *Evidence and admissions of guilt*

In East Timor and at the ICC, an admission of guilt must be supported by the facts of the case as alleged in the indictment and admitted by the accused; any materials presented by the prosecutor which support the indictment and which the accused accepts; and any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused. East Timor's Transitional Rules of Procedure provide that the court may accept all evidence that is 'relevant and has probative value with respect to issues of dispute'.⁹¹ In the *Joao Fernandes* case, the official record indicated to Judge Egonda-Ntende of the Appeals Chamber that the Special Panel had not distinguished between those documentary materials simply presented to it and those actually admitted as evidence, as well as between witness statements and oral testimony.⁹² Judge Egonda-Ntende's second objection to the Special Panel's acceptance of Fernandes' plea was that it was not supported by the facts. Judge Egonda-Ntende was concerned that the Special Panel failed to evaluate the material before it and to establish if in fact it was fully agreed to by the parties. There was nothing in the official record detailing the nature of the evidence against Joao Fernandes nor at what point the evidence was admitted on the record of trial:

'On the record of the trial court, all we have is the Presiding Judge asking, "Do you agree with the evidence and witness statements presented by the Public Prosecutor?" The record must particularise the evidence and the witness statements that are being referred to, and it is preferable that the defendant signifies his acceptance in respect of each item of evidence, or material, after its purport has been made clear to him.'⁹³

In other words, an assortment of materials was simply handed over and accepted as evidence, with no effort to distinguish which of the materials or evidence were submitted in support of the indictment, and what was accepted by the accused as the factual basis underlying his plea. Judge Egonda-Ntende therefore found that these materials had been erroneously entered into the official record as evidence pursuant to Sections 33-37 of the Transitional Rules of Criminal Procedure, and that the conviction based on such materials was void.

By way of comparison, Rule 62*bis* of the ICTY's Rules of Procedure and Evidence requires that there must be a sufficient factual basis for the crime and the

90. *The Public Prosecutor v. Gaspar Leite aka Gaspar Leki*, case No. 5/2001. On 14 September 2002, Leite was acquitted of murder but convicted of criminal negligence causing death under section 339 of the Indonesian Penal Code and sentenced to 11 months imprisonment.

91. Transitional Rules of Criminal Procedure, *supra* n. 7, s. 34.1.

92. *Joao Fernandes* Appeal, Judge Egonda-Ntende Separate Opinion, p. 33, *supra* n. 75.

93. *Ibid.*, p. 32-33.

accused's participation in it. That can be proved either on the basis of independent indicia or on the lack of any material disagreement between the parties about the facts of the case. In *Jelisić*, the Trial Chamber confirmed that a guilty plea alone does not provide a sufficient basis for conviction of an accused for 'it is still necessary for the judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime'.⁹⁴ In this particular case, and others such as *Todorović*⁹⁵ and *Kambanda*,⁹⁶ the parties expressly agreed on the facts and the crimes alleged but the Trial Chambers still applied conventional standards for admissibility and evaluation.

Thus, agreement between the parties on the facts does not absolve the Trial Chamber of its duty to assess the admissibility of evidence and evaluate its relevance and probative value. The practice of the Special Panels does not demonstrate a clear understanding of this, although the situation appears to have improved since *Fernandes*. In *dos Santos*, the defence counsel agreed that the content of two witness statements submitted by the prosecutor supported the admission made by the accused.⁹⁷ However, in the court's decision and during the discussions in court, there is no other explanation of what these statements contained. Similarly, in *de Deus*, the defence counsel did not dispute the prosecutor's submission that the admission was supported by the material before the court, but the judgment does not detail what the evidence relied upon contained, merely listing the names of four witnesses who gave statements, and the numerical references of some additional documents on the court file.⁹⁸

A diligent trial court should satisfy itself that there is consistency between the indictment, the statement(s) of the accused and independent evidence that is tendered in support. Seen together, all of this should establish a sufficient factual basis for the crime and the accused's involvement that convinces the court of guilt beyond reasonable doubt. Only this would warrant accepting the plea and entering a conviction. Commentary on the ICC Statute's Article 65(1), which is applied in East Timor, notes that the trial court hearing the guilty plea has in effect to embark on a 'trial factual basis procedure' and ensure that sufficient facts are shown to warrant a conviction if the defendant was to stand trial.⁹⁹ This would mean that, at the guilty plea stage, the evidence must convince the court of the accused's guilt beyond reasonable doubt.¹⁰⁰

94. *Prosecutor v. Goran Jelisić*, *supra* n. 19 para. 25.

95. *Supra* n. 20.

96. *Supra* n. 15.

97. *The Public Prosecutor v. Augusto dos Santos*, *supra* n. 67, para. 51. Counsel told the court that part of the accused's motivation to plead guilty was to spare those witnesses from the need to testify.

98. *The Public Prosecutor v. Marcurious Jose de Deus*, *supra* n. 67, at p. 9 and notes taken during the hearing on 2 April 2002, on file with Caitlin Reiger.

99. Triffterer, *op. cit.* n. 44, at p. 829.

100. Contrast this with Judge Stephen, *Prosecutor v. Erdemović*, *supra* n. 16.

3.2.5 *Perceptions of impartiality and what happens when an admission is not accepted as a guilty plea*

Following the procedure for the ICC, the Transitional Rules of Criminal Procedure provide for trial on the merits following rejection of an attempted admission of guilt pursuant to the test of Section 29A1. A finding of not guilty is entered by the court. The procedure for trial, set out in Section 30, does not preclude the case being tried on its merits by the same panel that rejects the guilty plea; the wording used is ‘it shall order that the trial be continued under the ordinary trial procedures provided in this Regulation’.¹⁰¹ Deliberately omitted from this provision were the last nine words of Article 65(4)(b) of the ICC Statute: ‘... and may remit the case to another Trial Chamber’.

This has been interpreted to mean that the same panel that heard the submissions and evidence relating to the guilty plea may be the same one that tries the accused. The challenging realities of work in East Timor have sometimes meant that issues such as perceptions of impartiality and objectivity have been overlooked. Perhaps the drafters of the law had some foresight about the problems that would come to plague the Serious Crimes enterprise in East Timor, including the difficulty of finding judges to fill the Special Panels. For most of the time since the creation of the Special Panels, there has only been one Special Panel.¹⁰² Thus, even if there had been a desire to have a different panel for the trial, there was no alternative but to conduct the trial before the same judges. If a guilty plea is rejected for failing the test of Section 29(A)1, the pretence of holding a ‘normal trial’ based on a plea of not guilty requires that the earlier admissions cannot be used against the accused during the ensuing trial. This is because the court is to treat the admission as if it was never made: it is null and void, and no adverse implications to the accused can be drawn from it.¹⁰³ It would thus be preferable if a completely new Trial Chamber were to hear the matter, for the risk of bias is undoubtedly greater when a case goes to the same panel that heard and rejected the guilty plea. Fair trial standards require that the panel must be impartial, which is a difficult task when one has heard an accused say that he committed the crime with which he is charged.

Subsequent reliance at trial on statements made before the Special Panel during an unsuccessful attempt to plead guilty has regularly occurred in Serious Crimes cases, for example in *da Costa* and *Tavares*.¹⁰⁴ In the former case, one of the judges had been replaced between the preliminary hearing and the trial; in the latter, the panel was entirely the same. The issue of use of material concerning the rejected

101. Transitional Rules of Criminal Procedure, *supra* n. 10, s 29A.3.

102. See Justice in Practice: Human Rights in Court Administration, Judicial System Monitoring Programme, Thematic Report No 1, November 2001, Dili, (‘Justice in Practice: Human Rights in Court Administration’) p. 14.

103. Trifterer, *op. cit.* n. 44, at p. 830.

104. *Public Prosecutor v. Agostinho da Costa*, case No. 07/2000, Judgment, 11 October 2001; *Public Prosecutor v. Augusto Asameta Tavares*, case No. 2/2001, Decision, 28 October 2001.

guilty plea has not been litigated, and the judgments do not address the matter at all, suggesting that it is not considered an issue.

Such materials were also used in the judgement of the panel in *Valente*,¹⁰⁵ but the circumstances indicate that this was not improper. The same Special Panel that rejected the purported confession tried the accused and eventually convicted him. In the course of the trial, the accused made no oral statement but his defence counsel submitted a written list of factual admissions and also quoted from the defendant's admissions at the preliminary hearing. In its written decision, the Special Panel relied extensively on the defendant's earlier statement to the court as part of the evidence that supported its conclusion.¹⁰⁶

The rules are aimed at protecting accused persons, and there is no doubt that renewed admissions of guilt will be detrimental to an accused, as he himself erodes the presumption of innocence. Yet, it would be unduly restrictive to read them as preventing an accused from voluntarily reiterating his statements or reusing evidence submitted from the earlier proceeding, provided that the decision is an informed one, preferably made with the advice of defence counsel. Regardless of whether or not the panel is the same one that heard the plea, the general prohibition against using materials from the earlier proceeding should not prevent submissions and evidence by an accused in the course of trial from being treated as 'fresh' submissions. Thus, if as in *Valente*, the accused acting through his defence counsel wishes to resubmit evidence or pleadings in the course of the new proceedings, that would seem to be consistent with his fundamental right to conduct his defence in the way that he sees fit. It would then be perfectly in order for the trial court to rely on such material in reaching its decision, as was done in *Valente*.

3.3 Assessing the handling of the guilty plea by the Special Panel

The cogent opinion of Judge Frederick Egonda-Ntende of the Court of Appeal in *Joao Fernandes* clearly points to significant weakness in the Special Panel's practice on admissions of guilt. Responsibility for the lack of infrastructural support, for example, transcribing facilities and adequate multilingual translation, rests with the administrators of the judicial system, initially UNTAET's Department of Justice, which became part of the East Timor Transitional Administration in the year before full independence. Some of the problems in East Timor may also be due to the fact that none of the judges of the Special Panels have expertise in or experience of working in the field of international criminal law, and as international observers have pointed out, they have not been provided with training or adequate resources in order to develop their capacity in this area.¹⁰⁷ These deficien-

105. *The Public Prosecutor v. Jose Valente*, *supra* n. 78.

106. *Ibid.* For example, at page 5 the panel stated that 'The statements of the Defendant must be considered with the facts and with the statements of the witnesses before the court.'

107. See *Justice in Practice: Human Rights in Court Administration*, pp. 10-12, *supra* n. 77. See also *East Timor: Justice past, present and future*, Amnesty International, AI Index ASA 57/001/2001, 27/7/01.

cies may also explain the unsatisfactory way that duress and superior orders have been handled, as will be seen in the following sections.

The problems may also be read as indicating that the ICC's provision on admissions of guilt does not provide judges of internationalised domestic tribunals with adequate guidance, and needs to be supplemented if its procedural streamlining purpose is to be achieved. It may well be that international judges of the ICC would not need to be given detailed rules on how to conduct such hearings, but East Timor's Special Panels have clearly had difficulty in grasping the rationale behind certain legal norms, for example, the reasoning behind rules that require investigations to be made of an accused to ascertain that a guilty plea meets the standards set down in law. It would seem that such courts would benefit from clear legislative guidance to ensure that standards of evidence and burdens of proof do not fall by the wayside simply because there is a guilty plea. Even if there is a guilty plea, the court needs to ensure that accused can only be convicted if the evidence of that guilt is convincing in accordance with the basic criminal standard, whether it is to satisfy the 'intimate conviction' in civil law or beyond reasonable doubt in common law.

A key element missing in all Special Panel and most related Court of Appeal decisions to date has been analysis and reliance on international standards. Given that under the basic law of East Timor (Regulation 1999/1, the very first law adopted by UNTAET) all laws and decisions must be consistent with the key human rights treaties (ICCPR, ICESCR, etc), it is surprising that decisions in these United Nations' courts are rarely made with reference to those international norms or international jurisprudence. It is perhaps excusable that this does not occur in the many Serious Crimes cases which are processed as domestic crimes under the Indonesian Penal Code, but even in the single crimes against humanity case to be heard at the time of writing (*Lospalos*), the submissions of the parties on international criminal law were simply reprinted in the judgement without any analysis or application by the Special Panel. And, as the foregoing examination reveals, many of the problems of the Special Panel's handling of the *Fernandes* case are similar to those that arose in *Erdemović*, yet no lessons appear to have been learnt from the latter case.

Although in a minority, the standards of due diligence demanded by Judge Egonda-Ntende of a court faced with a guilty plea are in line with international practice and should be utilised in order to improve the quality of justice in East Timor. In the particular context of the East Timorese cases, it is suggested that where (1) the accused is uneducated or illiterate, or suffering from any kind of intellectual or mental disadvantage; (2) defence counsel appear not to understand the issues (as occurred in *Erdemović* and certain Serious Crimes cases¹⁰⁸); and (3) the accused raises coercion in the form of both superior orders and duress, this should alert the panel to the necessity of giving an explanation in order to ensure

108. For example, in the *Soares* case, defence counsel argued that superior orders were a defence. *Public Prosecutor v. Carlos Soares*, *supra* n. 67.

that the accused understands what he is pleading to. If any doubts remain, or if it is clear that a possible defence is at issue, the panel must proceed to a full trial. As discussed in section 3.2.2 above, the recent cases of *de Deus* and *dos Santos* indicate some improvement in the quality of the more recent practice, although this seems largely due to the Special Panel's reliance on the presence of international defence counsel as a safeguard. The post-*Fernandes* practice suggests that the Special Panels now shy away from taking decisions at the pre-trial stage and prefer to proceed to trial whenever the issue of coercion is raised. It could be that Judge Egonda-Ntende's criticisms in that case have caused a crisis of confidence in the panel when faced with allegations of coercion at the plea stage. Yet, every accused who has gone to trial following a rejected admission of guilt has in fact been convicted, suggesting that the approach of the Special Panels is in fact over-cautious and that the duress-superior orders confusion could perhaps be sorted out at the plea stage by improving the quality of questioning of the accused. A panel could follow the guidance of Judge Egonda-Ntende and international jurisprudence such as *Erdemović*, *Jelisić* and *Kambanda* and explain the provisions of Regulation 2000/15 on duress and superior orders to an accused (and to counsel if need be) and then carefully question the accused to establish exactly what it is that he is saying. This would save the time, expense and trauma of going to trial, matters which are not lightly to be dismissed in East Timor.

4. DURESS

4.1 The law of duress in East Timor

Under the Indonesian law applicable at the time of commission of the offences falling within the jurisdiction of the Special Panels, duress was not expressly recognised as a defence although *force majeure* (undefined) was.¹⁰⁹ Section 19(d) of UNTAET Regulation No. 2000/15, following Article 31(1)(d) of the ICC Statute, permits duress as a defence in certain circumstances. There must have been:

1. a threat of imminent death or of continuing or imminent serious bodily harm;
2. the accused must have acted necessarily and reasonably to avoid the threat; and
3. the accused must not have intended to cause a greater harm than the one sought to be avoided.

109. Art. 48, Indonesian Penal Code, *supra* n. 5.

4.2 **Issues arising from the use of the ICC Statute's provision on duress in East Timor**

4.2.1 *How is the test of duress being applied?*

The test formulated at Rome is being strictly applied in East Timor. Duress is correctly being treated by the Special Panels as an extreme situation. No one has been acquitted on the grounds of duress, possibly because of the striking fact that corroborating evidence of duress has never been submitted by defence counsel. The general practice can be illustrated through the following cases.

In *Julio Fernandes*,¹¹⁰ the accused, a member of the resistance forces (FALINTIL) was charged with murder in violation of Article 340 of the Indonesian Penal Code. He admitted to killing a captured militiaman but claimed that he had been forced to do so by an angry crowd: an equivocal plea. The Special Panel declined to accept this as a guilty plea under Section 29A1 of the Transitional Rules of Procedure and referred the case for trial. During the trial, Fernandes claimed he had stabbed his victim twice during a tense situation with an hysterical crowd shouting, 'kill him, kill him'. The extremity of the situation was confirmed by prosecution witnesses who had been present. According to defence counsel, (1) the victim would probably have been killed anyway; (2) there was duress resulting from the threat of imminent death coming from the crowd; and (3) the victim had already been seriously maltreated and there was no evidence that the wounds inflicted by Julio Fernandes caused his death.

On 27 February 2001, Fernandes was convicted and sentenced to seven years imprisonment for deliberate and premeditated murder.¹¹¹ The Special Panel found that Fernandes had approached the victim, questioned him and, having listened to his answers, decided to kill him and only then stabbed him twice: 'It was not an instinctive reaction to a very peculiar situation, but a decision reached by reasoning.'¹¹² In rejecting the allegation of duress, the Special Panel found that the crowd was not threatening Fernandes, but calling on him, as a representative of the FALINTIL, to punish the captured militiaman in an 'official way'. It rejected the allegation that the crowd would have threatened his life had he refused to kill him in light of the fact that another person had refused to kill him and had walked away unscathed.¹¹³ The argument that the victim would have died anyway (the 'wasted sacrifice', an issue discussed at length by the Appeals Chamber judges in

110. *Prosecutor v. Julio Fernandes*, case No. 2/2000, Trial Decision, 1 March 2002, p. 11.

111. *Ibid.* The East Timorese judge dissented, finding the accused guilty of unpremeditated murder only.

112. *Ibid.*, at p. 8.

113. It should be noted that on appeal, Judge Egonda-Ntende noted that the Special Panel had made findings that were not based on the evidence before them, in particular that there was no evidence that this other person had been asked to kill the victim, and that other person had in fact stated that the shouts of the crowd were not directed at him. *Julio Fernandes v. Prosecutor General*, Criminal Appeal No. 7 of 2001, Ruling of the Court of Appeal, 29 June 2001, with Separate Opinion of Judge Frederick Egonda-Ntende, Nos. 13 and 14.

Erdemović), was not considered at all. This rejection of duress was later confirmed on appeal.¹¹⁴

In *Bere*,¹¹⁵ the accused argued coercion, interchangeably claiming superior orders and duress. He was charged with murder in violation of Article 340 of the Indonesian Penal Code for the killing of Joao Goncalves on an undetermined day at the end of September 1999. Bere was by his own admission a member of the Daderus Merah Putih militia and he admitted stabbing the victim with a sword, but claimed to have been acting under pressure and following an order. At the preliminary hearing, his guilty plea was rejected and the case proceeded to trial.

Bere gave a number of contradictory statements about the circumstances that led to the killing. It seems that he, his old friend Raimundo Bere Mau and two others (who both testified in court) were part of a group that drove from West Timor to East Timor that night, having been told to do so by TNI (Indonesian army) members. He said he went along because he was afraid of the TNI. The accused was contradictory about the purpose of the trip, interchangeably claiming both that the mission was tasked with collecting the body of Joao Goncalves and disposing of his body in East Timor and killing him and disposing of the body in East Timor. Bere spoke repeatedly of 'orders' and duress, for example:

'I was invited to pick up a dead body and bring it to East Timor, but it was still alive and therefore I was ordered to kill. I had big argument with Raimundo. If I'd refused he would have shot me.'¹¹⁶

There were numerous other inconsistencies in the accused's testimony, such as whether the victim was alive or dead when they reached him and put him in the vehicle. The two witnesses who were present did not hear any argument between Raimundo and the accused, and also stated categorically that when they got to the victim he was still alive. He was even able to walk and sit in the car despite having been seriously wounded.

The Special Panel rejected the allegation of duress due to the conflicting statements and the lack of any corroborating evidence. It was also persuaded that the accused would hardly fear his long-time friends (the two TNI officers Raimundo and Rui), with whom he had worked together on many occasions. The Special Panel did not consider if, in principle, Bere, as a member of the Daderus Merah Putih militia, was eligible to claim duress. It did, however, find that he had killed

114. See the discussion at para. 20 of the Separate Opinion of Judge Egonda-Ntende, *ibid.* The majority ultimately found that the question of duress was not fundamental to the basis of the appeal: para. 12 of majority decision.

115. *The Prosecutor v. Manuel Goncalves Leto Bere*, alias Manuel Leto Bere, case No. 10/2000, Decision, 15 May 2001.

116. Note that during the trials interpreters regularly translate the Bahasa Indonesia word 'jemput' as 'invite', which in English creates the impression that the accused had a choice. This is not necessarily so, for in Bahasa Indonesia, 'jemput' can include picking someone up or fetching a person and the expectation is that the person is compliant.

under superior orders, warranting mitigation of sentence. He was sentenced to 14 years.

In the *Lospalos* crimes against humanity case, none of the claims of duress brought by the multiple accused were accepted. One of the accused, Manuel da Costa, had claimed that another accused, Joni Marques, had threatened him and forced him to participate in the ambush and murder of a group of clergy. The panel was not satisfied that da Costa acted under duress when he joined the operation to kill the clergy and actually took part in the killings:

‘It is unreasonable that Manuel da Costa, a militiaman who had joined the group more than ten years earlier and holding a high position, did not know the purpose and could feel threatened that he was going to be killed by one of his colleagues. The alleged duress is based on a hypothetical threat to have his legs crushed or even to be killed, but no one in the group had been killed for refusing to follow an order from the commander until that time.

Manuel alleges having joined Team Alfa because he was threatened and tortured. As already decided by the Panel in the case of *The Prosecutor v. Josef Leki*, the alleged duress has to be current; not the alleged duress to join a group. There is a difference between being forced to join a group and to be engaged in a particular operation of a group. The words of Manuel to Joni Marques at the time when the grenade was thrown into the water sound like a comment only about the accomplishment of the operation, rather than a refusal to obey an order from Joni Marques (‘Why throw the grenade if they are all dead?’).¹¹⁷

4.2.2 *Voluntary participation in a criminal undertaking*

In *Erdemović*, Judge Cassese found that the first thing that must be done is to determine whether the situation leading to duress was voluntarily brought about by the accused.¹¹⁸ In particular, the trial court is first required to examine whether the group of which the accused was a member and with whom he had voluntarily enlisted was purposefully intent upon actions contrary to international humanitarian law and the appellant either knew or should have known of this when he joined it, or, if he only later became aware of it, that he then failed to leave the group or otherwise disengage himself from such actions. If the answer is in the affirmative, he cannot plead duress. Equally, he could not raise this defence if he in any other way voluntarily placed himself in a situation which he knew would entail the unlawful execution of civilians.

In only one East Timorese case, that of *Yoseph Leki*, has it been found that there was a threat of imminent death or bodily injury to the appellant. Yet duress was denied to the accused because the panel felt he had voluntarily associated with the

117. *Lospalos* Decision, *supra* n. 68, paras. 935-936.

118. *Erdemović* Appeal Decision, Separate Opinion of Judge Cassese, *supra* n. 16, para. 50.

criminal activities of the group. The practice of the Special Panels is to reject claims of duress on the basis that there were other choices available to the accused and that he deliberately chose the criminal option. This is particularly clear in the situations where accused persons claim that they were forced to join militias. In these cases, there is surprisingly little informed assessment of the feasibility of those options to someone in the accused's position.

During the trial of *Jose Valente*, the defence submitted that the accused had no choice but to cooperate with the local militia as his parents were members of the armed resistance, FALINTIL.¹¹⁹ The accused testified that he had been detained and tortured by the Indonesian special forces, KOPASSUS. He was only released after agreeing to obtain information on FALINTIL, and was forced to join the militia in the mid-1980s. Valente told the court that 'those who controlled us forced us'. The panel found that there was no evidence of duress, perhaps because the defence case consisted only of the accused's evidence. Unanswered are the questions of whether, such evidence being present, the subjective circumstances outlined by Valente could convince a court that he joined the militias under duress, and whether that duress could have continued for a considerable period of time, even amounting to years.

There are many reliable reports about the criminality of the East Timorese militia groups, including those of the International Commission of Inquiry, the Special Rapporteurs and Indonesia's KPP-HAM.¹²⁰ But in no case has a Special Panel entered into any substantive analysis of the militias by way of evidence submitted in the course of proceedings or summoned *proprio motu* by the court. The sorts of questions that one would expect the Special Panel to have asked by now include the following: What was the relationship between the militias and the Indonesian authorities? Were they legal or illegal organisations? How were they funded, equipped and trained? Who did they take their orders from? How were they structured? Were they controlled centrally? What was the purpose of the militias – were their activities directed at achieving a lawful or illegal purpose? Was the commission of serious offences, whether or not international crimes, a routine part of their activities? Was their sole or dominant intent and purpose that of violently and brutally bringing about a certain course of events? Did they achieve those means through criminal methods?

Without having asked such questions, the Special Panels have proceeded on the basis that the militias were a criminal organisation pursuing criminal activities. In

119. *Public Prosecutor v. Jose Valente*, *supra* n. 78.

120. Report on the Investigation of Human Rights Violations in East Timor (2000), KPP-HAM (Investigation Commission of the Indonesian Commission on Human Rights), ('KPP-HAM Report') para. 51; Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc A/54/726, S/2000/59 (2000) ('Report of the International Commission of Inquiry'); Report of the Joint Mission to East Timor by the Special Rapporteur of the Commission for Human Rights on Extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture, and the Special Rapporteur on Violence Against Women, UN Doc. A/54/660, 10 December 1999 ('Report of the Special Rapporteurs').

light of this, one is led to suspect that the judges draw on personal opinions and extraneous sources. This sort of practice led to the situation in *Leki*, where the Special Panel made findings of fact about Indonesia's role in the East Timor carnage without any evidence being submitted by the parties, without the issues being litigated, by relying on a test of 'what even the humblest and most candid man in the world can assess' and by drawing on extraneous sources of information.¹²¹ Another contributing factor may be the already mentioned poor quality of translation in the Serious Crimes cases.¹²² Although less than half of the accused who have come before the Special Panels to date have explicitly stated (in English translation) that they were forced or threatened into joining the militias, the rest refer (in English translation) to 'being selected' or 'invited' to join local militias. While this is often considered by the court to be voluntary participation, this is not always an accurate conclusion. An 'invitation' to join the militia from an armed and feared militia leader who controls the area where the invitee and his family live is not likely leave him with a choice. One of the ten accused in the *Lospalos* case, Gilberto Fernandes, testified to having been employed as a cook at the KOPASSUS (Special Forces) base.¹²³ He said that one of the officers noticed he had a 'good attitude' and from then on he was considered part of the militia. During questioning, he denied 'joining' the militia, inferring that he was essentially 'appointed' and that this was not his choice.

In the circumstances of East Timor, it is dangerous to assume that because a person was a militiaman he was voluntarily associated with it and willingly went along with criminal activities. In June 1999, Amnesty International reported that:

'There are many credible reports of people being coerced into joining militia groups. Recruitment operations have targeted whole villages. In one case, 12 people in Atara village in Ermera District were killed on 16 May 1999, apparently because the village had refused to join the militia group Tim Pancasila. A number of other people described to Amnesty International how they had been threatened, beaten or detained because they had refused to join militia groups.'¹²⁴

The frequency of accused raising this issue in Serious Crimes cases suggests that there was indeed massive forced recruitment of civilians into the militias in East Timor, that is, involuntary participation.

121. Case No. 5/2000, *The Prosecutor v. Yoseph Leki*, Judgement, 11 June 2001, p. 7.

122. *Supra* n. 77.

123. KOPASSUS are the special forces of the Indonesian Army. They are believed to have established, trained, equipped and directed the militias.

124. Amnesty International, East Timor: Seize the Moment, AI Index: 21/49/99, 21 June 1999.

The Special Panels have taken a rigid position.¹²⁵ This is illustrated by the case of *Yoseph Leki*, who was found to have voluntarily joined the Laksaur militia. He said that he could not flee the village for the hills as he had several young children and elderly relations, and did not consider fleeing with his family to the site of a notorious church massacre as a viable option. By way of comparison, child soldiers forcibly recruited into the armed forces cannot be said to have voluntarily exposed themselves to the danger. Certainly the age of the person will have a role but that in itself requires a subjective look at the facts of the case, rather than a blanket ruling to the effect that those who did not have the courage to stand up to the militias and flee to the hills did in fact exercise a decision to 'be with the guns',¹²⁶ to use the words of the Special Panel, and therefore cannot have recourse to the defence of duress.

The exact circumstances of how Leki joined the militia (two notorious Laksaur leaders, Olivio Moruk and Igidio Manek, were allegedly involved) were not examined in detail by the panel and the coercion at that particular point was not explored. Yet, the Special Panel refused to accept that he had no choice. It argued that while no one was expected to be a hero, others had been able to refuse to join the militia and had fled rather than resort to criminal activity. It may well be that the court simply did not believe him, for it found inconsistencies in Leki's testimony about his exact role leading up to 25 September 1999 and that he had carried arms since he joined the militia in June 1999 and was present with arms during the 25 September 1999 attack.

Having rejected the argument that Leki was forced to join the militia, the Special Panel then found he had been coerced into killing the victim. Prosecution witnesses (there were no defence witnesses) corroborated his claim that on 26 September 1999, he killed Paulino Cardoso under duress. One witness confirmed that Norberto Ximenes 'jumped and aimed his rifle at Yoseph Leki and said, 'Shoot him or I'll shoot you'. Another eyewitness told the Special Panel that Norberto had shot the victim, who was still alive, and then 'faced Leki ... Joseph [sic] Leki was the last to arrive. Then Norberto pointed the gun to Joseph [sic] Leki and spoke to him: 'If you don't shoot, I will kill you'.¹²⁷

The Special Panel acknowledged that this amounted to duress, but denied the defence to Leki, holding that duress is not an available defence to a perpetrator who deliberately joined the common purpose of the group with knowledge of the intention to commit the crime.¹²⁸ The Special Panel found that Leki had the option, up to the very last moment when the duress occurred, to avoid the situation by

125. In *Mateus Tilman*, the court held that he could have left the militia at any time during the months preceding the events charged, despite his claims that he had been forced to join. *The Prosecutor v. Mateus Tilman*, case No. 8/2000, Judgement, 14 June 2001. Also, in *Jose Valente*, the court held that he did not have to go with the militia group when they attacked independence supporters. *Supra* n. 78. Other examples include *Agustino da Costa*, *supra* n. 104, and *Augusto Asameta Tavares*, *supra* n. 104.

126. *Prosecutor v. Yoseph Leki*, *supra* n. 21, p. 8.

127. *Ibid.*, p. 7.

128. *Ibid.*, p. 9.

simply refusing to contribute to the attacks. There is no record that the Special Panel asked the fundamental question of why Norberto had to point a gun at Leki to make him kill the victim. If Leki really was ‘with the guns’, as claimed by the Special Panel, why did this person have to coerce him? Did he in fact refuse to kill, which would have been consistent with his claim that he was not a willing member of the group? If he had been voluntarily involved, as claimed by the panel, could Leki not have changed his mind about his involvement in criminal activity? Criminal law in most countries recognises that a person may escape liability if he is able to withdraw effectively from the criminal venture, but active and meaningful steps are needed for this. For example, an erstwhile accomplice may withdraw from the enterprise by trying to prevent the commission of the offence by the perpetrator, by informing the police. Something obviously transpired between Norberto and Leki which led Norberto to point his gun at Leki, but the Special Panel failed to address this crucial issue. It is also pertinent to recall the example given by Judge Cassese in the *Erdemović* case.¹²⁹ He suggested that a subordinate faced with a manifestly unlawful order is under a duty to refuse to obey the order but if his refusal is met with a reiterated order to perform the task under a threat to life or limb, then the defence of duress may be raised. Yet the Special Panel’s judgment in *Leki* does not tell us who Norberto was and whether he had any authority to give orders to the accused and whether those orders had to be obeyed. Perhaps the most troubling aspect of the *Leki* decision is the fact that it has been regularly cited as the leading authority on duress in subsequent cases before the Special Panels, including the *Los Palos* case.

4.3 Assessing the handling of duress by the Special Panels

Issues of proof are obviously crucial and yet posterity must record the extraordinary fact that in no Serious Crimes case so far has any witness (apart from the accused) been called by the defence, even in cases where the accused has not made a confession.¹³⁰ The lack of appreciation of the actual demands of fair trial and due process norms extends to the court’s application of the Transitional Rules of

129. Separate Opinion of Judge Cassese, *supra* n. 16, para.15.

130. This issue is clearly linked to the considerable resource disparity between the small East Timorese public defenders’ office and the larger, internationally-run Serious Crimes prosecution and investigation unit. Necessary facilities such as transport to remote districts, telephones and money for witness expenses have not been made available to the public defenders. Surprisingly, this has not concerned the Special Panel, which has never in the course of proceedings inquired about the conditions under which the defence operate and whether there is a level playing field enabling them to develop their case on the same terms as the prosecution, let alone taking steps to assist in the creation of suitable conditions for the exercise of the right of defence. It is also suggested that in the particular circumstances of East Timor, where poorly trained local defence counsel have struggled to defend their clients with minimal resources, the interests of justice would require the Special Panel to ensure that at all stages of the proceedings the defence is being given equal opportunity to find evidence and develop its case as that enjoyed by the Prosecution. See Judicial System Monitoring Programme, *The Prosecutor v. Joni Marques and 9 others* (The *Lospalos* case), A JSMP Trial Report, February 2002, p. 23.

Criminal Procedure. In the *Leki* case, the Special Panel effectively blocked the appearance of four defence witnesses in a case where the defence was of duress. At the end of the preliminary hearing, defence counsel advised the court that he was trying to contact witnesses in West Timor. However, the Court did not consider this to be a formal application to present evidence and the case was listed for trial. Then, at the commencement of the trial, the defence counsel presented a list of four witnesses who were prepared to testify in favour of the accused. However, the Special Panel dismissed this application to present evidence on the basis that it was 'ill-timed', as Section 29 of the Transitional Rules of Criminal Procedure requires that such matters are resolved at the preliminary hearing, when the court shall determine what evidence the defence intends to present to the court, as well as granting additional time to present additional evidence. The Transitional Rules of Criminal Procedure also state that during the trial the court has the power to call any additional witnesses it wishes to hear after the parties have completed their submissions. Thus, legally, the panel could have called those four witnesses.¹³¹ East Timor's transitional legal system is a hybrid one, based on the Indonesian-Dutch civil law model as amended by UNTAET. This envisages a pro-active judiciary that seeks to establish the truth rather than arbitrate an adversarial process between prosecution and defence. Given this, the passivity of the Special Panel in 'getting to the bottom of things' is surprising.

A disturbing feature that arises from this study is that the Special Panels seem to have divided the East Timorese into two groups: 'good' people who fled to the hills and 'bad' people who chose to stay in their villages. The latter are regarded as not being worthy of the defence of duress, without serious consideration of the choices that individuals had to make and their subjective circumstances in an extreme situation. There is surprisingly little effort to establish what an accused means when he claims to have been forced to commit a crime, or the circumstances in which the accused say they joined the militia and whether it can be said to have been under duress or not. One rare incidence of judicial activity on this front occurred in the *Leki* case, when the sole East Timorese judge began vigorously pursuing a line of questioning to the accused about the links between the militia and the TNI, only to be stopped by the presiding judge (Burundian). No reason was publicly given for the halting of that questioning.

For the Special Panels to do justice in Serious Crimes cases, they must base their decisions upon a thorough examination of the realities of East Timor. That would mean assessing issues such as the power structures, the players and the political dynamics that operated in East Timor and eventually led to the violence of September 1999. The situation in East Timor during 1999 cannot be meaningfully divorced from the history of the Indonesian occupation since 1975, which was characterised by widespread violence, terror, intimidation and regular harassment by the Indonesian armed forces, particularly of those identified as having family members working with the resistance movement or who were suspected of such

131. Section 33.2, Transitional Rules of Criminal Procedure, *supra* n. 7.

involvement themselves. Such people were often specifically targeted to prove their allegiance through involvement in, for example, militia activity. Many East Timorese have reported the complexity of public versus private allegiances throughout the 24 year occupation, such as working with the Indonesians to deflect attention from their clandestine resistance activities or to take the pressure off their families, who in turn may have been targeted. This raises questions of the linkage between repression in a time of occupation and coercion. The pragmatic and shifting choices that people made to avoid suspicion and to keep out of trouble are not only complex but extremely difficult to assess for the purpose of legal categorisation.

During 1999, the pattern of capture, abduction, torture, murder and forced recruitment into militias intensified with the emergence of the second option given to the people of East Timor: independence should they reject autonomy within Indonesia.¹³² This context was described by one of the East Timorese public defenders during the closing submissions of the *Lospalos* trial. She outlined the nature of the environment that the accused, Hilario da Silva, faced *vis-à-vis* powerful militia figures and the TNI in his village. The militia had been given the authority by the Indonesian military to terrorise the ordinary population and was protected by them. The reality was that ordinary people had no choice; to stay alive, one did as one was told. In response to the suggestion that the accused could have reported threats to the police, counsel stated that:

‘The people who should have received such reports were not just involved but were main actors! ... At that time Team Alfa was very very powerful. They can kill anybody, they can do anything and commit any crime. They manipulated and used ordinary people and intimidated them to follow the wish of the Indonesian armed forces ... Ordinary people were scared and did such things.’¹³³

The Special Panel rejected the argument on the basis that there was no evidence that da Silva had been forced to participate but only ordered to do so. Here too, as in all other Serious Crimes cases, the Special Panel did not investigate if the defence was being provided with the means to find evidence of what was being alleged.

Duress to join a group engaged in criminal activities and duress to commit a crime when part of that group each requires its own evidence. The two may in certain situations be linked and the Special Panels need to be more flexible and carry out a balanced assessment that examines both issues thoroughly. There certainly does come a point where a judicial assessment has to be made about whether the extent of a person’s involvement with the militias has become more about voluntary participation rather than participation under duress. This is not a

132. See KPP-Ham Report, para. 124, *supra* n. 120. Also, see Amnesty International, Paramilitary attacks jeopardise East Timor’s future, ASA 21/026/1999 of 16 April 1999; Amnesty International, East Timor: Seize the Moment, AI, *supra* n. 124.

133. Independent Observer notes, on file with Caitlin Reiger.

call for the Special Panels to excuse anyone who raises the cry of duress because they were forced to join the militias, but for a more diligent assessment of the realities of the environment at the time or times of the alleged duress.

5. SUPERIOR ORDERS

5.1 The law in East Timor

Under Section 21 of Regulation 2000/15, the fact that someone accused of Serious Crimes acted pursuant to an order of a Government or a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the panel determines that justice so requires.¹³⁴ Here the drafters chose to reject the ICC Statute's provisions and revert to the IMT/ICTY/ICTR position. By doing so, they placed upon the Special Panels an obligation to examine customary international law to determine the content of the law on superior orders, in particular, the test for identifying superior orders described earlier.

Section 21 introduced a new concept to East Timor, replacing Article 51 of the Indonesian Penal Code, which recognised superior orders as a defence in certain circumstances.¹³⁵ Article 51 provides that:

- (1) Not punishable shall be the person who commits an act for the execution of an official order issued by the competent authority.
- (2) An official order issued incompetently shall not exempt the punishment unless it was considered in good faith by the subordinate to be issued competently and its execution lied [sic] within the limit of his subordination.

It should be noted that Article 51 can be raised by accused on trial at Indonesia's Ad Hoc Court for Human Rights, which is currently processing cases arising from the East Timor violence, and in East Timor itself for cases pursued as 'Ordinary Crimes'. This may explain why so many East Timorese accused and their defence counsel seem to be confused about superior orders and duress under Regulation 2000/15, and continue to believe that because an act was committed pursuant to someone's order, the perpetrator is neither morally nor criminally responsible for his actions.

134. Regulation 2000/15, *supra* n. 4, s. 21.

135. *Supra* n. 5. Indonesian law is derived from Dutch law and Art. 51 is not unusual. For example, it is similar to Arts. 122-124 of the 1994 French Penal Code, which provides that: '[1] A person is not criminally responsible if that person performs an act prescribed or authorised by legislative or regulatory powers. [2] A person is not criminally responsible if that person performs an act ordered by a legitimate authority, except if that act is manifestly unlawful.'

5.2. Retroactivity and the removal of a legitimate defence

The fundamental principle of *nullum crimen nulla poena sine lege* requires that no one be tried or punished for acts that were not criminal at the time they were committed.¹³⁶ Given that superior orders were a defence at the time that the offences were committed and continue to be applicable in Ordinary Crimes cases in East Timor, there appears to be a legality problem with Section 21's prohibition of its use as a defence by Serious Crimes accused. This is a very important issue for the majority of East Timor's Serious Crimes defendants who have been tried to date, charged with violating the Indonesian Penal Code and not with international crimes.

Retroactive laws were also a problem with the post-World War II German and Japanese cases. The controversy over the legality of the subject matter jurisdiction of the IMTs is well recorded.¹³⁷ Less attention has been focused on the legality aspect of the doctrine of obedience to superior orders. This provided a defence under domestic law in Germany and Japan at the time the crimes were committed. The courts have tended to avoid the issue of legality by relying on the rationale that whatever local laws said, soldiers are not automatons and are only bound to obey lawful and are obliged to disobey manifestly unlawful orders¹³⁸ or 'the rule that superior orders is not a defence to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively'.¹³⁹

As the *Dover Castle* case before the Leipzig court revealed, German military doctrine was that the subordinate was bound to obey the orders of his superiors, but when that order involved a criminal act, it was the superior alone who was responsible unless the subordinate was found to have been an accomplice.¹⁴⁰ German National Socialist law embraced the concept of the *Führerprinzip*, under which the leader's orders were to be obeyed, and it was the leader who would be responsible for the consequences of that order. Until 1944, Allied military codes, such as that of the United States and the United Kingdom, reflected the classic position as stated in Oppenheim's International Law, which recognised a limited defence of superior

136. See Universal Declaration of Human Rights, Art. 11(2); International Covenant on Civil and Political Rights, Art. 15.

137. From the start, defence counsel strenuously objected to prosecutions not specifically criminalized by international treaties or custom, let alone domestic law, but on the basis of a law passed after the acts had been committed.

138. *Einsatzgruppen*, *supra* n. 24, p. 472.

139. In *Re List and others (Hostages Trial)*, United States Military Tribunal at Nuremberg, Feb. 19 1949, War Crimes Reports, 8, (1949) reported in *Annual Digest and Reports of Public International Law Cases, 1948*, ed. H. Lauterpacht, p. 34.

140. *Dover Castle*, 16 *AJIL* (1922) p. 704. According to L.C. Green, under section 47(2) of the German Military Penal Code 1882, while the subordinate was bound to obey the orders of his superior, he would be punished as an accomplice to a criminal act if he knew that the order concerned an act criminal by either civil or military law and this was still German law at the end of the Second World War. 'Superior Orders and the Reasonable Man', in Green, *op. cit.* n. 40, at p. 260.

orders.¹⁴¹ The position was revised during the Second World War to the effect that 'members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity'.¹⁴² The United States' Field Manual was amended shortly after to the effect that all those who violate the accepted laws and customs of war may be punished, and that superior orders 'may be taken into consideration in determining culpability, either by way of defence, or in mitigation of punishment'.¹⁴³

As noted, the two international military tribunals excluded superior orders as a defence. The Nuremberg Tribunal avoided the problem of the *ex post facto* removal of the defence that had applied in Germany by stressing that a soldier 'was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though as the Charter here provides, the order may be urged in mitigation of the punishment'.¹⁴⁴ The tribunal in *Einsatzgruppen* specifically attacked the myth of absolute obedience to superior orders in German law by way of reference to the accused Seibert's testimony which indicated he saw that he had choice in the matter of obeying superior orders and in its examination of German precedent on the superior orders doctrine'.¹⁴⁵

In the *Masuda* (Jaluit Atoll) case, defence counsel pointed out that the then-applicable Japanese law required complete obedience and that it was impossible to apply 'the liberal and individualistic ideas which rule usual societies unmodified to this totalistic and absolutistic military society'.¹⁴⁶ The court rejected this, focusing on manifest unlawfulness and convicted the accused. It found that:

'an order illegal in itself and not justified by the rules and usages of war, or in its substance clearly illegal so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in which may be necessary to constitute the same crime in law'.¹⁴⁷

Bassiouni has raised the issue of legality in relation to new laws in former Soviet bloc nations that do not recognise the legal effects of superior orders or by

141. See *U.S. Dep't of the Army Rules of Land Warfare*, at 347 (Field Manual 27-10). Oppenheim's *International Law*, Vol. 2 (1906) took the position that members of the armed forces who commit violations ordered by their commander the member cannot be punished, for the commander is the one responsible: see Green, *op. cit.* n. 40, at p. 262.

142. Lauterpacht's amendments to the 1940 and 1944 editions of *International Law*, cited in Green, *op. cit.* n. 40, at p. 263.

143. *Supra* n. 141, Field Manual 27-10. Also see British Manual Amendment 34, April 1944.

144. IMT Judgment, *supra* n. 36, pp. 235-236.

145. *Einsatzgruppen*, *supra* n. 24, p. 472, 473, also p. 483-488.

146. The Trial of Admiral Masuda, cited in Green, *op. cit.* n. 40, at p. 265.

147. *Ibid.*

declaring laws permitting superior orders as a defence to be null and void.¹⁴⁸ He cites the case of two East German border guards, who carried out 'shoot to kill' orders on the basis of then-applicable laws, and were convicted of manslaughter with the defence of superior orders being denied.¹⁴⁹ Clearly such orders would be manifestly unlawful. Yet Bassiouni argues that for such accused persons, the removal of the superior orders defence 'would not work as a way of policy prevention but as retributive vengeance against those who may not have been in a position to exercise a moral choice'.¹⁵⁰

The principle of legality enshrined in Article 15 of the ICCPR addresses itself to new laws that turn previously lawful actions into criminal actions, permitting a person to be prosecuted and punished. A defence provides an excuse, a justification to criminal actions. If a defence is accepted, the accused is acquitted and incurs no moral or legal guilt. This does not mean that no crime was committed; what it does mean is that the accused was not proven to be guilty of the charges against him and the presumption of innocence remains intact. If obedience to superior orders as a defence mean that a person's actions that are otherwise criminal acts become lawful, would retroactively removing the defence not violate the principle of retroactivity? This proposition finds support in the writings of Bassiouni, who argues that this would clearly be a violation of the principle of legality for it removes the legal basis for the legitimacy of the order that was followed.¹⁵¹ Finally, the prohibition on retroactive criminal law bars the imposition of a heavier penalty than was prescribed by law at the time of the offence. In East Timor, when obedience to superior orders is raised by an accused under Section 21 of Regulation 2000/15, this will invariably be accompanied by an admission of particular conduct. If a conviction is entered, any sentence that is not mitigated to zero will be heavier than what existed at the time of the offence. Thus, one could argue that section 21 is null and void and its use in Serious Crimes cases is a grave violation of a fundamental principle of justice.

No Special Panel has considered this issue, although in the recent case of *de Oliveira* it was found that Regulation 2000/15 violates the prohibition against retroactive criminal laws insofar as it seeks to regulate the offences of murder and rape under the Indonesian Penal Code.¹⁵² The case required examination of the broad definition of individual criminal responsibility contained in Regulation 15/2000, as the court found that the accused, a member of the Mahidi militia, was

148. M.C. Bassiouni, *Crimes Against Humanity in International Law*, 2nd revised edn. (The Hague, Kluwer Law International 1999) p. 483.

149. *Ibid.*

150. *Ibid.*

151. *Ibid.*

152. *Public Prosecutor v. Anigio De Oliveira*, case No. 7/2001, Decision, 27 March 2002 (currently only available in Portuguese).

not the main perpetrator in the killing of Fernando Gomes.¹⁵³ Gomes' house had been set alight while he and his family were still inside by a group of militia that included the accused. When Gomes ran out of the house, he was shot by another militia member. The accused was found to have been the one who had first summoned Gomes out of the house. Although de Oliveira had been charged with murder under Article 340 of the Indonesian Penal Code, the Special Panel convicted him of the lesser offence of being an accomplice to murder.¹⁵⁴ The court did not address the impact of its finding of illegality in relation to the grounds for excluding such criminal responsibility set out in Regulation 2000/15, but it would seem to follow from the court's reasoning that the removal of a defence could possibly be found to be illegal at international law if the matter is litigated

5.3 Superior orders in Serious Crimes cases

As of 31 May 2002, all but three accused claimed to have been acting under orders as a means of justifying or explaining their conduct.¹⁵⁵ Of the 18 defendants who claimed to be acting under orders from either militia leaders or the Indonesian armed forces, the Special Panels accepted it as a mitigating factor for sentencing purposes in 15 cases. In virtually all of these cases, the accused also claimed some duress, generally described as the fear of being killed if the orders were not obeyed. These claims have been rejected and, as of 31 May 2002 there were no acquittals on the grounds of duress or otherwise.

Given the Special Panel's receptivity to superior orders as a mitigating factor, it seems that all accused are now raising it as a matter of strategy. However, it is not clear how much it weighs in mitigation. In this context, it should be recalled that the law does not require that the court must mitigate sentence, merely that the court may mitigate punishment in those circumstances where it is in the interests of justice.¹⁵⁶

What is the test used by the Special Panels for determining the existence of superior orders? The Special Panels have been deciding the existence of superior orders on an ad-hoc, case-by-case basis without applying any discernable test or standard, whether that enshrined in Article 33 of the ICC Statute or otherwise.

Several cases usefully illustrate the practice of the Special Panels. *Agustinho da Costa* was a member of Team Pancasila militia and was charged with the murder of

153. S 14.3 of Regulation 2000/15 is taken from the ICC Statute and sets out a broad range of bases for individual criminal responsibility; these include committing, ordering, aiding, abetting, otherwise assisting with the crime, or in any other way contributing to the commission of a crime by a group. The prosecutor had charged de Oliveira with several of these modes of responsibility for the murder. *Supra* n. 4.

154. Art. 56, Indonesian Penal Code, *supra* n. 5.

155. The only cases where superior orders have not been claimed are *Public Prosecutor v. Mateus Tilman* (case No. 8/2000); the lead defendant in the *Lospalos* case, Joni Marques; and *Public Prosecutor v. Carlos Soares Carmona* (case No. 3/2000), which is the only case not to directly involve politically-related violence but instead involved the murder of a person accused of witchcraft.

156. S. 21, Regulation 2000/15, *supra* n. 4.

an UNAMET staff member.¹⁵⁷ The accused claimed to have done everything pursuant to orders of the TNI commander (*babinsa*) in his village.¹⁵⁸ According to the accused, the *babinsa* had been present at all of the militia activities to ‘assist’ and command them, although he did not directly participate. Da Costa claimed that he was ordered to join the militia four months before the incident. At the preliminary hearing, he stated that he was not guilty because everything he did was in obedience to the orders of his commander, failing which he believed he would have been killed. He told the court that he had acted under compulsion:

‘I was forced, I was following an order. If I did not obey the order, I would be killed. They told me that I would be in trouble. I felt afraid. ...It was not on my own decision, my own initiative, my own will.’¹⁵⁹

The Special Panel rejected the guilty plea for being ambiguous, and in its judgement found that as the accused stayed in his village rather than flee, as did so many others, he must have supported the militia and its criminal activities and thus could not claim duress. The panel convicted him to 15 years; the sentence was mitigated by the existence of superior orders. Without applying any identifiable test or standard, the Special Panel found that ‘the defendant was ordered to look for and kill pro-independence and FALINTIL supporters’ and that he ‘carried out an order of Paul Babinsa [sic]’.¹⁶⁰ Yet, the only evidence of superior orders that emerged from this trial came from the accused. The panel accepted the existence of superior orders without establishing whether the accused was under a legal obligation to obey the *babinsa*, by investigating the relationship between the TNI and militias in the village, and more particularly the role of the *babinsa*, including whether the latter had the legal competence to give orders and whether his orders had to be obeyed by the accused. In reaching the conclusion that there was a superior order, the judgment did not consider if an order to kill the UNAMET worker – who was in fact subjected to a particularly gruesome death, involving being hacked and the chopping off of his hands and tongue – would have been manifestly unlawful and recognised as such by the accused. Likewise, the duty of the accused to disobey such an order, even if formally valid, received no consideration. Finally, da Costa was found to have been voluntarily part of a criminal enter-

157. *Prosecutor v. Agostinho da Costa*, *supra* n. 104.

158. *Babinsa* is an abbreviation of Bintara Pembina Desa, which is the title of a non-commissioned officer of a ‘trainer’ rank at the village level. The role of the *babinsas* in the TNI structure is discussed by Dr Peter Bartu in ‘The militia, the military, and the people of Bobonaro District’ in D. Kingsbury, ed., *Guns and Ballot Boxes: East Timor’s Vote for Independence* (Melbourne, Monash Asia Institute 2000) pp. 81, 83. It is possible that ‘Paul’, as a *babinsa*, was also a militia leader, but no clear evidence was ever led on this point.

159. *Prosecutor v. Agostinho da Costa*, *supra* n. 104.

160. The second *Erdemovic* Trial Chamber also accepted there had been superior orders and coercion on the basis of the accused’s word alone, but this was not during trial but in the course of a guilty plea. *Prosecutor v. Drazen Erdemovic*, Sentencing Judgment, *supra* n. 89.

prise and denied duress as a defence, yet this did not prevent the panel from accepting the claim of superior orders.

The case of *Prosecutor v. Manuel Lete Bere*¹⁶¹ is also revealing. Its facts have already been examined.¹⁶² Relevant here is the allegation by the Daderus Merah Putih militiaman that he stabbed the victim with a sword both under duress and following an order. Bere told the court he had been ordered to kill the victim and feared that his friend Raimundo would have shot him if he refused.

Whilst it rejected this as a duress situation, the Special Panel found that the accused had killed under the orders of Manuel Lopez, a local commander of the TNI. Again, there was no application of a discernable test or standard for establishing the finding of superior orders. There was no examination of the power structures and the legal relationships between the players in this incident, in particular whether Bere was legally obliged to obey the order, that order being given by someone with legal competence to give such an order. The illegality of the order was not considered. Furthermore, the only evidence about the role of Manuel Lopez in the incident was the testimony of a witness Y., present during the incident, who said 'the order to kill the victim came from Manuel Lopez, the Daderus Merah Putih leader'. As noted, the accused had in fact claimed that a certain Raimundo forced him to commit the crime and he is not recorded as having said anything to suggest that the killing itself was done under specific orders from Manuel Lopez. Thus, the very existence of the order accepted by the Special Panel as a superior order is itself dubious.

In the *Lospalos* crimes against humanity case, superior orders were considered in much the same way. Although in closing submissions both the prosecutor and one of the defence counsel referred to international jurisprudence, the court entered into no substantive examination of the law whatsoever. The submissions were simply reproduced in the judgement. The only mention of superior orders in the court's findings is at the end in the discussion of the sentencing for each accused, where the court simply made findings of fact that several of the accused were acting under superior orders. On the issue of the militias, all that the Special Panel did was to confirm general findings made by other bodies, such as the International Commission of Inquiry, and take note of oral evidence by certain accused about the linkage. If a standard is discernable, it is that every order was treated as a superior order. Joni Marques, the lead defendant and one of the key figures in Team Alfa, was the only one of the ten accused who did not claim he was ordered to commit the crimes. Each of the others claimed that they were forced by Joni Marques to participate in the crimes charged. All except one, Manuel da Costa, were found to have been ordered by Joni Marques, and this was considered in mitigation of their sentences. There was no examination of whether Team Alfa was a legitimate institution and whether Joni Marques could lawfully issue orders to subordinates, who were *then* legally obliged to obey. These subordinates, like Joni Marques himself,

161. The Prosecutor v. *Manuel Goncalves Leto Bere alias Manuel Leto Bere*, *supra* n. 115.

162. *Supra*, p. ¶¶ 20 (van dit artikel).

were convicted of crimes against humanity, and customary international law is clear that orders to commit crimes against humanity are manifestly unlawful.

Manuel da Costa was himself a platoon commander of Team Alfa and the Special Panel found that he joined the operation to kill a group of clergy at the request and not the order of Joni Marques.¹⁶³ The issue of who was the more senior militia member with legal capacity to give orders, if at all, was not considered. This issue of rank was, however, given some consideration in the case of *Francisco dos Santos Laku*.¹⁶⁴ Laku was not a militia member but was an East Timorese member of the TNI, of the rank of sergeant, charged with murder for handing over a pro-independence supporter to militia members, who subsequently killed the man. Although he asserted that he was only following the orders of a Sergeant Alo, the court held that these could not be viewed as superior orders since they were both of the same rank. Nevertheless, in sentencing Laku to eight years' imprisonment for the murder, the panel stated that it accepted that the accused was acting under the orders of the Indonesian government and that this had been taken into account as a mitigating factor.

5.3.1 *Can militia legitimately raise the issue of superior orders?*

As noted above, the nature and role of the militias has yet to be analysed in any of the proceedings of the Special Panels. This is partly a reflection of the fact that in only one case so far has the prosecution called a witness to provide detailed and specific evidence about the militias.¹⁶⁵ Had they seen fit to understand the phenomenon of the East Timorese militias in a meaningful way and thus really 'get to the bottom' of what happened and why it happened, the Special Panels could easily have exercised the option of summoning expert witnesses. They have never done so.

Unravelling the relationship between the militias is crucial as this impacts upon many legal issues, including whether they were part of the state apparatus and thus had legal authority to issue orders and demand compliance. The linkage to the state is important for determining whether they could commit war crimes (they would have to be sufficiently linked to Indonesia to do so) and whether criminal acts by them would trigger Indonesia's international obligations. Particularly relevant is the question of whether the militias were, as is almost universally alleged, a criminal organisation involved in criminal activities.

International experts agree that the East Timorese militias were extra-legal paramilitary organisations closely linked to the Indonesian regime, whose objectives

163. See *supra* n. 116 for discussion on the translation of the Bahasa Indonesia word 'jemput' as 'invite' when it does not necessarily mean the person had a choice.

164. *Prosecutor v. Francisco dos Santos Laku*, case No. 8/2001, Judgment 25 July 2001.

165. In a recent trial, *Public Prosecutor v. Lino de Carvalho* (case No. 9/2001), the Public Prosecutor did call a police investigator to testify about the militia structures and links with the TNI. At the time of writing, this trial was not yet concluded.

and working methods were criminal.¹⁶⁶ The Serious Crimes cases have involved a variety of persons with different degrees of involvement with the militias – core militia members, those who got involved on a casual basis and those who say they were ‘forced’ to join the militias – even if all of them are ‘small fish’. Can all or any of these categories benefit from a claim of superior orders? To what extent is a court of law able to look at the subjective circumstances of why the accused was associated with the militias? Unfortunately, the questions are not being asked and the prosecution, even the defence, proceed on the basis that the militias were obviously a criminal organisation and there is no need for litigation with evidence presented to a court of law. Thus, the Special Panels conclude that the militias were a criminal organisation *per se* and even make findings about how they acted under the direction and control of the Indonesian security forces.

Various reports of experts, including the UN Special Rapporteurs, the Indonesian KPP-HAM and others, have described the close links between the militias and the Indonesian armed forces, particularly the Special Forces KOPASSUS.¹⁶⁷ The UN Special Rapporteurs, for example, stated that although most of the atrocities during 1999 were committed by the militias, they had ‘little doubt as to the direct and indirect involvement of TNI and police in supporting, planning, assisting and organising the pro-integration militia groups’, particularly ‘to convey strategic and tactical plans for acts of violence against supporters of independence’.¹⁶⁸ Testimony of militiamen before the Special Panels reveals that the militias often shared barracks with the military and received training and arms from them as well as engaging in joint operations and patrols. Furthermore, there is extensive material suggesting that the militias were used as a front for the Indonesia military to commit atrocities directly, such as participating in militia activities while dressed as militia.¹⁶⁹ Many have observed that the widespread and systematic destruction of September 1999, notably the forced evacuation of the population to West Timor, destruction of property and violence against the person, could not have been achieved with such success in so short a time without extensive support and assistance from institutions of state.¹⁷⁰

There is then the contradictory practice whereby those who are considered to have voluntarily joined the militias are unable to claim a defence by way of duress,

166. See D. Kingsbury, ‘The TNI and the Militias’ and P. Bartu, ‘The Militia, the military and the People of Bobonaro District’, both in Damien Kingsbury, ed., *Guns and Ballot Boxes: East Timor's Vote for Independence* (Clayton, Monash Asia Institute 2000). See also the reports listed in n. 120.

167. See Report of the Special Rapporteurs, *supra* n. 120, para. 59-61; see also Chapter II, KPP-Ham Report, *supra* n. 120; Report of the International Commission of Inquiry, *supra* n. 120, paras. 135-141.

168. Report of the Special Rapporteurs, *ibid*.

169. See Chapter II, KPP-HAM Report, *supra* n. 120; J. Dunn, ‘Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes’, in *Masters of Terror: Indonesia's Military and Violence in East Timor in 1999*, Canberra Papers on Strategy and Defence No. 145 (Canberra, Strategic and Defence Studies Centre, ANU 2002) pp. 60-74.

170. Report of the International Commission of Inquiry, *supra* n. 120, paras. 136-142; Conclusions, KPP-HAM Report, *supra* n. 120.

yet those same persons are able to benefit from mitigation by way of superior orders. Superior orders is a doctrine that builds on legitimate power structures such as within the armed forces of a state; it would be unacceptable for someone from the Mafia to be permitted to claim he was following superior orders and thus benefit from mitigation or even be excused of liability in countries which accept this as a defence. In East Timor, the issue is whether the Special Panels are correct to mitigate the sentences of convicted militia members because they claim that they committed crimes as a result of superior orders. UNTAET Regulation 2000/15 does not have a provision along the lines of Articles 9 and 10 of the IMT Charter, which enabled that tribunal to declare organisations such as the SS (*Schutzstaffel*) criminal, thus opening up the possibility of prosecutions for membership of a criminal organisation and involvement in its criminal activities following an earlier judicial determination of the nature of the group. It is unfortunate that Section 21 of Regulation 2000/15 has no statutory filter that would exclude subordination within a criminal organisation. However, such filters are part of the test in customary international law, which denies recourse to duress and superior order for such persons. As noted, the Special Panels do not seek guidance in the rules of customary international law and there is now a practice whereby the logic of the finding of voluntary participation in a criminal enterprise is not followed through.

5.3.2 *The question of manifest unlawfulness*

The doctrine of *obedience to superior orders* requires that a distinction is made between manifestly unlawful and plain unlawful orders. A manifestly unlawful order cannot lead to mitigation of sentence by way of superior orders; whether an unlawful order may do so falls within the inherent discretion of the court as to the mitigation it is prepared to concede. An order to kill unarmed civilians sheltering in a church would surely be unlawful, even for the many uneducated East Timorese farmers and fishermen who, for different reasons, committed Serious Crimes as or alongside militias and appear before the Special Panel as accused. But would such persons have had the capacity to distinguish between unlawful and manifestly unlawful orders? Could they fairly be expected to distinguish between those East Timorese who actively supported independence but did so peacefully, those who simply voted against autonomy and those who resisted the Indonesians by armed force, and know that just one of these could be a legitimate target of attack in an armed conflict? Could such people really be expected to know that the IMT at Nuremburg found that individuals have international duties which transcend the national obligations of obedience imposed by the individual state?

The answer would certainly depend on the circumstances and subjective facts; for example, seasoned militia members such as Joni Marques and Manuel da Costa in *Lospalos* told the Special Panel that they had received training from the Indonesian armed forces and should not be able to raise such an argument. Professional soldiers can be reasonably assumed to have received training on how to conduct themselves, dictated by both their specific rules of engagement as well as international humanitarian law. This concurs with judicial practice in military cases such

as *Calley*, which also asserted a common sense standard for the average man.¹⁷¹ The ordinary low-ranking militia member would not have access to training of the kind that Marques and da Costa received, which even included international training with foreign soldiers. They would not have had knowledge of international humanitarian law, nor have been subjected to the 'discipline' of the regular TNI soldiers. Certainly, they would have known that to kill a group of nuns and priests who had been distributing food to refugees would be criminal. Even manifestly unlawful. But, did the lower ranking members of Team Alfa know that they did not have to obey manifestly unlawful orders? Did they genuinely believe that they were obliged to follow all orders they received, regardless of how horrific? Should it make a difference to a court of law? Fairness suggests that questions should at least be asked, but the Special Panel has not made the necessary enquiries.

In the case of *Joao Fernandes*, the majority of the Court of Appeal examined Article 51 of the Indonesian Penal Code, which provides for superior orders as a defence and found that:

'this demands, for the exclusion of the penal responsibility, that the agent that had acted by executing an official order given by the competent authority – which wasn't the appellant's case, seeing that neither the militia chief Natalino Monteiro nor the Maliana POLRES commander nor the Indonesian armed forces (TNI) had legal competence to order the killing of people, nor the appellant had a legal obligation to execute that order'.¹⁷²

This touches on the doctrine of manifestly unlawful orders – from this it is clear that the two appellate judges viewed an order to kill as manifestly unlawful in itself, regardless of whether the giver of the order had the legal competence to issue any such orders. In the particular circumstances of the case, where the killing allegedly ordered was of civilians sheltering in the police station, such an order was manifestly unlawful, even for the low-ranking accused. He was obliged to disobey the order, but chose to obey and took part in the operation. Yet, despite the unlawfulness of the order, the logical connection was not made that Fernandes could not therefore claim the benefit of mitigation by way of superior orders under Regulation 2000/15.

5.4 Conclusions on superior orders before the Special Panels

This foregoing study clearly reveals substantial weaknesses with the treatment of superior orders in East Timor. Section 21 of Regulation 2000/15 may itself be null and void because it denies Serious Crimes accused the right to raise superior orders as a defence, as was permitted under the then-applicable law and which continues to be allowed to accused in Ordinary Crimes cases and those on trial in Indonesia.

171. *United States v. Calley*, 48 CMR 19 (CMA 1973).

172. *Joao Fernandes Appeal* - Majority Decision, *supra* n. 75, p. 8.

Virtually every person convicted of Serious Crimes and serving sentence has been detrimentally affected by this provision. As for the Special Panels, the practice and jurisprudence on superior orders reveal that every order is being accepted as a superior order without testing against the standards set by customary international law.¹⁷³ Many of the decisions reached are inconsistent with international practice, for example, permitting those who act on the basis of a manifestly unlawful order to claim mitigation by way of superior orders.

Given the frequency with which such claims are accepted, superior orders have become a 'consolation prize' for those whose claims of duress have been rejected. Compassion towards low-ranking persons is not unusual: one need only look at the five year sentence ultimately meted out to *Drazen Erdemović* at the ICTY for his role in the slaughter at Srebrenica. Yet the practice of the Special Panels is not consistent, and the consequences of a finding that a person participated voluntarily in a criminal enterprise are not followed through to deny recourse to both duress and superior orders. Moral judgements are in fact being made about people without closely examining the subjective circumstances that led to their association with the militias.

In order that the doctrine of superior orders is justly implemented in a society such as East Timor's, it would seem essential to consider local concepts of power and authority. Traditional East Timorese society was a structured one, with hereditary villager elders (*liurai* and *dato*) commanding deep respect and loyalty from a predominantly rural community. In occupied East Timor, and elsewhere across Suharto's Indonesia, the cultural norms of the dominant Javanese islanders were introduced. The hereditary leaders were replaced with hand-picked *kepala desa* [village leaders] who were civil servants. Javanese culture emphasises a focus on avoiding conflict, extreme respect for hierarchy and authority, as well as a specific concept of centralised power in the figure of authority.¹⁷⁴ The cultural imperative was that people in higher positions must be respected and never contradicted through the voicing of an alternative viewpoint.¹⁷⁵ This meant that one had to follow the instructions of a person in a higher position; legal obligation either from the capacity of the person to give orders, or the obligation to obey, was simply not a

173. Contrast the practice of the Special Panels with the IMT, which held that 'Superior orders ... cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification.' Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946. London: HMSO, Cmd. 6964, Reprinted 1966, pp. 90-92. See also *Einsatzgruppen*, *supra* n. 24, p. 480, where it was held that to plead superior orders, 'one must show an excusable ignorance of their illegality'.

174. F. Magnis-Suseno, 'Langsir Keprabon: New Order leadership, Javanese culture, and the prospects for democracy in Indonesia', in G. Forrester, ed., *Post Suharto Indonesia: Renewal or Chaos?* (Singapore, Institute of Southeast Asian Studies 1999) p. 218.

175. *Ibid.*, at p. 219: 'In the Javanese conception, behaving in a respectful and rukun [avoidance of open conflict] way will in the end always pay dividends since the community will live in harmony and be free from disturbances, and individuals are protected and provided for by their community and their leaders.'

consideration. In such an environment, the majority of those being tried by the Special Panels (being low-ranking, non-hardcore militia members whose association may not have been voluntary), would have felt obliged by the applicable social norms to obey *kepala desa*, *babinsa* and others in authority positions, such as Indonesian soldiers and policemen, probably also the militia members, who had open and blatant support from those in power. Further incentive to obey such persons came from the fact that such authority was backed up by the brute force of an occupying power. This discussion is linked to the issue of what a reasonable man in East Timor may consider to be manifestly unlawful.¹⁷⁶ While we do not suggest the introduction of cultural relativity, we do suggest that the reality of everyday life in such societies is a relevant factor particularly when considering the actions of civilians. It is unfortunate that the Special Panels have not demonstrated sensitivity towards this, given that the mixed panel mechanism itself was designed to meet local needs.

Despite the overarching need to search for the truth and make decisions that are informed, findings have been based on extraneous sources of information, as occurred in *Leki*. The responsibilities of the court as fact-finder have also been evaded by the practice of simply incorporating the reports of others, as in *Lospalos*, and as Judge Egonda-Ntende noted in *Joao Fernandes*, lax evidentiary standards. Given that superior orders presume legitimate power structures, the Special Panel's generosity in the area of superior orders creates a series of parallel implications that the militias were legitimate organisations with an official hierarchy, permitting its leaders the legal competence to give orders to subordinates who were in turn obliged to obey them. We do however recognise, that such assessments must be tempered with the reality that the Special Panels have adopted an ad hoc approach that does not rely on recognised tests of international or other law.

6. CONCLUDING REMARKS

This study of admissions of guilt, duress and superior orders before the Special Panels reveals disturbing practices. The problems that were observed and examined all impact upon the ability of the Serious Crimes process to meet international standards.

The world's first internationalised domestic tribunal is providing an abundance of lessons for future experiments in international criminal justice. Even if an impressive rate of concluding trials in the face of tremendous obstacles has been achieved, the truth is that the overwhelming majority of these cases have been of

¹⁷⁶ L.C. Green suggests that 'the standard of measurement cannot be universal, but must depend on whether the accused is a civilian or a serviceman and whether the offence is of a kind that can be considered as being civil in character though committed by a soldier. If the act is essentially military in character and has been committed in war conditions, then the palpability must be looked at from the point of view of the reasonable soldier ...', Green, op. cit. n. 40, at p. 281.

ordinary murder and not the more demanding international crimes.¹⁷⁷ This paper has revealed that the quality of the process and the decisions themselves leave much to be desired. The wealth of international jurisprudence going back to Nuremburg is being ignored, and lessons that have been learnt in other institutions, such as in the course of the *Erdemović* litigation at the ICTY, have not been taken on board. Despite the huge influence of the ICC Statute, the Serious Crimes project operates as though it was disconnected from the norms and demands of customary international law. Some may argue that this is because the provisions taken from the ICC Statute are complete in themselves and there is no need to look beyond the laws passed by UNTAET in East Timor. Whether cases are processed as domestic crimes under the Indonesian Penal Code or as international crimes, the issues that arise from admissions of guilt, duress and superior orders are not easy. Yet, the issues examined herein reveal that fundamental and unnecessary mistakes are being made, and that some of those failings arise from a reluctance to examine and apply substantive and procedural international law in order to reach decisions of an international standard. Some of the problems identified, such as findings of facts being made in the absence of evidence on issues not litigated by the parties, inconsistencies, blanket rulings that prevent a case-by-case assessment, ad hoc approaches and effective discrimination against entire groups of people, suggest problems with judicial capacity.

There are many reasons why the road to justice in East Timor has been so rocky, and any attempt to understand them must begin with an appreciation that for the process to have come so far is in itself a remarkable achievement. When UNTAET took over the administration of the half-island, it really was faced with a catastrophic situation, with no courts, no judges, no prosecutors, no police force, no prisons; and that was just the criminal justice system. It is no exaggeration to say that the entire system had to be built from scratch, and UNTAET faced major challenges in finding personnel who were up to that job. To a certain extent, mistakes must be seen in the context of an evolving judicial system, but 'teething problems' are clearly not an excuse for much of what we have observed in the handling of Serious Crimes cases. The role of the Court of Appeal is therefore crucial for providing recourse to appeal for accused persons, and guidance for the Special Chambers. Extraordinarily, the Court of Appeal has been allowed to lie dormant since the departure of Judge Egonda-Ntende in November 2001, thus depriving Serious Crimes accused of the fundamental right to appeal convictions since then. The weakness and malfunctioning of the infant criminal justice system has been and remains the subject of concern for many observers and the UN itself. The former Special Representative of the Secretary-General and Transitional Administrator for East Timor, Sergio Vieira de Mello, has conceded that 'the justice system

177. At 31 May 2002, the Special Panels had concluded 15 trials against a total of 24 individual accused, all of whom have been convicted and sentenced. Of these cases, only the *Lospalos* case involved charges of crimes against humanity. Six of the ten accused in that case were acquitted of some charges but convicted on others. A further 12 cases involving crimes against humanity were due to be heard by the Special Panels but had not yet been completed at the time of writing.

is still in a nascent state and needs continued close attention', adding that 'the lack of resources, including interpreters and court staff, has led to delayed hearings and unduly prolonged detention of suspects'.¹⁷⁸ The Serious Crimes project, even if it is dominated by international employees of the United Nations, has to be seen as a part of that weak structure and the ongoing challenges of creating a democratic nation founded solidly on justice, rule of law and respect for human rights.

For all its blemishes, the Serious Crimes project offers the closest that the East Timorese have ever had to justice for crimes committed against them in the course of their struggle for freedom. It appears increasingly likely that the Serious Crimes project will be terminated by the end of 2003, and best efforts will have barely scratched the surface. At the time of writing, a draft law on amnesties and pardons introduced by President Xanana Gusmao remains pending before East Timor's Parliament. The draft law seeks to amnesty a broad range of criminal activity, including some actions that qualify as Serious Crimes. Proceedings before Indonesia's Ad Hoc Court for Human Rights in East Timor, the preferred option of the UN Secretary-General and the international community, are surpassing all expectations of a show trial.¹⁷⁹ Rather than bringing those accountable for atrocities to justice and uncovering the truth of what happened in East Timor, it seems to be used as a vehicle to whitewash the role of Indonesia in the carnage. Justice in the form of an *ad hoc* International Criminal Tribunal for East Timor, the preferred option of the International Commission of Inquiry, the UN Special Rapporteurs, Nobel Peace Prize winner Bishop Carlos Belo, many NGOs and countless ordinary East Timorese, seems in the post-September 11 and Bali Bomb world to be a lost cause.

Thus, the hopes for some sort of equilibrium will increasingly focus on East Timor's Commission for Reception, Truth and Reconciliation.¹⁸⁰ The Commission's mandate is threefold: to establish an accurate record of what happened in East Timor by examining the pattern and scope of human rights violations in the context of the country's unhappy history since 1974; to establish a Community Reconciliation Process to facilitate the return and reintegration of those who have committed less serious crimes by use of traditional justice mechanisms which are ultimately approved by a court of law; and to make recommendations to the government. The Community Reconciliation Process is designed to complement the investigation and prosecution of Serious Crimes, in that the General Prosecutor approves the cases which are dealt with through this mechanism, and amnesties

178. Sergio Vieira de Mello, Statement on the occasion of the Security Council Open Debate on the situation in East Timor, New York (30 January 2002). See also Report of the Secretary-General on the Transitional Administration in East Timor, 17 April 2002, UN Doc. S/2002/432 at pp. 17-18.

179. See International Crisis Group, Indonesia: The Implications of the Timor Trials, 8 May 2002; Human Rights Watch, Justice Denied for East Timor: Indonesia's Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of UN Action, 20 December 2002.

180. The Commission was established by UNTAET Regulation 2001/10 of 13/7/01, UNTAET/REG/2001/10. For an examination of the commission, see C. Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor', 95 *AJIL* (2001) p. 952.

may not be given for offences that amount to Serious Crimes. Given the limitations of the justice system, it appears

increasingly likely that the commission will have to take on an even greater responsibility for uncovering and recording the history of human rights violations in East Timor than originally planned.