

Commentary

1. Introduction

This commentary examines four decisions of the Court of Appeal of East Timor, one handed down in November 2004 and the rest over the first part of 2005.¹ All of them review judgements of the Special Panels for Serious Crimes within the District Court of Dili (SPSC), in relation to cases brought before that internationalized criminal jurisdiction in 2002 and 2003.²

The two cases under consideration – Paulino de Jesus and Vitor Manuel Alves – are particularly remarkable in the context of the jurisprudence of the SPSC, the former from a human rights perspective and the latter by virtue of political sensitivities overshadowing the trial. The Paulino de Jesus appeal decision reverses the first judgement in the practice of the SPSC, acquitting the accused of all charges³ and, moreover, appears to be the first and the only reversal of such an acquittal.⁴ It has been characterized as “one of the most controversial in the history of the Serious Crimes process”.⁵ Yet, one may feel uncertain as to whether the Paulino de Jesus judgement would still retain that dubious honour in the face of the problematic decision in, as Cohen put it, the “legendary in the Dili Serious Crimes community” Vitor Manuel Alves case.⁶ This ‘flip-side’ case involved a pro-independence leader accused of killing a former village chief and Indonesian collaborator, in contrast with a far more usual scenario of having an autonomy supporter in the dock. The lenient trial judgement may but leave one with an impression that judicial impartiality and independence yielded, in that case, to the political considerations and that improper interference in the process may have occurred.⁷

Prior to setting out the structure of the present commentary, it is worthwhile briefly outlining the procedural background of the decisions under review and addressing further developments where these could be of interest.

In the Paulino de Jesus and Vitor Manuel Alves cases, the prosecutor lodged an appeal, whereas the proceedings in Marcelino Soares and Umbertus Ena were initiated by the public defender. Only in the first two cases was the appeal maintained.

The Court of Appeal overturned the SPSC’s decision acquitting Paulino de Jesus, who was charged with one count of murder and one count of attempted murder, as crimes against humanity, committed in Lourba village (Bobonaro district), on the grounds of factual error leading to the wrong application of law. It furthermore entered a new judgement sentencing the accused to 12 years imprisonment. Defence counsel filed a notice of appeal against this new conviction to the Court of Appeal sitting in the capacity of the as yet

¹ TL, Judgement (Criminal Appeal No. 2004/29), *Prosecutor v. Paulino de Jesus*, Case No. 6/2002, CoA, 4 November 2004, in this volume, p. 849; TL, Judgement (Criminal Appeal No. 2004/30), *Prosecutor v. Marcelino Soares*, Case No. 11/2003, CoA, 17 February 2005, in this volume, p. 857; TL, Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, Case No. 5/2002, CoA, 18 March 2005, in this volume, p. 867; TL, Judgement (Criminal Appeal No. 2004/60), *Prosecutor v. Vitor Manuel Alves*, Case No. 1/2002, CoA, 26 April 2005, in this volume, p. 875. The names ‘East Timor’ and ‘Timor-Leste’ are used depending on whether the period prior or subsequent to 20 May 2002 (the day when East Timor acquired independence) is referred to.

² See, regarding its jurisdiction, S. Freeland, A. Klip, G. Sluiter and S. Vasiliev, Introduction, Klip/ Sluiter ALC-XIII-15.

³ D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, East-West Center Special Reports, No. 9, June 2006, Hawaii, 2006, p. 68; Amnesty International and Judicial System Monitoring Programme, Justice for Timor-Leste: The Way Forward, Report, ASA 21/006/2004, 1 April 2004, p. 12, footnote 32. In total, out of 97 defendants brought before SPSC, 94 were convicted; Judicial System Monitoring Programme, Digest of the Jurisprudence of the Special Panels for Serious Crimes, Report, April 2007, p. 14. Available via: [http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20\(Megan\)%20250407.pdf](http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20(Megan)%20250407.pdf); visited 9 February 2009. For example, definitive acquittals on all charges took place in the Florindo Morreira and Aprecio Guterres cases: see TL, Judgement, *Prosecutor v. Florindo Morreira*, Case No. 29/2003, SPSC, 19 May 2004, in this volume, p. 491; TL, Judgment, *Prosecutor v. Aprecio Guterres*, Case No. 18a/2003, SPSC, 28 February 2005, in this volume, p. 683.

⁴ Judicial System Monitoring Programme, The Paulino de Jesus Decisions, April 2005, p. 4. Available via: [http://www.jsmp.minihub.org/Reports/jsmpreports/Paulino%20De%20Jesus/paulino%20de%20jesus%20report%20\(e\).pdf](http://www.jsmp.minihub.org/Reports/jsmpreports/Paulino%20De%20Jesus/paulino%20de%20jesus%20report%20(e).pdf); visited 9 February 2009. See also D. Cohen, ‘Justice on the Cheap’ Revisited: The Failure of the Serious Crimes Trials in East Timor, East West Center, Asia Pacific Issues, No. 80, May 2006, p. 3-4.

⁵ D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, *supra* note 3, p. 86.

⁶ *Ibid.*, p. 63.

⁷ This is confirmed by Cohen on the basis of an interview with an anonymous staff member of the Serious Crimes Unit (*ibid.*, p. 64). See *infra* Paragraph 3.5 ‘Vitor Manuel Alves’.

inoperative Supreme Court of Justice of Timor Leste. The Court of Appeal nevertheless refused to sit on appeal against its own decision.⁸

The accused Marcelino Soares was convicted by the SPSC, on the basis of both individual and command responsibility, for murder of one person and torture and persecution of three persons committed in Hera village (Dili district), as crimes against humanity, and sentenced to eleven years imprisonment. The appeal decision examined whether an error of fact (leading to an error of law) had been committed by the SPSC, when it acknowledged the systematic character of the attack against the civilian population contextual to the conduct of the accused, the illegality of detention of victims and the superior responsibility of the accused.

The accused Umbertus Ena was found guilty of murder and other inhumane acts, as crimes against humanity, practised on several individuals in Nakome (Oecússi enclave) and sentenced to eleven years in prison. The Court of Appeal considered the defendant's claims of the groundlessness of the first-instance decision in view of the alleged contradictory and perjurious character of prosecution witness statements, errors of law (wrong qualification of a 'single incident' as a systematic attack against civilians), and violation of the principle of legality. Interestingly, the Court of Appeal also had to deal with the defendant's allegation of the violation by the SPSC of his procedural rights, in the form of: (i) preventing him from being examined by the parties with regard to the statement he made at trial; (ii) taking into consideration his statements made during police interrogation in the absence of counsel; and (iii) admitting into evidence human rights reports not intended for judicial purposes and having no connection with the facts of the case.

Finally, in the Vítor Manuel Alves decision, as mentioned, the Court of Appeal maintained in part the prosecutorial appeal from the judgement convicting the accused of negligent homicide in Beloi village (Ataúro island) and sentencing him to one year imprisonment conditionally, with a probation period of two years. The prosecutor alleged errors of fact and law and procedural violations and requested the Court of Appeal to modify qualification of the offence from Article 359 of the Indonesian Penal Code (IPC) to Article 338 ('manslaughter'), as charged, and to increase the sentence to 10 years imprisonment. While declining the former, the Court of Appeal adjusted the sentence to two years. This sentence was actually not served by the convict, as he was released less than one month after the decision on appeal as per the Presidential Decree commuting the remaining part of his sentence for 'good behaviour'.⁹

The four decisions of the Court of Appeal present significant interest from both substantive and procedural law perspectives. Since the substantive law applied within the special crimes process has been explored in the literature to a large extent, the primary objective of the present commentary is to provide analysis of the system of appellate review of final decisions in the framework of the SPSC. Here, the choice is to address cross-cutting themes relevant to all decisions under scrutiny (applicable standard of review, scope of appellate powers etc.). As a second step, the commentary takes an opportunity to consider a selected number of salient issues in the individual decisions at hand and reflect on the quality of the Court of Appeal's argumentation on the merits. Insofar as each of the four cases involve discrete incidents and give rise to various non-overlapping questions, those deserve to be surveyed under separate headings corresponding to the relevant decisions.

This warrants the following structure. First, the need to evaluate the exercise of appellate powers by the Court of Appeal in the cases at hand makes opportune a scrutiny of the system of appellate review of final judgements within the serious crimes process (Paragraph 2 'Exercise of competences by the Court of Appeal'). Secondly, the commentary will examine whether the Court of Appeal's legal reasoning is satisfactory on the merits and to what extent the decisions at hand meet the relevant formal and material requirements (Paragraph 3 'Substantive and procedural issues: consideration on the merits'). Following that, the Court of Appeal's views on the teleology of punishment, as well as on the effects of mitigating and

⁸ For details, see Judicial System Monitoring Programme, The Role, Practice and Procedure of the Court of Appeal, Report, 28 June 2005, p. 12. Available via: [http://www.jsmp.minihub.org/Reports/jsmpreports/Report%20on%20Court%20of%20Appeal/Court%20of%20Appeal%20report%20\(e\).pdf](http://www.jsmp.minihub.org/Reports/jsmpreports/Report%20on%20Court%20of%20Appeal/Court%20of%20Appeal%20report%20(e).pdf); visited 9 February 2009.

⁹ Decreto do Presidente da República No. 16/2005 de 19 de Maio 2005, Journal da República, Série I, No. 6, de 19 de Maio 2005, p. 757. See Article 85, paragraph i of the Constitution of Timor-Leste, granting the President of the Republic the power to grant pardons and commute sentences after consultation with the government.

aggravating factors with regard to sentence, are reflected upon (Paragraph 4 ‘Sentencing aspects’), followed by concluding remarks on the legacy of serious crimes adjudication by the Court of Appeal.

Before embarking on the discussion along these lines, a remark needs to be made that will serve as a reference framework to the following evaluation of the jurisprudential outcomes of the SPSC process in general and its appellate mechanism in particular. Elsewhere, the analysis of the background, objectives and the major features of the serious crimes project and the fundamental structural problems it had to confront in its operations have been addressed in detail,¹⁰ and will not be reproduced here. It is submitted that awareness of these factors informs one with a better understanding of the context in which the Court of Appeal delivered its decisions and invites a fairer, somewhat more lenient, assessment of the quality of its jurisprudence. The obvious qualitative lag of the Court of Appeal’s decisions from the case law of international criminal tribunals, for instance the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) and the Former Yugoslavia (ICTY), would make a scrupulous collation among them a frustrating exercise. However, resort to the statutory frameworks and jurisprudence of the *ad hoc* tribunals will be unavoidable as a way to determine if and to what extent the Court of Appeal endeavoured to align its reasoning with the standards of substantive and procedural criminal law shaped by international tribunals.

2. Exercise of competences by the Court of Appeal

The process of appellate review of final judgements, in particular the scope and modalities of intervention by the appellate court in the factual findings and legal qualifications of the first-instance court, may effectively be assessed against a number of criteria: (1) grounds for and standard of appellate review; (2) type of decisions subject to appeal and, in that connection, eligible appellants; and (3) appellate powers and implications of appeal proceedings for the position of the defendant.¹¹ As will be shown, in most of the above-mentioned aspects, the SPSC appellate system approximates that of the International Criminal Court (ICC), characterized by ‘openness’ and ‘extreme flexibility’.¹²

This section evaluates the procedural framework of SPSC in light of the above-indicated criteria, with the view to identifying specific features of the appellate mechanism in that jurisdiction. In that context, it examines the issues stemming from the four decisions at hand and thus links the analysis of the identified appellate standards to the discussion of the actual practice by the Court of Appeal in the given cases.

2.1 Appellate grounds and standard of review

According to Section 40.1 of United Nations Transitional Authority in East Timor (UNTAET) Regulation 2000/30,¹³ any final decision of a District Court may be appealed to the Court of Appeal, on one or more of the following grounds: (a) violation of the rules of criminal procedure; (b) violation of the procedural or substantive rights of the accused; (c) inconsistency within the grounds of the decision; and (d) material error of law or fact. It is worthwhile to assess the overall design of the prerequisites for appeal in the procedural framework of the SPSC in turn, drawing comparison to other international and internationalized criminal jurisdictions.

A four-pronged set of appellate grounds appears to be a largely innovative step if compared to the legal frameworks of the *ad hoc* tribunals. The latter only foresee ‘error of fact that has occasioned a miscarriage of justice’ and ‘error of law invalidating the decision’.¹⁴ Thus, the grounds under (a), (b) and (c) above are totally unfamiliar to the ICTY and ICTR.

¹⁰ For an account of political and financial hurdles surrounding the functioning of the SPSC, with further references, see S. Freeland *et al.*, Introduction, *supra* note 2, p. 23.

¹¹ On some of these criteria, see R. Roth and M. Henzlin, The Appeal Procedure of the ICC, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Volume II, Oxford University Press, Oxford 2003, p. 1538.

¹² *Ibid.*, p. 1538-1539.

¹³ UNTAET Regulation 2000/30 On Transitional Rules of Criminal Procedure, 25 September 2000, as amended by UNTAET Regulation 2001/25 on the Amendment of UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure, 14 September 2001.

¹⁴ Article 25, paragraph 1 of the ICTY Statute and Article 24, paragraph 1 of the ICTR Statute. Article 20, paragraph 1, of the SCSL Statute supplements these grounds with one more, namely ‘procedural error’.

Moreover, in contrast to the *ad hoc* tribunals' statutes, Section 40.1 of UNTAET Regulation 2000/30 appears to disconnect error of fact/ law from the consequences that such error may have for the delivery of justice in the case at hand and the validity of a particular decision respectively. However, it does so not in a manner as outright as Article 81, paragraph 1 of the ICC Statute, which omits mention of required implications altogether; it rather prescribes that an error must be 'material'.¹⁵ The implications of this word are not totally clear: on the one hand, it may be interpreted as limiting the grounds of review to errors that have bearing upon the verdict and thus directly affect the outcome of a particular case and, on the other, as going beyond that and covering also errors that involve an issue of general significance. While the former way of construing this provision would eventually approximate it to the statutory appeal grounds before the ICTY, ICTR and Special Court for Sierra Leone (SCSL), the latter construction would rather make it reminiscent of the 'legal issue of general significance' ground allowed in exceptional situations in the *ad hoc* tribunals' case law.¹⁶ Given that Article 83, paragraph 2 of the ICC Statute refers to an error materially affecting the decision or sentence, and taking into account the overall proximity of the SPSC procedural model to that of the ICC, one could argue by analogy that the former way of construing the provision of UNTAET Regulation 2000/30 in question is more appropriate.

Although heavily based on the ICC model, the appellate grounds in UNTAET Regulation 2000/30 depart from it on at least four aspects. First, the list includes the unfamiliar (to the ICC Statute) ground (c) of "inconsistency within grounds of the decision"; secondly, "any other ground that affects the fairness or reliability of the proceedings or decision" of the ICC seems to be narrowed down to a "violation of the procedural or substantive rights of the accused" and extended as an appellate ground to both parties;¹⁷ thirdly, there is no explicit provision on the possibility of appealing against a sentence on the ground of disproportion between the crime and the sentence;¹⁸ fourthly, the ground of 'procedural violation' under UNTAET Regulation 2000/30 appears to encompass a broader range of possible errors than under the more restrictive Article 83, paragraph 2 of the ICC Statute.¹⁹

Broad appellate grounds indicate that UNTAET Regulation 2000/30 certainly embodies a flexible appellate system. A closer look at the differences with the ICC appeal model reveals that, on certain points, the SPSC appellate mechanism even overreaches that of the ICC. UNTAET Regulation 2000/30 casts a net of review over nearly every conceivable procedural violation and breach of law prejudicing substantive and procedural rights of the accused. That is also the case with the unrestricted ground of 'procedural error', whereas the ICC allows for the 'procedural error materially affecting the decision or sentence'. The approach that any minor procedural error could, in principle, be sufficient to justify appellate intervention may have scarcely been conducive to the expeditious conduct of proceedings and adequate in light of the principle of judicial economy. Furthermore, it may seem overly ambitious and unrealistic in the context of the SPSC, particularly in view of the institutional hurdles hindering specifically the work of the Court of Appeal.²⁰

At this juncture, it is apposite to avert to the individual grounds and relevant standards of review in light of their application by the Court of Appeal in the cases at hand.

The appellate ground of 'violation of the rules of the criminal procedure' reflects the 'procedural error' ground found also in the SCSL and ICC Statutes. It catches all possible breaches of the procedural norms

¹⁵ However, the distinction between UNTAET Regulation 2000/30 and the ICC Statute is in fact not as stark as it seems, given that Article 83, paragraph 2 of the ICC Statute qualifies that the errors of fact and law and procedural errors capable of resulting in a reversal of a trial decision by the Appeals Chamber should be of a nature to 'materially' affect the impugned decision.

¹⁶ "[T]he Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation *where a party has raised a legal issue that is of general significance to the Tribunal's jurisprudence*." ICTY, Appeal Judgement, *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović and Šantić*, Case No. IT-95-16-A, A. Ch., 23 October 2001, Klip/ Sluiter, ALC-VIII-429, par. 22 (emphasis added); see also ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/ Sluiter, ALC-III-761, par. 247; ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, A. Ch., 1 June 2001, Klip/ Sluiter, ALC-X-335, par. 19.

¹⁷ Cf. Article 81, paragraph 1, sub b, sub iv of the ICC Statute.

¹⁸ Article 81, paragraph 2, sub a of the ICC Statute.

¹⁹ Cf. the *chapeau* of Article 83, paragraph 2 of the ICC Statute, authorizing the Appeals Chamber to reverse or amend the decision or sentence or order a retrial if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error."

²⁰ See S. Freeland *et al.*, Introduction, *supra* note 2, p. 23.

found in UNTAET Regulation 2000/30 and other relevant UNTAET regulations,²¹ as well as, one can argue, violations of the ‘internationally recognized principles’ of criminal procedure that are part of the SPSC law by virtue of Section 54.5 of UNTAET Regulation 2000/30.²² Just as for the ICC, there may be an overlap between this ground of appeal and the ‘error of law’, insofar as any procedural violation may be deemed a consequence of the SPSC’s ‘erroneous view of the procedural requirements’ or ‘requirements for the exercise of its judicial discretion’.²³ The similarity of the appellate grounds in light of the corrective goal of the appellate procedure should logically result in the affinity of the review standard relative to the ‘procedural violation’ to that pertaining to the error of law, which will be explored below.

The violation of the procedural or substantive rights of accused as a ground of appeal is a unique feature of the appellate system of the serious crimes process. Unaccompanied by further clarification as to which types of violations fall within its scope, this provision entails that these may consist of any conceivable and identifiable breaches of the rights of accused guaranteed by the legislation of East Timor, UNTAET Regulations and Indonesian law.²⁴ Its practical value is that it may serve as a catch-all provision to address a generally unfair outcome of proceedings, where no easily discernible violations of concrete substantive or procedural rules appear to have occurred.

Interestingly, this ground was one of the two raised by the appellant in the *Umbertus Ena* case. In that case, the accused alleged the violation of his rights by the SPSC on three instances: firstly, when, after providing him with an opportunity to make a declaration, it dismissed his request to be further interrogated by the parties, which, in his view, impeded clarification of the relevant doubts as to the facts; secondly, when it took into account his statements given during the interrogation by the police without the presence of defence counsel; thirdly, when the SPSC admitted into evidence the human rights reports not endowed with judicial effect and irrelevant to his case.²⁵ The Court of Appeal’s discussion of this ground may be interpreted as indicating, by implication, the legal test to be regarded as a standard of review relating to the violation of the rights of the accused, albeit that the court itself fails to articulate that standard. Namely, not every violation of the rights warrants a reversal of conviction by the SPSC, but only when the trial decision is based solely or mostly on a piece of evidence obtained through such a violation.²⁶

The inclusion of the unprecedented ‘inconsistency within the grounds of decision’ in the procedural framework of the SPSC appears to be somewhat excessive. Particularly, its relation to the ‘error of fact’ and ‘error of law’ grounds is unclear. The errors of fact or law are inevitable where the trial court bases its findings on a contradictory factual or legal basis, which may suggest the implied character of ‘inconsistency within grounds of the decision’ as a ground of appeal. Perhaps it is due to the fact that the overlap of this ground has not been raised in any of the cases under review, in contrast with the frequent ‘error of fact’ and ‘error of law’.

With regard to ‘error of law’, it is at present an uncontested ground of appeal in both civil law and common law countries and widely accepted in international criminal procedure.²⁷ The appellate instance at the international criminal tribunals is considered a ‘final arbiter of law’ and as of right may determine if the trial decision is tainted by a legal error, without necessarily being limited in its inquiry to the indication of error and supporting arguments advanced by the appellant.²⁸ Thus, the Appeals Chamber may “raise questions

²¹ Regarding the inclusion of “any formal violations of the Statute or the [RPE]” in the ‘procedural error’ as the ground of appeal before the ICC, see R. Roth and M. Henzelin, *The Appeal Procedure of the ICC*, *supra* note 11, p. 1544.

²² Section 54.5 provides that “[o]n points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply.” On this set of principles in the system of sources of the SPSC law of criminal procedure, see S. Freeland *et al.*, Introduction, *supra* note 2, p. 19. In the *Lolotoe* case, ‘internationally recognized principles’ were considered to include “principles of customary international law, provisions of international treaties, jurisprudence from the International Tribunals – ICTY & ICTR and other international tribunals”: see TL, Judgement, *Prosecutor v. José Cardoso Ferreira*, Case No. 4c/2001, SPSC, 5 April 2003, Klip/ Sluiter, ALC-XIII-671, par. 302.

²³ C. Staker, Article 81, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Baden Baden, Nomos Verlagsgesellschaft 1999, p. 1019.

²⁴ On applicable law within SPSC, see S. Freeland *et al.*, Introduction, *supra* note 2, p. 20.

²⁵ For a detailed discussion, see *infra* Paragraph 3.4 ‘*Umbertus Ena*’.

²⁶ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(1)(b).

²⁷ M. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 *Texas International Law Journal* 2002, p. 113.

²⁸ See, for example, ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, A. Ch., 21 July 2000, Klip/ Sluiter, ALC-V-291, par. 35; ICTY, Judgement, *Prosecutor v. Prosecutor v. Kvočka, Radić, Žigić and Prcać*, Case No. IT-98-30/1-A, A. Ch.,

proprio motu or agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal.”²⁹ This implies that the errors of law do not as a matter of fact raise much debate as to the applicable standard of review,³⁰ making a reversal on this ground as such unproblematic from the perspective of a division of competences between the appellate court and the trial instance.

The error of law may arise from the wrong choice of applicable law, misinterpretation of law or the application of a wrong legal standard. In such situations, the Appeals Chamber may reassess the trial record evidence from a valid legal perspective and apply a correct legal standard with an eye to determining “whether it is itself convinced beyond reasonable doubt as to the factual findings challenged, as a result of the legal error”.³¹

The ‘error of fact’ as the ground for appellate review in the statutory framework of the SPSC allows considerably more room open to controversy. Absent the uniform approach at the national level regarding admissibility of such review, the identification of general principles of law that govern the applicable standard is not an easy task. Generally speaking, the common law view militates against unrestricted appeal on factual issues.³² This has to do with the prerogative of the jury to perform as a trier of fact, which may not be usurped by the appellate instance.³³ Due to the absence of a jury in international criminal proceedings, the civil law criminal procedure tolerant to the idea of retrial on appeal on the issues of fact, such as is embodied in the notions of German *Berufung* or French *appel*,³⁴ apparently had a stronger impact on the approach to the review of factual issues at the international level.³⁵ Ultimately, the appeal models of all existing international criminal jurisdictions are of an amalgamated nature that is difficult to credibly grade in the ‘inquisitorial’ v. ‘accusatorial’ scale.³⁶ This may point to the decreased relevance of the respective vocabulary as a means to describe and comprehend the ‘unique compromises’ embodied in the *sui generis* models of international criminal procedure, including that of the SPSC.

The key feature of this amalgamated approach towards the factual review is characterized by a ‘margin of deference’ accorded by the Appeals Chamber to the findings of the Trial Chamber,³⁷ similar to the one bestowed on a jury in the common law systems. Given that this principle is adhered to in all international and internationalized criminal fora, one may argue that it constitutes an ‘internationally recognized principle’ arising from the domain of international criminal procedure. In accordance with Section 54.5 of UNTAET

28 February 2005, par. 16-17; ICTR, Judgement, *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, A. Ch., 13 December 2004, Klip/Sluiter, ALC-XVIII-755, par. 11; ICTR, Judgement, *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A, A. Ch., 19 September 2005, Klip/Sluiter, ALC-XXII-721, par. 6.

²⁹ ICTY, Judgement, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, A. Ch., 17 September 2003, Klip/Sluiter, ALC-XIV-753, par. 6.

³⁰ Judgement, *Prosecutor v. Furundžija*, A. Ch., *supra* note 28, par. 35.

³¹ Judgement, *Prosecutor v. Prosecutor v. Kvočka et al.*, A. Ch., *supra* note 28, par. 17; ICTY, Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., 29 July 2004, to be published in volume XX, par. 15; ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 17.

³² For an overview of common law jurisdictions, see U. Lundqvist, *Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings. A Few Remarks*, 15 *Leiden Journal of International Law* 2002, p. 653-654.

³³ A. Cassese, *International Criminal Law*, Oxford University Press, Oxford 2003, p. 431; C. Safferling, *Towards an International Criminal Procedure*, Oxford University Press, Oxford 2003, p. 334; S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford 2003, p. 155.

³⁴ A. Cassese, *International Criminal Law*, *supra* note 33, p. 430-431; C. Safferling, *Towards an International Criminal Procedure*, *supra* note 33, p. 335.

³⁵ S. Zappalà, *Human Rights in International Criminal Proceedings*, *supra* note 33, p. 155. For the view discarding this significant difference, see U. Lundqvist, *Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings. A Few Remarks*, *supra* note 32, p. 655.

³⁶ S. Zappalà, *Human Rights in International Criminal Proceedings*, *supra* note 33, p. 155 (“[i]n international criminal procedure the civil law approach has somewhat prevailed, by assigning to the Appeals Chamber a broad scope of review on factual issues” (footnotes omitted)). *Cf. contra* A. Orié, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, *supra* note 11, p. 1474 (“The appeal proceedings tend however towards a common-law direction (no trial *de novo*, the record on appeal consists of the trial record, submission of the grounds for the appeal, and limited opportunities for new evidence.”).

³⁷ Judgement, *Prosecutor v. Tadić*, A. Ch., *supra* note 16, par. 64; Judgement, *Prosecutor v. Furundžija*, A. Ch., *supra* note 28, par. 37; Appeal Judgement, *Prosecutor v. Kupreškić et al.*, A. Ch., *supra* note 16, par. 30. This seems to hold true for the ICC as well: C. Staker, *Article 81*, *supra* note 23, p. 1019.

Regulation 2000/30, the standard in question is perfectly fit to be incorporated in the appellate mechanism of the SPSC, as being representative of the ‘internationally recognized principles’ that serve as a subsidiary source of procedural law next to UNTAET law and enjoying priority compared to Indonesian law.

The rationale behind granting a ‘margin of deference’ to the trial court’s factual findings can be best illustrated by the considerations rooted in the judicial institutional culture and in the division of labour between various levels of the judicial system.³⁸ On the one hand, every judicial environment, national or international, is based on the hierarchical relations between various jurisdictional levels, entailing what may be labelled ‘intra-institutional trust’. The appellate instance should not, without compelling reasons, disturb the findings of the first instance, whereas the latter is expected to be loyal to a higher judicial forum and revere the gist of its reasoning and directions handed down on a particular legal issue when adjudicating a similar question, unless the interests of justice dictate otherwise.³⁹

On the other hand, there is a more concrete and practical notion of distribution of functions between the trial and the appellate instance. While the latter is the ‘final arbiter of law’, it is presumed that the trial court in its capacity of organ hearing, assessing and weighing first-hand evidence (importantly, the testimony and demeanour of witnesses in the courtroom), is better suited to evaluate the credibility of that evidence so as to make well-founded factual findings on that basis.⁴⁰

The perceptions of the role of the appellate instance as fact-finder vary among international criminal courts, from a restrictive common law like approach to a more liberal civil law oriented one, depending on the forum in question. In the ICTY and ICTR, Rule 115, paragraph B of the Rules of Procedure and Evidence (RPE) limits the opportunity for the Appeals Chamber to engage in the direct examination of evidence only in cases when such evidence was not available at trial, when it is relevant and credible, and when “it could have been a decisive factor in reaching the decision at trial”. The consideration of additional evidence by the Appeals Chamber is furthermore contingent upon the request by a party; it is therefore not a *proprio motu* power.

As to the power of the Appeals Chamber to examine anew the evidence admitted earlier by the Trial Chamber (for example, to call witnesses earlier examined in the first instance), it is not excluded in the RPE, at least expressly. A tacit assignment of such power to the Appeals Chamber could be inferred from Rule 107 of the ICTY and ICTR RPE.⁴¹ At the same time, the RPE embody an approach that the appeal judgement shall be pronounced “on the basis of the record on appeal together with such additional evidence as has been presented” to the Appeal Chamber,⁴² whereas the ‘record on appeal’ in evidentiary terms is confined to the materials already on the trial record.⁴³ Thus, in practice before the *ad hoc* tribunals, the appeals normally proceed on the basis of the trial record,⁴⁴ which shows that fact-finding is extraordinary and limited, rather than a regular function of the Appeals Chamber.

³⁸ Commentators refer in this connection to the ‘hierarchical’ and ‘functional’ aspects of relationship between the Trial Chambers and the Appeals Chamber: U. Lundqvist, Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings. A Few Remarks, *supra* note 32, p. 642.

³⁹ See ICTY, Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000, Klip/ Sluiter, ALC-IV-361, par. 113 (“[A] proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons: (i) [...] hierarchical structure in which the Appeal Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers [...]; (ii) [the need to ensure] certainty and predictability in the application of the applicable law; and (iii) [importance of] the right of the accused to have like cases treated alike.”).

⁴⁰ Judgement, *Prosecutor v. Tadić*, A. Ch., *supra* note 16, par. 64; Appeal Judgement, *Prosecutor v. Kupreškić et al.*, A. Ch., *supra* note 16, par. 32; Judgement, *Prosecutor v. Aleksovski*, A. Ch., *supra* note 39, par. 63. See also C. Staker, Article 81, *supra* note 23, p. 1020; U. Lundqvist, Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings. A Few Remarks, *supra* note 32, p. 644.

⁴¹ Rule 107 of the ICTY and ICTR RPE (“The Rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.”). See also Rule 98 of the ICTY and ICTR RPE (“A Trial Chamber may [...] *proprio motu* summon witnesses and order their attendance.”).

⁴² Rule 117, paragraph A of the ICTY RPE; Rule 118, paragraph A of the ICTR RPE.

⁴³ Rule 109 of the ICTY RPE and Rule 109, paragraph A of the ICTR RPE (“The record on appeal shall consist of the trial record, as certified by the Registrar.”).

⁴⁴ U. Lundqvist, Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings. A Few Remarks, *supra* note 32, p. 651. Note, however, ICTY, Decision to Summon a Witness *Proprio Motu*, *Prosecutor v. Stakić*, Case No. IT-97-24-A, A. Ch., 20 September 2005 (Appeals Chamber summoning a witness *proprio motu* based on Rules 98 and 107 of the ICTY RPE).

In contrast to the ICTY, the ICC Statute explicitly affords the Appeals Chamber discretion to call evidence with an eye to determining factual issues itself, as an alternative to remanding them to the Trial Chamber.⁴⁵

As far as the serious crimes process is concerned, Section 41.2 of UNTAET Regulation 2000/30 provides for a possibility of presenting new evidence or examining witnesses at the appellate hearing, upon authorization of the Court of Appeal, where such evidence “was not known to the moving party at the time of the prior proceedings and could not have been discovered through the exercise of due diligence”. Furthermore, this section indicates that the appeal *may* proceed on the record of evidence produced in the District Court, if there is no complaint from the participants in relation to evidence. Should such a complaint be brought and the new evidence not presented, what would be the evidentiary basis for the Court of Appeal to rely on? This question indicates the existence of an inherent mandate of the Court of Appeal to immediately examine the evidence included in the trial record in cases of complaints and, in the absence thereof, its discretion to proceed with hearing evidence directly.

UNTAET Regulation 2000/30 contains a number of other provisions that support the allocation of such trier-of-fact powers to the Court of Appeal. For instance, Section 41.3 provides for an order of examination of witnesses, it seems to presume the Court of Appeal’s power to call witness testimony, without necessarily limiting it to the newly called witnesses. Thus, as concerns the reconsideration by the Court of Appeal of the evidence earlier heard by the District Court, UNTAET Regulation 2000/30 should be construed as providing the Court of Appeal with a *proprio motu* power to call such evidence again. Furthermore, it appears a matter of obligation of the Court of Appeal to examine anew the evidence that is called into question, in view of Section 41.2. Secondly, in situations where no dispute has arisen regarding the credibility and legality of evidence, it may be argued that the consideration of a case by the Court of Appeal on the basis of the trial record is subject to discretion, which can be inferred from the use of the word ‘may’ instead of ‘shall’ in Section 41.2 of UNTAET Regulation 2000/30. These provisions, embedded in the context of a more – compared to the *ad hoc* tribunals – civil law oriented procedural framework of SPSC that approximates it to the ICC, unequivocally equip the Court of Appeal with a broader fact-finding competence, including the possibility of directly examining the evidence part of the trial record, for example by calling witnesses who have testified at trial.⁴⁶

Recourse to these powers appears highly apposite in light of the unavailability of the adequate transcript services in the SPSC as a precondition for effective and genuine appellate review.⁴⁷ Importantly, this deficiency should also entail the increased responsibility of the Court of Appeal for ensuring the adequate factual basis in support of its decisions to overturn conclusions of the SPSC on the issues of fact. This observation must be kept in mind for the purpose of assessing the performance of the Court of Appeal, particularly in the Paulino de Jesus case, which will follow below.

Before going into that, it is necessary to clarify the scope and standard of appellate review on factual grounds and the implications of any existing internationally recognized procedural standards that may restrict the exercise of fact-finding powers by the Court of Appeal.

As the ICTY has repeatedly affirmed, the appeal is not a trial *de novo*.⁴⁸ This process has a merely corrective function and is not designed to allow parties to reargue their case or to remedy their failings during trial.⁴⁹ Although the ICC Appeals Chamber has not yet clarified the nature of appeal against trial judgements in its jurisdiction, this principle was found by commentators to be equally valid for the ICC.⁵⁰ The proximity of

⁴⁵ Cf. Article 83, paragraph 2 of the ICC Statute (“[T]he Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and report back accordingly, or may itself call evidence.”) and Rule 149 of the ICC RPE.

⁴⁶ Cf. P. Caeiro, Commentary, Klip/ Sluiter ALC-XIII-817, p. 831, questioning if the Court of Appeal could actually proceed with a factual review of a trial decision based solely on a trial record, thus without “having had immediate contact with the evidence tendered by the parties.”

⁴⁷ On the lack of adequate transcript facilities, see S. Freeland *et al.*, Introduction, *supra* note 2, p. 25; D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, *supra* note 3, p. 28.

⁴⁸ See Judgement, *Prosecutor v. Furundžija*, A. Ch., *supra* note 28, par. 40; Appeal Judgement, *Prosecutor v. Kupreškić et al.*, A. Ch., *supra* note 16, par. 22; Judgement, *Prosecutor v. Blaškić*, A. Ch., *supra* note 31, par. 13; ICTY, Judgement, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, A. Ch., 25 February 2004, to be published in volume XIX, par. 5.

⁴⁹ ICTY, Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997, Klip/ Sluiter, ALC-I-537, par. 15; A. Cassese, International Criminal Law, *supra* note 33, p. 433.

⁵⁰ H. Brady, Appeal, in R. Lee *et al.* (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley 2001, p. 585.

the SPSC to that procedural system makes it reasonable to assume the principle's authority over the appeal procedure within the serious crimes process.

The standard of review at the *ad hoc* tribunals is that the trial decision must go undisturbed and the Appeals Chamber may not substitute the factual finding of the Trial Chamber for that of its own, unless "the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous""⁵¹. This entails that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence"⁵².

One can notice that this test is not void of obscurity, since the modus of evidence evaluation to be defined as "wholly erroneous" yields to the bench's own subjective perception of the tolerable scope of error. At times, the ICTY Appeals Chamber itself exceeded the boundaries of the self-imposed review standard, by quashing the assessment of credibility of evidence by the Trial Chamber, where it did not appear unreasonable.⁵³

Since, in none of the decisions commented on, does the Court of Appeal postulate clearly the applicable standard of review on the matters of fact or analyse the standards developed by other international criminal jurisdictions, the 'reasonableness' standard certainly deserves to be considered as a general source of guidance. It is uncertain, though, if it should unreservedly be taken over by the Court of Appeal.⁵⁴ First, this test has been subject to criticism, as potentially leaving aside the factual errors that result in a miscarriage of justice, but are based on a reasonable evaluation of evidence.⁵⁵ Secondly, the appellate system in the framework of the SPSC differs from that of the *ad hoc* tribunals, as shown above, in a more extensive fact-finding function attributed to the Court of Appeal.

As far as the right of accused to a *substantive* and *genuine* review by a higher tribunal is concerned,⁵⁶ it can be argued that the gravitating to a civil law character of the SPSC appeal procedure and the broad formulation of the 'material error of fact' appellate ground allow for a less restrictive approach towards review of the issues of fact than that of 'reasonableness'. Moreover, there seems to be every reason for the Court of Appeal to apply a more liberal standard of review in relation to the issues arising from the alleged factual errors, when in favour of defendant. In particular, the *in dubio pro reo* principle suggests that the court should engage in a more inquisitive and diligent fact-finding, where there is a chance that such undertaking may reveal exculpatory circumstances.⁵⁷

With regard to prosecutorial appeals to the prejudice of accused, the interests of the proper administration of justice may in principle justify a retrial on factual issues. Fairness requires, however, that the reversal of factual findings by the Court of Appeal be limited to situations where: 1) the SPSC's findings are manifestly 'unreasonable' or 'erroneous' under the ICTY standard; and 2) the Court of Appeal engages in the direct hearing of new evidence under Section 41.2 of UNTAET Regulation 2000/30, which makes it capable of making truly reasoned factual findings. This procedural asymmetry between the parties as to the test to be applied for the purpose of the factual review may be justified by that *ne bis in idem* considerations militating

⁵¹ Judgement, *Prosecutor v. Tadić*, A. Ch., *supra* note 16, par. 64; Judgement, *Prosecutor v. Aleksovski*, A. Ch., *supra* note 39, par. 63 and 74; Appeal Judgement, *Prosecutor v. Kupreškić et al.*, A. Ch., *supra* note 16, par. 30; ICTR, Judgement, *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, A. Ch., 26 May 2003, Klip/ Sluiter, ALC-XII-857, par. 505.

⁵² Judgement, *Prosecutor v. Tadić*, A. Ch., *supra* note 16, par. 64; Appeal Judgement, *Prosecutor v. Kupreškić et al.*, A. Ch., *supra* note 16, par. 30; Judgement, *Prosecutor v. Aleksovski*, A. Ch., *supra* note 39, par. 63.

⁵³ S. Zappalà, Human Rights in International Criminal Proceedings, *supra* note 33, p. 166, footnote 58 and accompanying text.

⁵⁴ Cf. Judicial System Monitoring Programme, The Paulino de Jesus Decisions, *supra* note 4, p. 14.

⁵⁵ See S. Zappalà, Human Rights in International Criminal Proceedings, *supra* note 33, p. 167.

⁵⁶ Appeal proceedings limited to a scrutiny of issues of law raised by a first instance judgement might not always meet the criteria of substantial and genuine review: Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/1994/7, 7 December 1993, par. 113 and 404; Human Rights Committee, *Aliboeva v. Tajikistan*, U.N. Doc. CCPR/C/85/D/985/2001, 16 November 2005, par. 6.5; Human Rights Committee, *Khalilova v. Tajikistan*, U.N. Doc. CCPR/C/83/D/973/2001, par. 7.5. See also M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, N.P. Engel Verlag, Kehl 2005, p. 348-349.

⁵⁷ This principle is also deemed to justify the 'more generous' treatment of the defence motions on the admission of the additional evidence than those of the prosecutor: U. Lundqvist, Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings. A Few Remarks, *supra* note 32, p. 657.

against a trial *de novo* to the benefit of the prosecution, and may not be totally dismissed since the fundamental right to substantive and genuine review belongs exclusively to the convicted.⁵⁸

These observations equip us sufficiently for an assessment of the manner in which the Court of Appeal dealt with the alleged errors of fact in some of the decisions under review.

In the Paulino de Jesus case, the Court of Appeal quashed, on the grounds of both factual and legal errors, the acquittal entered by the SPSC and convicted the defendant to 12 years imprisonment for attempted and consummated murder as a crime against humanity. It did so upon having reached an opposite conclusion as to the facts, basing itself on a different assessment of the evidence.

On 26 January 2004, the SPSC acquitted the accused in view of the lack of evidence proving beyond reasonable doubt the facts alleged in the indictment, namely that the accused was on the site of crime (Lourba, Bobonaro district), at the time of the incidents on 10 September 1999, and that it was he who committed the imputed facts. On the one hand, it found inconsistencies between the incriminating depositions of the victims and main prosecution witnesses (the parents of the deceased Lucinda Saldanha, Juvita Saldanha and Dinis Cardoso) made at different stages of the investigation. Those discrepancies concerned the sequence and character of events, the identity of the alleged perpetrator and the instrument of the crime and were held to critically diminish the probative value and credibility of the statements. The SPSC attached weight to the fact that the report of Fokuper (the private women's organisation providing support to victims of violence, whose representative heard Lucinda Saldanha shortly after the events in question) did not mention the name of Paulino de Jesus among other persons who had attempted to murder her and who had killed her daughter.

The existing doubts as to the reliability of the testimonies of the prosecution witnesses were corroborated by the statements of the family of the accused and of the accused himself alleging his presence in Atambua (West Timor) at the time of the events. In the SPSC's view, the prosecution presented no convincing evidence in support of the accused's presence at the scene of the crime, which precluded it from considering the *alibi* of the accused duly refuted.

In its reaction to the SPSC's findings, the Court of Appeal stated:

"We do not, however, agree with nor do we understand how the Special Panel for Serious Crimes under appeal can admit that defendant Paulino was [in Atambua] but, at the same time, does not find him to be the author of the acts imputed to him and described by witnesses Dinis and Juvita."⁵⁹

The Court of Appeal thus seems to find a factual error or inconsistency between the grounds of decision, where there is no such error or inconsistency. On the contrary, admitting the possibility that someone might have been at the scene of crime does not entail a conclusion beyond reasonable doubt that he or she is necessarily a perpetrator of that crime. Holding otherwise is apparently an odd position that runs contrary to the presumption of innocence and leads to a reversal of the burden of proof.⁶⁰ Resulting from the application of a wrong legal standard for the assessment of evidence, such reasoning is demonstrative of the fact that the Court of Appeal, despite its role as the 'final arbiter of law', committed a legal error. The disregard by the Court of Appeal of the fundamental principles of presumption of innocence and *in dubio pro reo*, as well as of the applicable standard of proof is striking, particularly compared to the exemplary treatment thereof in the SPSC judgement.⁶¹

Following that, the Court of Appeal engaged in the reassessment of evidence exclusively on the basis of the trial record and boldly overturned the SPSC's factual findings, irrespective of the applicable standard of

⁵⁸ Advocating for the procedural asymmetry in favour of accused, see S. Zappalà, Human Rights in International Criminal Proceedings, *supra* note 33, p. 167.

⁵⁹ Judgement (Criminal Appeal No. 2004/29), *Prosecutor v. Paulino de Jesus*, *supra* note 1, under Section III (footnotes omitted). Contrary to the observation by the Judicial System Monitoring Programme, the Court of Appeal does not seem to misrepresent the finding by the SPSC of the hypothetical possibility of the accused to be present in Lourba as "a positive finding that Paulino was in Lourba" (Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 14).

⁶⁰ This aspect of the decision is noted in D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, *supra* note 3, p. 69.

⁶¹ TL, Final Decision, *Prosecutor v. Paulino de Jesus*, Case No. 6/2002, SPSC, 26 January 2004, in this volume, p. 439, p. 7-8.

review that should have prevented it from disturbing the SPSC's factual findings. Thus, it attached greater weight to the testimonies of Juvita Saldanha and Dinis Cardoso and held them to be credible, convincing and sufficient to consider the charges imputed to Paulino de Jesus as proven.

According to the Judicial System Monitoring Programme (JSMP), in the Court of Appeal's oral decision, the reliability of testimonies made by the members of the accused's family was questioned on the ground that they were "excessively precise in certain details".⁶² First, the non-inclusion of this finding in the written decision is in itself problematic in light of the failure to provide a reasoned opinion.⁶³ Secondly, it is indeed quite unacceptable of the Court of Appeal to base its conclusion as to the reliability of evidence – which it has not even cared to hear directly despite the statutory possibility of doing so – on a tortuous reasoning that interprets an ambiguous factual pattern in a fashion prejudicial to the accused.⁶⁴ Finally, the Court of Appeal defied the probative value of the omission of the accused's name in the Fokuper's summary, given that the report was drafted afterwards, and its author could not recall whether Juvita had mentioned the name of the assaulter or whether that particular question was asked at all.

Apart from being inappropriate in this case, the Court of Appeal's inquiry into the issues of fact manifests its apparent neglect of a number of relevant circumstances. It fails to attach weight to the fact that, as reflected in the trial record, the names of the other alleged co-perpetrators, Pedro Mau and Sabino, were in fact indicated on the Fokuper's summary, while the name of Paulino de Jesus was not. Similarly, no consideration was given to the numerous contradictions in the testimonies of prosecution witnesses that lead the SPSC to acquit the accused. The character of the Court of Appeal's assessment is thus far-fetched, as it dismisses the evidence favourable to the accused too easily and ultimately draws on that basis an inference negative for the accused. Again, this does not seem to sit well with the presumption of innocence, which prescribes that any doubts as to the guilt shall be construed in favour of the accused, as carefully observed by the SPSC.⁶⁵

In the application by the Court of Appeal of the 'factual error' ground of appellate review in the Paulino de Jesus case, one may indicate two interconnected problems. All in all, in reversing the acquittal, the Court of Appeal replaced the SPSC's assessment of the evidence with that of its own, whereas the former was, to say the least, not 'wholly erroneous' or unacceptable by 'any reasonable tribunal of fact'.⁶⁶ Therefore, the observation of JSMP that the Court of Appeal adopted "a significantly lower standard" than the threshold of unreasonableness appears correct.⁶⁷

Indeed, as indicated above, the subjectivity inherent in this test compounds the challenge against the holding by the Court of Appeal of the SPSC's assessment as 'unreasonable' or 'wholly erroneous'. However, it is a troublesome feature of the Paulino de Jesus appeal judgement that the Court of Appeal set aside the factual findings of the SPSC without caring to show credible reasons to consider them unreasonable and erroneous.

The second problem is that, for the purposes of the Paulino de Jesus judgement, the Court of Appeal neither heard additional evidence nor called evidence contained in the trial record, which has been argued above as an available option and in specific cases mandatory under Section 40.1 of UNTAET Regulation 2000/30. As an example of the latter, the discussion by the Court of Appeal of the reliability of the Fokuper's report must have necessarily involved a new examination of the relevant evidence, given that the prosecutor specifically complained against the admission of, and reliance on, that report.⁶⁸ In relying on the trial record, the Court

⁶² Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 15.

⁶³ See *infra* Paragraph 3.1 'General remarks'.

⁶⁴ Judicial System Monitoring Programme, The Role, Practice and Procedure of the Court of Appeal, *supra* note 8, p. 17.

⁶⁵ Final Decision, *Prosecutor v. Paulino de Jesus*, SPSC, *supra* note 61, p. 7-8 ("Any doubts that may appear to be insurmountable must be treated in favour of the accused, because it is too risky, if not unlawful and unjust, the sentencing based on feeble, uncertain and contradictory evidence, even if they are subtle.")

⁶⁶ On the contrary, the Paulino de Jesus SPSC judgement was complimented by commentators as "based upon a very careful analysis of the evidence by the Special Panel" and as a "[j]udgement that justifies its findings and reasoning in a coherent and cogent way." (D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, *supra* note 3, p. 68; see also Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 8.)

⁶⁷ Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 15.

⁶⁸ According to the Judicial System Monitoring Programme, one of the grounds of appeal contained in the written appeal statement of the prosecutor was that the trial panel "materially erred in law and in fact in admitting and relying on the report from

of Appeal was not in a position to benefit from hearing, evaluating and weighing the first-hand evidence or from observing the demeanour of witnesses in a courtroom. In these circumstances, it should have treated the conclusions of the SPSC with more caution, since the latter was better placed to assess the credibility of that evidence.

All this leads one to the conclusion that, albeit charged with a corrective role in relation to the erroneous and unfair decisions of the SPSC, the Court of Appeal in the Paulino de Jesus case has applied a cure that proved to be worse than the disease. By unjustifiably abrogating the role of a first-instance court, the Court of Appeal grossly overstepped its mandate.⁶⁹ In this light and, in view of the problem of the conviction on appeal following acquittal (explored below),⁷⁰ it should have instead remitted the case for retrial.

In the Umbertus Ena case, the defendant's allegations of the incorrect assessment of evidence by the Trial Panel met with a cardinally different approach by the Court of Appeal. In particular, the appellant claimed that his conviction was based on the testimonies of witnesses that were false and inconsistent, in neglect of the statements of other witnesses and those of his own.⁷¹ The Court of Appeal noted that the appellant confined himself to contraposing his own evaluation of the evidence produced during the hearings to that of the SPSC, which did not in itself warrant that his version of facts was more correct. The Court of Appeal gave the following assessment to the evaluation of evidence embodied in the trial decision:

“What appears from reading the decision appealed against is that the Court of First Instance duly justified it as it considered some facts proved and other not. The reasoning of the decision appealed against allows one to conclude that the court of first instance made its decision in a logical, coherent and rational way and based it on objective elements of evidence which can put aside any reasonable doubt.”⁷²

Thus, the Court of Appeal seems to have applied the standard of review similar to that of ‘reasonableness’ developed and applied by the ICTY. Having found that the assessment of evidence as reflected in the trial decision is reasonable, it chose not to disturb the factual findings entered at the first instance and did not engage in the reassessment of evidence on the basis of the trial record, as it did do in the Paulino de Jesus case.

Nevertheless, it is submitted that, in the case at issue, a more robust approach towards a substantive review of facts by the Court of Appeal would be justified. First, an appeal proceeding solely on the basis of the trial record was arguably in breach of Section 41.2 of UNTAET Regulation 2000/30, given that the accused alleged perjury of witnesses (which can be qualified as a ‘complaint in relation to evidence’). This must have urged the Court of Appeal to order the appearance of the witnesses before it. Secondly, it was the accused, and not the prosecutor, who filed the appeal in which case, as contended above, the application of a less restrictive standard of review on factual issues is warranted as a matter of the accused's entitlement to a substantive and genuine review.

As will be demonstrated below,⁷³ the Vitor Manuel Alves proceedings provide the example of a case where the evaluation of evidence by the SPSC might well be considered as ‘wholly erroneous’ and the version of events that it sponsored very close to ‘unreasonable’ under the standard adopted in international appeal practice. However, in contrast to its approach in Paulino de Jesus, the Court of Appeal refrained from challenging the evidentiary process conducted by the SPSC and upheld the incomplete and inconsistent version of facts as presented in what may be seen as a politically motivated and corrupt trial decision.

On the basis of this overview, the treatment of the alleged error of fact in the cases at hand reveals the Court of Appeal's failure to postulate and consistently apply the standard of review. On all occasions, this resulted in the procedural outcomes prejudicial either to the interests of the accused or to the effective administration of justice.

Fokupers.” (Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 13.

⁶⁹ For a concurring conclusion, see *ibid.*, p. 12.

⁷⁰ Paragraph 2.3 ‘Appellate powers and outcome of proceedings’.

⁷¹ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(2)(a).

⁷² *Ibid.*

⁷³ See *infra* Paragraph 3.6 ‘Vitor Manuel Alves’.

2.2 Eligible appellants and decisions subject to appeal

Section 40.1 of UNTAET Regulation 2000/30 permits any party to appeal “a final decision of District Court”, or “any other order of an inferior court which is the final disposition of a case”. Allowing for the appellate review to be triggered by either counterparty in the proceedings before the SPSC fully corresponds to the approach embodied in the procedural frameworks of all international and internationalized criminal jurisdictions.⁷⁴ Apart from permitting appeals against conviction by both prosecution and defense, UNTAET Regulation 2000/30 does not appear to exclude appeals against acquittals by either ‘party’. To a large extent an academic query, the appeals by acquitted defendants are formally not ruled out by of UNTAET Regulation 2000/30, in contrast to the procedural law of other jurisdictions that speak of ‘convicted person’ as eligible appellants.⁷⁵

The position of the prosecutor as a fit party to challenge acquittal – the scenario found in the Paulino de Jesus case – generates more contention. While the idea of prosecutorial appeals as such is alien to some common law countries, these jurisdictions (including the United Kingdom and the United States) are particularly opposed to prosecutorial appeals against acquittals.⁷⁶ This has to do with a number of concerns particularly problematic in their view: first, the possibility of the usurpation by the appellate court of the function of a trier of fact when entering a verdict of guilt; secondly, repeatedly putting the acquitted under the risk of conviction contrary to the protection against double jeopardy.⁷⁷

After the ICTY Statute was drafted and until the reversal of the acquittal on nine counts in Tadić,⁷⁸ it was believed by some commentators that the ICTY Statute was not intended to grant the prosecutor the right to appeal acquittals and, on that basis, it was hoped that this statutory avenue would not be followed.⁷⁹ The subsequent fiasco of these expectations and the ‘cavalier’ treatment of the whole issue in Tadić were bitterly criticized from the common law positions.⁸⁰ It was argued that the possibility of prosecutorial appeals of acquittals was unjustified, in view of the purposes of the appellate review, unless undertaken on issues of law, as it resulted merely from the lack of any rationale underlying the appellate system at the ICTY.⁸¹ Shrewd as this observation may be, the argument it is used to corroborate seems to be a case for an uncritical imposition of an undiluted common law appellate paradigm on international criminal proceedings.

⁷⁴ Article 25, paragraph 1 of the ICTY Statute; Article 24, paragraph 1 of the ICTR Statute; Article 20, paragraph 1 of the SCSL Statute and Article 81, paragraph 1 of the ICC Statute. On the ICTY and ICTR, see M. Drumbl and K. Gallant, Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases, 3 *Journal of Appellate Practice & Process* 2001, p. 607-608. On the ICC, see H. Brady and M. Jennings, Appeal and Revision, in R. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer, The Hague 1999, p. 298-299.

⁷⁵ Article 25, paragraph 1 of the ICTY Statute; Article 24, paragraph 1 of the ICTR Statute; Article 81, paragraph 1, sub b of the ICC Statute; Article 20, paragraph 1 of the SCSL Statute. As there were no appeals from acquittals by accused in the practice of the SPSC, this question is moot and will not be considered. On this matter generally, see S. Zappalà, *Human Rights in International Criminal Proceedings*, *supra* note 33, p. 170.

⁷⁶ K. Lindstone, *Human Rights in the English Criminal Trial*, in J.A. Andrews (ed.), *Human Rights in Criminal Procedure: A Comparative Study*, Martinus Nijhoff, The Hague 1982, p. 102 and C. Osakwe, *The Bill of Rights for the Criminal Defendant in American Law*, in *ibid.*, p. 286, with reference to United States Supreme Court, *Fong Foo v. United States*, 19 March 1962, 369 US 141; United States Supreme Court, *Sanabria v. United States*, 437 U.S. 54, 14 June 1978; United States Supreme Court, *Kepler v. United States*, 195 US 100, 31 May 1904. However, the “US constitutional principles do not preclude prosecutorial appeals from acquittals on the questions of law.” (M. Fleming, *Appellate Review in the International Criminal Tribunals*, *supra* note 27, p. 130). Trechsel indicates that the introduction of a possibility of appeals against a person acquitted or convicted of a lesser offence is considered for England and Wales. See, S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford 2005, p. 401.

⁷⁷ For example, the Fifth Amendment to the United States Constitution prescribing: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb” is interpreted as prohibiting reversals of acquittals on appeal in that jurisdiction.

⁷⁸ Judgement, *Prosecutor v. Tadić*, A. Ch., *supra* note 16, par. 171 and 235-237.

⁷⁹ V. Morris and M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Transnational Publishers, Irvington-on-Hudson 1995, p. 295-296; M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publications, Irvington-on-Hudson 1996, p. 979.

⁸⁰ M. Fleming, *Appellate Review in the International Criminal Tribunals*, *supra* note 27, p. 117 *et seq.*

⁸¹ *Ibid.*, p. 127 and p. 14 (“The literal language of Article 25 [of the ICTY] carries little normative force as it appears to be a groundless conflation of principles advanced in the proposals, none of which advance any rationale for prosecutorial appeals.”).

However, the subsequently created international and hybrid criminal courts, including the ICC and the SPSC, did not depart from the ICTY and ICTR model on this point,⁸² and their positive law perspicuously allows for prosecutorial appeals against acquittals. In this respect, international criminal proceedings seem to lean on the line of reasoning prevailing in civil law jurisdictions,⁸³ where retrial on appeal on the issues of fact is generally not precluded and the appeal proceedings are treated as a part of single process for the purposes of *ne bis in idem*.⁸⁴

This approach is particularly true in the context of, to a certain extent civil law oriented systems, such as the ICC and SPSC. But even more generally, international criminal proceedings are run by professional judges and operate quite differently from a jury trial, which makes the first rationale for the prohibition on appeals from acquittals invalid in this context.⁸⁵ Moreover, there seem to be no reasons why timely instituted appeal proceedings should be counted as *bis in idem*, given that the International Covenant on Civil and Political Rights (ICCPR) allows jurisdictions a leeway to define what constitutes a final conviction or acquittal.⁸⁶ Furthermore, it seems correct that the international criminal justice system must be proof to any type of error underlying a decision, given the outstanding gravity of international crimes. This may urge all to provide the prosecution with a possibility of challenging the legal and factual foundations of a trial decision delivering acquittal. The appellate goals of ensuring the proper administration of justice and the truth-finding prerequisite to national reconciliation may call for giving an even opportunity to rectify erroneous convictions and unwarranted acquittals entered as a result of any – factual or legal – error.

Thus, there seems to be every reason, both on the basis of positive law and in view of the goals of the appellate review, to construe Section 40.1 of UNTAET Regulation 2000/30 as authorizing prosecutorial appeals from acquittals. While such authorization in itself is not at odds with the human rights precepts, its possible consequences – namely, a reversal of acquittal – can prove to be problematic. This must be further assessed in the institutional context of the SPSC, in light of the decisions at hand.

2.3 Appellate powers and outcome of proceedings

Similar to the Appeals Chambers of other international and internationalized criminal courts, the Court of Appeal is accorded broad competence to confirm, reverse, or modify the first-instance decisions and to order initiation of new proceedings before the first instance.⁸⁷

In the Marcelino Soares case, the Court of Appeal employed its power to confirm the trial judgement in full. In the Umbertus Ena case, it, upon (unjustifiably) modifying the conviction entered by the SPSC,⁸⁸ excluded the possibility of modifying the sentence to the detriment of the accused, given that he lodged the appeal.⁸⁹ It thus correctly applied Section 41.6 of UNTAET Regulation 2000/30 precluding *reformatio in peius* where the appeal has been filed by the accused.⁹⁰

In none of the proceedings under review did the Court of Appeal exercise its power to remit the case to the SPSC for retrial. Although ‘bouncing’ the case back and forth may not sit comfortably with the needs of expediency and effectiveness, the remittance of a case to the SPSC is a useful procedural vehicle for the

⁸² H. Brady, Appeal, *supra* note 50, p. 576.

⁸³ S. Zappalà, Human Rights in International Criminal Proceedings, *supra* note 33, p. 155 and 176.

⁸⁴ C. Safferling, Towards an International Criminal Procedure, *supra* note 33, p. 332; S. Zappalà, Human Rights in International Criminal Proceedings, *supra* note 33, p. 176.

⁸⁵ H. Behrens, Investigation, Trial and Appeal in the International Criminal Court Statute (Parts V, VI, VII), 6 European Journal of Crime, Criminal Law and Criminal Justice 1998, p. 124.

⁸⁶ Article 14, paragraph 7 of the ICCPR provides that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” (emphasis added).

⁸⁷ Section 41.4 of UNTAET Regulation 2000/30. Cf. Article 25, paragraph 2 of the ICTY Statute and Rule 117, paragraph C of the ICTY RPE; Article 24, paragraph 2 of the ICTR Statute and Rule 118, paragraph C of the ICTR RPE; Article 20, paragraph 2 of the SCSL Statute and Rule 118, paragraph C of the SCSL RPE; Article 83, paragraph 2 of the ICC Statute.

⁸⁸ See *infra* Paragraph 3.4 ‘Umbertus Ena’.

⁸⁹ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(2)(c)(ii).

⁹⁰ Cf. Article 83, paragraph 2 of the ICC Statute, which provides that “[w]hen the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person’s behalf, it cannot be amended to his or her detriment.” Note the absence of this prohibition in the Statutes of the ICTY, ICTR and SCSL, which, however, has not resulted in aggravations following defendants’ appeal.

Court of Appeal to commission the correction of errors to the organ that may be in a better position to do so, particularly as far as the errors of fact are concerned. In at least one case commented on – the Paulino de Jesus case – such a measure would be fully justified, whereas the reversal of acquittal resulting in the entry of a conviction on appeal appears highly problematic.

That reversals of acquittals and aggravating modifications of convictions and sentence are not precluded in international criminal practice may be inferred from the rules of the *ad hoc* tribunals,⁹¹ as well as from their case law to that effect.⁹² However, the jurisprudence is not uniform and consistent.⁹³ Nor is it uncontroversial, inasmuch as it has been accompanied by a consistent dissent from a member of the appellate bench. Judge Pocar argued in three cases that the Appeals Chamber may not enter a new or more serious conviction and should instead order new trial proceedings.⁹⁴ His objection is rooted in the consideration that a different approach in the system where an appeal court functions as the ultimate instance is irreconcilable with the right to appeal unambiguously guaranteed under Article 14, paragraph 5 of the ICCPR, which remains binding upon the Appeals Chamber notwithstanding that the statute allows prosecutorial appeals as such.⁹⁵ The present author subscribes to this reasoning, save that a stronger emphasis must be placed on the quantitative and legal differences between various types of modifications of conviction and/or sentence, as will be explored below in connection with the Vitor Manuel Alves case.

It is submitted that, as with any other two-tiered system of judiciary, the serious crimes process raises similar concerns. The possibility that the Court of Appeal convicts the acquitted person or that the convicted defendant receives a more severe punishment on appeal entails effective forfeiture of the right to appeal against the latest unfavourable decision guaranteed in absolute terms by Article 14, paragraph 5 of the ICCPR. Moreover, the Human Rights Committee (HRC) has repeatedly held as unappealable convictions by an appellate instance following a first-instance acquittal, and as a violation of the right to appeal.⁹⁶

It is noteworthy that international human rights law provisions are not unanimous in their treatment of the right to appeal. In contrast to the absolute character of the ICCPR, Protocol 7 to the European Convention on Human Rights (ECHR) establishes exceptions to that right, among which are the cases of conviction in the first instance by the highest tribunal and following appeal against acquittal.⁹⁷

However, this regional human rights instrument (let alone the relevant protocol) is not applicable in East Timor as such;⁹⁸ it is not strictly speaking an ‘applicable treaty’ under the terms of Section 3 of UNTAET

⁹¹ Rule 99, paragraph B of the ICTY and ICTR RPE, which entitles the Trial Chamber to order the continued detention of an accused acquitted where the Prosecutor has indicated the intention to file a notice of appeal, may attest to the authority of the Appeal Chamber to render a reversal. See, W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge 2006, p. 441.

⁹² Judgement, *Prosecutor v. Tadić*, A. Ch., *supra* note 16, par. 171 and 235-237; Judgement, *Rutaganda v. Prosecutor*, A. Ch., *supra* note 51, par. 584; ICTR, Judgement, *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, A. Ch., 20 May 2005, Klip/ Sluiter, ALC-XXII-525, par. 364, 371 and 389; Judgement, *Prosecutor v. Aleksovski*, A. Ch., *supra* note 39, par. 173; ICTY, Judgement, *Prosecutor v. Galić*, Case No. IT-98-29-A, A. Ch., 30 November 2006, par. 456 and Disposition.

⁹³ Note in this connection ICTY, Judgement, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, A. Ch., 20 February 2001, Klip/ Sluiter, ALC-V-369, par. 711 (“[A]s, in any event, a new matter of such significance should be determined by a Chamber from which an appeal is possible, the Appeals Chamber proposes to remit these issues for determination by a Trial Chamber.”) See also ICTY, Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, *Prosecutor v. Tadić*, Case No. IT-94-A-AR77, A. Ch., 27 February 2001, Klip/ Sluiter, ALC-VII-195.

⁹⁴ See ICTR, Dissenting Opinion of Judge Pocar, *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, A. Ch., 26 May 2003, Klip/ Sluiter, ALC-XII-1003; Judgement, *Semanza v. Prosecutor*, A. Ch., *supra* note 92; and Judgement, *Prosecutor v. Galić*, A. Ch., *supra* note 92.

⁹⁵ ICTY, Partially Dissenting Opinion of Judge Pocar, *Prosecutor v. Galić*, Case No. IT-98-29-A, A. Ch., 30 November 2006, par. 2.

⁹⁶ Human Rights Committee, *Bernardino Gomariz Valera v. Spain*, U.N. Doc. CCPR/C/84/D/1095/2002, 26 August 2005, par. 7.1 (“Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant’s right to review of his conviction and sentence by a higher court.”) See also, Human Rights Committee, *Francisco Juan Larrañaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, 14 September 2006, par. 7.8 and cases mentioned in *supra* note 56.

⁹⁷ Article 2, paragraph 2 of Protocol No. 7 to the ECHR provides that the right to appeal “may be subject to exceptions [...] in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

⁹⁸ Note that the European Convention on Human Rights and its protocols are not mentioned in Section 2 of the UNTAET Regulation 1999/1 regarding the human rights treaties whose “internationally recognized human rights standards” that regulation

Regulation 2000/15 and it is highly questionable whether Article 2, paragraph 2 of Protocol 7 can otherwise be considered part of the law applied by the SPSC.⁹⁹ Thus, it is the more universal, unequivocal and favourable standard of the ICCPR that must be given priority. This is particularly because the ICCPR is directly binding on the SPSC as organs of the relevant United Nations agency (UNTAET or the United Nations Mission of Support in East Timor (UNMISSET)), as foreseen in Section 2 of UNTAET Regulation 1999/1 and, subsequently, as organs of the independent Timor-Leste, which committed to the ICCPR in 2003.¹⁰⁰ Therefore, the obligation to ensure the right to appeal as interpreted by the HRC appears to have been valid in its full entirety for the SPSC and the Court of Appeal.

In the Paulino de Jesus case, the Court of Appeal not only entered a conviction as a result of a misapplication of the standard of review in respect of errors of fact and on very tenuous evidentiary grounds. Given that no possibility of appeal against its decision existed, by convicting the defendant anew, the Court of Appeal flagrantly violated its duty to observe the right to appeal. Instead of entering a new conviction, it should have opted for other available solutions that would not result in a formidable disadvantage for the defendant.

First, as mentioned earlier, the Court of Appeal could and should have remitted the case for retrial in accordance with Section 41.4 of UNTAET Regulation 2000/30 to the SPSC, which was better equipped to reassess the evidence and make factual findings anew on the points quashed by the Court of Appeal. It is submitted that the interests of fairness associated with the guarantee of the right to appeal in the context of this case undoubtedly prevail over the concerns of expediency that such a measure would generate.

An alternative to remitting the case could have been a self-imposed moratorium on the Court of Appeal's exercise of the power to enter a new conviction following acquittal by the SPSC or otherwise to aggravate the position of the defendant. This has a basis both in ICTY case law, which occasionally allowed prosecutorial appeals without impact on conviction or sentencing,¹⁰¹ and in the recent codification of the procedural rules of an internationalized criminal court. Note the original solution embodied in the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC):

“[I]n case of appeal by the Co-Prosecutors against an acquittal judgment at first instance, the Chamber of the Supreme Court may only modify the findings of the Trial Chamber's decision if it considers the judgment erroneous, but *cannot modify the disposition of the Trial Chamber judgment.*”¹⁰²

This approach allows for both correcting the error made by the trial instance and avoiding inflicting a new conviction on a defendant that is not subject to further review. Indeed, it is questionable whether the option of such a nominal and defective conviction not leading to an actual sentence strikes a proper balance between the interest of justice for international crimes, to which avoidance of unjustified acquittals is an essential aspect, and the individual right to appeal. But, at least, this solution does not worsen the actual position of the acquitted, in the way making the access to another appellate instance imperative; consequently, it does not compromise the right to appeal on the substance.

Thirdly, a solution of an institutional nature might remedy the problem with the right to appeal in the SPSC framework, namely securing the possibility of filing appeals from a conviction entered by the Court of

mandates, “all persons undertaking public duties or holding public office in East Timor” are to observe them when executing their functions. By contrast, the ICCPR does make part of that list.

⁹⁹ Section 3.1 of UNTAET Regulation 2000/15 provides that “[i]n exercising their jurisdiction, the panels shall apply: [...] (b) where appropriate, *applicable treaties* and recognised principles and norms of international law, including the established principles of the international law of armed conflict.” (emphasis added.) While there is strong basis for a claim that certain provisions of the ECHR have indeed attained customary law status (for example, the right to fair and public hearing or presumption of innocence of Article 6), it would be difficult to say the same with respect to Article 2, paragraph 2 of Protocol No. 7 to the ECHR.

¹⁰⁰ Timor Leste ratified the ICCPR on 18 December 2003 without declarations and reservations, unlike some other states that attached declarations or reservations specifically in connection with Article 14, paragraph 5: for example, Austria, Belgium, Denmark, France, Germany, Italy, Luxembourg, Norway, the Republic of Korea, and Trinidad and Tobago.

¹⁰¹ Judgement, *Prosecutor v. Delalić et al.*, A. Ch., *supra* note 93, par. 711; ICTY, Judgement, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 19 April 2004, to be published in volume XIX, par. 219-229 and Disposition, merely noting that the Trial Chamber erred in disallowing convictions of extermination and persecution. See also ICTY, Judgment, *Prosecutor v. Jelisić*, Case No. IT-95-10-A, A. Ch., 5 July 2001, Klip/ Sluiter, ALC-VII-513, par. 77, where the Appeals Chamber declined to reverse the acquittal upon finding that the prosecution's appeal had merit, stating that ordering retrial is not a matter of obligation but discretion.

¹⁰² Rule 110 of the Internal Rules of the ECCC (emphasis added).

Appeal following acquittal in the first instance.¹⁰³ Although it was not realistically available at the time of the Paulino de Jesus appeal judgement, further procedural developments in that case make it worthwhile to consider this avenue.

In fact, the third tier, the Supreme Court of Justice of Timor-Leste, was proposed, but has not been made operational. Pending the establishment of the Supreme Court, the Court of Appeal has been (and, to the knowledge of this author, still is) the highest judicial instance in East Timor.¹⁰⁴ The counsel for Paulino de Jesus attempted to appeal against the Court of Appeals's decision to the same court sitting in its capacity of the yet non-existent Supreme Court of Justice.¹⁰⁵ In its decision of 17 December 2004, the Court of Appeal dismissed the appeal on the ground that, while it performed the functions of the highest court in Timor-Leste, its decisions were not subject to appeal.¹⁰⁶

Arguably, it would not be inappropriate for the judges under these circumstances to review their own decision under the guise of the Supreme Court,¹⁰⁷ given that composing another bench with the court to that end was not an option, due to limited staff, and the remaining alternative was to refuse the defendant the right to appeal the conviction by the Court of Appeal altogether. On the one hand, judges sitting on a review of their own decision would indeed be problematic, in light of the principle *nemo iudex in sua causa*. On the other hand, as another avenue was taken, one can perceive a denial of the defendant's fundamental right as a direct consequence of the legislative inadequacies precluding the establishment of the Supreme Court,¹⁰⁸ and the failure to envisage the temporary jurisdictional mechanism within the Court of Appeal. The latter would have enabled the appellate review of convictions entered on appeal prior to the creation of a 'higher' tribunal.

As a disadvantage of that option, the appointment of another bench in the Court of Appeal to sit on appeals from its own decision might still be controversial in light of Article 14, paragraph 5 of the ICCPR, as such bench may barely be taken as a 'higher tribunal' *stricto sensu*.¹⁰⁹ However, this objection may seem too formal to preclude designation of a panel with special competence within the same court as a matter of principle. This option is certainly to be preferred to stripping the defendant of the right to appeal as a result of reversal of acquittal and conviction by the Court of Appeal.

Finally, it is interesting to address the exercise of appellate powers in the Vitor Manuel Alves case, where the Court of Appeal increased the sentence of one year imprisonment conditionally to two years, thereby modifying the conviction in a fashion unfavourable to the accused. Prior to that, a clarifying remark is due regarding the differences between the situations in the Paulino de Jesus and Vitor Manuel Alves cases.

Reversals of acquittals and aggravating modifications are frequently treated jointly, because of their similar character and potentially equally strong prejudicial effects with regard to the situation of the defendant, both being types of *reformatio in peius*.¹¹⁰ There is, nevertheless, a fine line of distinction to be drawn. In contrast to the reversal of acquittal, an aggravating modification does not entail an entirely new verdict of guilt entered by the appellate court. Such a verdict may be seen as affecting the position of the defendant more

¹⁰³ "[S]hould a conviction be imposed first at the appellate level, the person convicted must be afforded a further appeal" (M. Nowak, U.N. Covenant on Civil and Political Rights, *supra* note 56, p. 351). *Cf. contra*: ICTY, Separate Opinion of Judge Wald, Dissenting From the Finding of Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-A-AR77, A. Ch., 27 February 2001, Klip/Sluiter, ALC-VII-200 ("there [not] yet exists a universal principle that a right of appeal must be afforded even when a conviction first arises in the highest tribunal.")

¹⁰⁴ Sections 124-126 and 164, paragraph 2 of the Constitution of the Democratic Republic of East Timor, adopted on 20 May 2002.

¹⁰⁵ Another application to the Court of Appeal acting as the Supreme Court was for the review of the appellate decision in Armando dos Santos. See, Judicial System Monitoring Programme, The Role, Practice and Procedure of the Court of Appeal, *supra* note 8, p. 12.

¹⁰⁶ Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 4.

¹⁰⁷ Judicial System Monitoring Programme, The Role, Practice and Procedure of the Court of Appeal, *supra* note 8, p. 12.

¹⁰⁸ The Judicial System Monitoring Programme indicates in this regard the inadequate nationality and qualification requirements towards the candidates for the appointment to the Supreme Court established respectively by Section 127.1 of the Constitution and by the Judicial Magistrates Law N8/2002. (JSM, The Role, Practice and Procedure of the Court of Appeal, *supra* note 8, p. 10 and 14).

¹⁰⁹ J. Jones and S. Powles, *International Criminal Practice*, Transnational Publishers, Ardsley 2003, p. 811.

¹¹⁰ The example is the augmentation of a sentence of 20 years imprisonment to a life sentence rendered on appeal. See, Judgement, *Prosecutor v. Galić*, A. Ch., *supra* note 92, par. 456 and Disposition.

fundamentally: it is before the appellate court that the defendant is stigmatized as guilty for the first time and, moreover, this verdict is not subject to appeal. Thus, it could be argued that, from a legal point of view, the modification of conviction or sentence is by definition less problematic. However, the above distinction is only formal. The presupposition that the modification of conviction results in a significantly lower added sentence than a new conviction is easily disproved on the empirical plane by cases such as Galić, where the sentence of 20 years in prison was quashed by the Appeals Chamber and a new unappealable sentence of life imprisonment was inflicted.

For the purpose of determining whether to modify the conviction and/ or sentence or to remit the case to the first instance, it is more useful to tentatively distinguish between different types of modifications, on the basis of: i) the scope of reassessment leading to a proposition to modify; and ii) the expected outcome of the modification. Where the modification of conviction and/ or sentence arises merely from the correction of a (minor) legal error and not from the complete reassessment of the factual or legal findings, remitting the case to the SPSC appears not as important.¹¹¹ Furthermore, the modification appears less problematic where it does not result in an increase of sentence so significant as to seriously prejudice the position of the defendant if left without a possibility of appeal, given the overriding considerations of expediency. For the obvious lack of precision, these considerations can hardly serve as strict and universal criteria for the assessment of the choices made by the appellate instance between modifying the conviction and remitting the case to the trial instance. Yet, it is submitted that they may be helpful in highlighting *evident* cases where the appellate court's exercising the power to modify the conviction or sentence *in peius* does not prejudice the right to appeal as seriously as to result in unfairness. In other words, they indicate when retrial is not mandatory, in light of the conflicting considerations of time and resource economies.

Thus, the Vitor Manuel Alves appeal judgement does not undertake a full reconsideration of the factual findings of the SPSC and modifies the sentence solely on a minor legal ground, namely a higher intensity of the defendant's blameworthiness within the same form of *mens rea* ('gross negligence' instead of unqualified 'negligence'). Furthermore, it can hardly be said that the appeal decision increases the sentence entered by the Trial Panel significantly, at least under the Semanza and Galić standards (respectively, for 10 years and up to a life sentence).

In this light, the marginal modification by the Court of Appeal of the sentence in the Vitor Manuel Alves case does not amount to a problem as critical from the perspective of a right to appeal as in the Paulino de Jesus case. Although the Court of Appeal could well have opted for remanding the former case to the SPSC,¹¹² the overriding 'efficiency' interests particularly critical in the context of the SPSC might not outright warrant that solution.

3. Substantive and procedural issues: consideration on the merits

3.1 General remarks

The previous section examined the decisions in question from a procedural angle, in particular whether the Court of Appeal exercised its appellate powers correctly and whether the proper review standard was applied. These decisions are also interesting in view of the fact that when reviewing the trial judgements, the Court of Appeal had to deal with various issues of substantive and procedural criminal law in the specific context of the serious crimes process. The present section will review the legal reasoning of the Court of Appeal related to the material aspects of the four decisions.

The performance of the Court of Appeal in this respect is to be assessed against the formal and material requirements towards judgements on appeal from final decisions of a SPSC. As to the formal prerequisites, Section 41.5 of UNTAET Regulation 2000/30 stipulates that

¹¹¹ Partially Dissenting Opinion of Judge Pocar, *Prosecutor v. Galić*, *supra* note 95, par. 4 ("Remitting to the Trial Chamber for a redetermination of sentence [...] is especially important where [...] the Appeals Chamber considers that the sentence must be wholly reassessed. Such a *de novo* reassessment must be made by a Trial Chamber as the Chamber with primary responsibility for evaluating the evidence [and] makes it all the more imperative that the resulting sentence be subject to review by a higher court.")

¹¹² Note, however, the discussion on the jurisdictional defect in the case (*infra* Paragraph 3.5 'Vitor Manuel Alves'), whereby the Court of Appeal should have recognized the previous proceeding null and ordered a retrial.

“a decision of the Court of Appeal shall contain the same elements as defined in Section 39.3 of the present regulation and shall address each issue raised by the appellant; provided, however, that the Court of Appeal may summarily dismiss any appeal, issue or claim for relief it finds to be patently frivolous or without merit.”

Among others, Section 39.3 of UNTAET Regulation 2000/30 provides for the following elements to be mandatory to the final decision: (i) an account of the events and circumstances of the case tried by the court; an account of the facts that the court considered proven and facts that were not proven; (ii) an account of the factual and legal grounds of those considerations; (iii) a finding in relation to the innocence or guilt of the accused identifying the section applied of the penal legislation; (iv) an order relating to the penalty if the accused is found guilty. By setting out these requirements, the drafters of UNTAET Regulation 2000/30 intended to urge the Court of Appeal to render decisions that would address every substantial issue raised on appeal – unless “patently frivolous or without merit” – and articulate the factual and legal basis for the conclusions reached.

As to the material requirement, unlike the ICC Statute and ICTY and ICTR RPE, UNTAET Regulation 2000/30 unfortunately does not explicitly require the decision of the appellate instance to “state the reasons on which it is based” or to be “accompanied by a reasoned opinion in writing”.¹¹³ It is nonetheless inconceivable that this requirement is not fully applicable to the Court of Appeal’s decisions, as an internationally recognized standard of criminal procedure and integral part of the right of accused to a fair trial hearing.¹¹⁴

The ICTY Appeals Chamber has linked the right of the accused to a reasoned opinion by a Trial Chamber to enabling him or her to effectively exercise the right to appeal and making it possible for the Appeals Chamber to “understand and review the findings of the Trial Chamber as well as its evaluation of evidence”.¹¹⁵ Apparently, this may not be a rationale behind validation of the ‘reasoned opinion’ requirement for the judgements of the Appeals Chamber itself,¹¹⁶ perhaps except for cases on remand. However, the rule’s relevance to appellate decisions may be inferred from the goals of the appellate review. Particularly, neither the proper administration of justice and truth-finding in an individual case, nor the purpose of ensuring the uniform treatment of issues by inferior courts, may be attained unless the appellate court delivers reasoned and transparent judgements.

As far as the decisions under review are concerned, this material requirement suffers in the majority of cases, as detailed below. Whilst the appeal decisions in question endeavour to generally follow the template provided for in Section 39.3 of UNTAET Regulation 2000/30, serious problems may also be detected with the proper observance of the requirement to address each ground of appeal raised by an appellant, as prescribed by Section 41.5.

Since the original written appeal statements are not made publicly available, the observance by the Court of Appeal of the duty under Section 41.5 of UNTAET Regulation 2000/30 in the decisions under review will be evaluated solely on the basis of the summaries of appellate grounds provided by the Court of Appeal itself, unless otherwise indicated. Usually, such summaries are extremely succinct and unaccompanied by the underlying argumentation or its assessment by the Court of Appeal, from which it could follow that the Court had qualified some of them as frivolous and without merit. Thus, it is often hard to identify the gist of the grounds submitted or grasp the reasons why the Court of Appeal bypassed them in its discussion. In view of that, the following analysis runs the risk of being incomplete – to the extent that the Court of Appeal might have omitted, understated or misinterpreted the grounds advanced.

¹¹³ Article 83, paragraph 4 of the ICC Statute, Rule 117, paragraph B of the ICTY RPE and Rule 118, paragraph B of the ICTR RPE.

¹¹⁴ Judgement, *Prosecutor v. Furundžija*, A. Ch., *supra* note 28, par. 69; ICTY, Judgement, *Prosecutor v. Kunarac, Kovač and Vuković*, Case No. IT-96-23&IT-96-23/1-A, A. Ch., 12 June 2002, Klip/Sluiters, ALC-VIII-911, par. 41; Appeal Judgement, *Prosecutor v. Kupreškić et al.*, A. Ch., *supra* note 16, par. 32 and 39.

¹¹⁵ Judgement, *Prosecutor v. Kunarac et al.*, A. Ch., *supra* note 114, par. 41.

¹¹⁶ *Ibid.*, par. 42 (“The *rationale* of a judgement of the Appeals Chamber must be clearly explained. There is a significant difference from the standard of reasoning before a Trial Chamber. [...] The purpose of a reasoned opinion under Rule 117(B) of the Rules is not to provide access to all the deliberations of the Appeals Chamber in order to enable a review of its ultimate findings and conclusions. The Appeals Chamber must indicate with sufficient clarity the grounds on which a decision has been based. However, this obligation cannot be understood as requiring a detailed response to every argument.”)

3.2 Paulino de Jesus

The misapprehension by the Court of Appeal of the standard of review on the matters of facts and the boundaries of its powers has already been explored in detail.¹¹⁷ To the extent that the Court of Appeal provided no substantive and convincing arguments that could show why, in its view, the assessment of the evidence by the SPSC was erroneous and unreasonable, the decision falls short of satisfying the requirement of a 'reasoned opinion'. Even worse, the inappropriate and far-fetched intrusion upon the factual findings of the SPSC gave an opportunity to observe the inability of the Court of Appeal to apply elementary legal concepts, such as the presumption of innocence, which, for the sake of convenience, has also been addressed above.

In addition, the Paulino de Jesus appeal judgement raises a number of other problems irreconcilable with the proper observance of both material and formal requirements towards a final (appeal) decision. Thus, the Court of Appeal failed to specify which appeal grounds it relied upon when reversing the trial decision and to address all of them.¹¹⁸ Out of the four grounds submitted by the prosecutor, the Court of Appeal completely ignored at least two: i) the material error of law in relying on the accused's statement that was not admitted as evidence during the trial; and ii) the material error of law and fact in admitting the testimony of the defence witnesses.¹¹⁹ The Court of Appeal only partially and very indistinctly addressed the other two grounds; namely, in relation to the alleged factual and legal error resulting in the dismissal of the testimony of prosecution witnesses Saldanha and Cardoso (leaving aside the alleged procedural error),¹²⁰ and in relation to the material factual error in relying on the Fokuper's report (leaving aside the alleged legal error arising from the admission of this evidence).

Furthermore, it is in the Paulino de Jesus appeal judgement where the issue of the complex nature of the applicable substantive criminal law becomes most palpable and the wrong choice of law occurs.¹²¹ Throughout the text, the Court of Appeal evinces a conspicuous lack of understanding of the differences between 'premeditated murder' under Article 340 of the Indonesian Penal Code (IPC) and murder as a crime against humanity under Section 5.1, sub a of UNTAET Regulation 2000/15.¹²² One contemplates persisting confusion as to which head Paulino de Jesus has been convicted under. This demonstrates vividly the Court of Appeal's inability to handle appropriately the separate application of Indonesian law for domestic offences against the UNTAET law for international crimes and to select the applicable law from among legal provisions pertaining to different subsystems.

The initial indictment contained the counts of the crime of murder under Section 8 of UNTAET Regulation 2000/15 and Article 340 of the IPC and attempted murder under the same section and Articles 53 and 340 of the IPC. Following the request of the prosecutor, it was amended to modify these charges to one attempted and one consummated murder as a crime against humanity under Section 5.1, sub a of UNTAET Regulation 2000/15.¹²³ This amendment appears appropriate, in light of the previous problematic practice of indicting persons, who could reasonably be believed to have committed international crimes, for domestic offences.¹²⁴

Nevertheless, the Court of Appeal opens its decision by including in the legal bases for the charges a reference to Article 340 of the IPC regarding premeditated murder.¹²⁵ Further on, the Court of Appeal devotes

¹¹⁷ See *supra* Paragraph 2.1 'Appellate grounds and standard of review'.

¹¹⁸ Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 13; Judicial System Monitoring Programme, The Role, Practice and Procedure of the Court of Appeal, *supra* note 8, p. 15.

¹¹⁹ See Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 13, citing Written Appeal Statement of the Prosecutor, Paulino de Jesus (6/2002), 26 March 2004, p. 4-25.

¹²⁰ In part I of its decision, the Court of Appeal misstates the facts alleged by the prosecution in the indictment, when it mentions in its summary of the appellate grounds that it was the defendant who shot at Juvita Saldanha, whereas the prosecutor only alleged that the defendant was aiding the perpetrator of this act. See JSMP, Paulino de Jesus Decisions, *supra* note 4, p. 13, footnote 13.

¹²¹ On applicable law, see S. Freeland *et al.*, Introduction, *supra* note 2, p. 20.

¹²² This is also noted in Judicial System Monitoring Programme, The Role, Practice and Procedure of the Court of Appeal, *supra* note 8, p. 17; and Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 16-17.

¹²³ TL, Decisão, *Prosecutor v. Paulino de Jesus*, Case No. 2/2002, CoA, 8 September 2003.

¹²⁴ S. Linton, Prosecuting Atrocities at the District Court of Dili, 2 Melbourne Journal of International Law 2001, p. 421. On the problems relating to the amendment of the indictments in this case, see Judicial System Monitoring Programme, Paulino de Jesus Decisions, *supra* note 4, p. 6-8.

¹²⁵ Judgement (Criminal Appeal No. 2004/29), *Prosecutor v. Paulino de Jesus*, *supra* note 1, par. I.

considerable attention to the criteria for premeditation, which is an element of the crime of murder under Article 340 of the IPC. For instance, it discusses such properties of premeditated conduct as “cold-bloodedness in the reflexion of the means employed or in persistence to kill for more than twenty-four hours”, which it derives solely from a Portuguese criminal law textbook, a commentary of the Portuguese Criminal Code and Portuguese jurisprudence.¹²⁶ If it were a comparative exercise, the coverage of the approaches existing in other jurisdictions with regard to ‘premeditation’ is far from complete.¹²⁷

It is moreover disturbing in light of the earlier judicial conflict regarding applicability of Indonesian law, for it is difficult not to suspect that the appellate judges merely tried to bring in the law of Portugal through the backdoor under the guise of Indonesian law. Apart from this misgiving, in addition to the Portuguese background of the Reporting Judge José Maria Calvário Antunes, nothing else can explain why namely Portuguese criminal law doctrine was used for the purposes of clarifying the content of premeditation.

More importantly, it is nowhere stated why the discussion regarding premeditation is considered relevant to the present case, where the defendant was charged with crimes against humanity. Should the Court of Appeal have been fully cognizant of what was charged in the indictment, it would certainly have saved itself embarrassment and notice that such discussion was not pertinent. Apparently, the judges had in mind the provision of Article 340 of the IPC on premeditated murder, which was not even charged, whereas premeditation is not a requisite element of murder as a crime against humanity neither as per the legal frameworks of the *ad hoc* tribunals,¹²⁸ nor under Section 5.1, sub a of UNTAET Regulation 2000/15.¹²⁹

After having satisfied itself of the presence in the acts of Paulino de Jesus of the *indicia* of premeditated murder, the Court of Appeal merely cited Section 5.1 of UNTAET Regulation 2000/15. Without commenting on the *chapeau* element of that section, and without identifying facts proven in the case that would sustain such qualification, the Court of Appeal determined that the defendant had committed crimes against humanity and entered a respective conviction. Given that the legal analysis of the notion and elements of the crime against humanity is not just extremely poor but rather non-existent, the Paulino de Jesus appellate panel fails at the delivery of a reasoned decision, thus also falling short of the material requirements towards appeal decisions.

3.3 Marcelino Soares

Insofar as one can rely on the overview of the appellate grounds advanced by the public defender that is provided in the Marceline Soares appeal judgement,¹³⁰ the Court of Appeal in this case did not address all of the grounds either – without dismissing them as frivolous – thereby failing to meet a mandatory formal requirement. For instance, it totally ignored the alleged procedural violation of evidentiary rules, which makes the analysis of its performance with regard to this ground impossible and compels one to proceed to the alleged lack of evidence ground.

¹²⁶ *Ibid.*, par. IV(B). The commentary referred to appears to be J. de Figueiredo Dias *et al.* (eds.), *Comentário conimbricense do Código Penal*, Tomo 1 e 2, Coimbra Editora, Coimbra 1999.

¹²⁷ On the content of the notion of ‘premeditation’ in some national jurisdictions, see G. Cumes, *Murder as a Crime Against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor*, 11 *European Journal of Crime, Criminal Law and Criminal Justice* 2003, p. 61-62.

¹²⁸ *Ibid.*, p. 53-55 and 65 (at footnote 138), showing, with the references to the Akayesu, Blaškić, Čelebići and Kordić and Čerkez cases, that the Kayishema precedent “is out of step with the mainstream line of authority of the international Tribunals.” See also K. Ambos and S. Wirth, *The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, 13 *Criminal Law Forum* 2002, p. 58. In the Kayishema case, the ICTR opined that the use of the notion *assassinat* as opposed to *meurtre* in the French version of Article 3, sub a of the ICTR Statute indicates that namely premeditation is the *mens rea* of murder as a crime against humanity: see ICTR, Judgement, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, Klip/Sluiter, ALC-II-555, par. 137-139.

¹²⁹ TL, Judgement, *Prosecutor v. Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva, Gonsalo dos Santos, Alerico Fernandes, Mautersa Monis and Gilberto Fernandes*, Case No. 9/2000, SPSC, 11 December 2001, Klip/Sluiter, ALC-XIII-257, par. 649, followed in: TL, Judgement, *Prosecutor v. Domingos Mendonça*, Case No. 18b/2001, SPSC, 13 October 2003, in this volume, p. 309, par. 115-120; Judgement, *Prosecutor v. José Cardoso Ferreira*, *supra* note 22, par. 473-477 and 501-503; TL, Judgement, *Prosecutor v. Agostinho Cloe, Agostinho Cab, Lazarus Fuli and Antonio Lelan*, Case No 4/2003, SPSC, 16 November 2004, in this volume, p. 587, par. 15. See also K. Ambos and S. Wirth, *The Current Law of Crimes Against Humanity*, *supra* note 128, p. 59.

¹³⁰ The Court of Appeal itself lists the following grounds: (1) Lack of proof with regard to i) the existence of the ‘concerted plan of attack targeting at the extermination of the entire population’; ii) the illegal character of the detention of the victims; iii) the essential elements of superior responsibility; (2) error of law (or procedural violation) regarding the applicable evidentiary rules and the wrong evaluation of facts.

To start with the ‘lack of proof’ ground, one notices that the oddly formulated ground of the “existence of the concerted plan of attack with an objective of exterminating the entire population” does not have much in common with the *chapeau* element of Section 5.1 of UNTAET Regulation 2000/15.¹³¹ It is unclear whether it was truly the public defender who confused and merged in the single phrase, intended to denote the ‘contextual element’, the *indicia* pertaining to different crimes including the ones that the client was neither charged with nor convicted for. Or, was it rather a misstatement of the original ground by the Court of Appeal itself?

In any case, the consideration by the Court of Appeal of the alleged lack of evidence in support of the existing widespread or systematic attack, which seems to have been implied by this ground of appeal, is almost nil. It is limited to a single sentence, merely stating that this attack did in fact exist and that the actions of the defendant were part of it.¹³² Thus, the Court of Appeal failed even to reach the issue of whether or not the evidence relating to this element admitted by the SPSC was sufficient to ascertain the existence of the attack,¹³³ let alone take remedial action if the allegation by the defence were to be sustained.

Secondly, the appeal judgement did not pay enough attention to the alleged lack of proof regarding the illegal character of detention of the three members of the ESTAFET.¹³⁴ Showing that such detention constitutes an “intentional and severe deprivation of fundamental rights contrary to international law” appears one of the key elements of persecution as a crime against humanity.¹³⁵ The case law of the *ad hoc* tribunals has confirmed that the unlawful detention of civilians, or infringement of their personal freedom, amount to the persecution as a crime against humanity, if committed on discriminatory basis and with discriminatory intent.¹³⁶

The SPSC deliberately left undecided the defence’s reference to the factual circumstance suggesting the existence of the grounds for arrest under Indonesian law, such as the possession by the victim Luis Dias Soares of an arguably illicit ‘katana’ as a criminal offence. It did so because of the lack of proof as to the illegality of possession of a knife under Indonesian law.¹³⁷ The SPSC’s refusal to consider this issue may seem right on its face, because, formally speaking, the question of legality of detention under domestic law is irrelevant to establishing the crime of persecution. However, the issue of legality of possessing a knife was not fully warranted, because of its ultimate relevance for the determination of the status of detainees and the legality of detention under international humanitarian law, as will be made clear below.

In its judgement, the SPSC incomprehensibly inferred the arbitrary character of detention of the victims from the illegality of the Indonesian occupation of East Timor,¹³⁸ and not from the lack of substantive grounds or procedural violations that would render such detention illegal under customary international or treaty law.¹³⁹ This shows that the analysis of the illegality of detention under international law by the SPSC

¹³¹ Cf. *chapeau* of Section 5.1 of UNTAET Regulation 2000/15 (“‘Crimes against humanity’ means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of attack.” (emphasis added)).

¹³² Judgement (Criminal Appeal No. 2004/30), *Prosecutor v. Marcelino Soares*, *supra* note 1, par. IV(B).

¹³³ TL, Judgement, *Prosecutor v. Marcelino Soares*, Case No. 11/2003, SPSC, 11 December 2003, in this volume, p. 415, par. 9.

¹³⁴ ESTAFET is “[a] clandestine resistance group against Indonesian occupation and for independence” (*ibid.*, par. 5). Further information on the nature and scope of the group’s activities is unavailable.

¹³⁵ Section 5.1, sub h and Section 5.2, sub f of UNTAET Regulation No. 2000/15 (“‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”, undertaken ‘against any identifiable group or collectivity on [...] grounds that are universally recognized as impermissible under international law, in connection with [other crime] within the jurisdiction of the panels.’”).

¹³⁶ ICTY, Judgement, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, T. Ch. I, 31 March 2003, Klip/Sluiter, ALC-XI-697, par. 641; ICTY, Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, T. Ch. I, 3 March 2000, Klip/Sluiter, ALC-IV-477, par. 220 and 234.

¹³⁷ Judgement, *Prosecutor v. Marcelino Soares*, *supra* note 133, par. 11 (“Whether the assertion that it was illegal under Indonesian law for civilians to carry “weapons” is true, can be left undecided, as no proof was offered that ordinary knives were such “weapons”, and such proof is unlikely to be forthcoming as an indispensable working tool for the agrarian population of Timor was and is the katana [...] which is larger and more dangerous than an ordinary knife.”).

¹³⁸ *Ibid.*, par. 21 (“Since the occupation of East Timor by Indonesia was illegal [...], it follows that arrests and detentions carried out by the Indonesian Armed Forces were illegal too.”)

¹³⁹ Judgement, *Prosecutor v. Naletilić and Martinović*, T. Ch., *supra* note 136, par. 641 (“[T]he confinement of civilians is unlawful (i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.*, they are

is unsatisfactory and that, on this point, it failed to provide a sound legal reasoning to bolster its conclusion, which would warrant the intervention by the Court of Appeal. However, the Court of Appeal passed over this issue in silence and ignored the flaws in the SPSC's reasoning. It did not even attempt to review the SPSC's argument in light of whether the substantive legal grounds for detention were absent, or whether the procedural violations could be established under relevant international norms, which could render illegal the detention of the victims. Moreover, the Court of Appeal ignored the respective appellate ground altogether, although in the first paragraph of the decision it recognized itself seized of it.

The victims belonged to ESTAFET and there seemed to be indications to their real or mistakenly perceived links to the *Forças Armadas da Libertação Nacional de Timor-Leste* (FALINTIL),¹⁴⁰ in appropriate conditions, the latter could give rise to a mistake of fact as defence under Section 20.1 of UNTAET Regulation 2000/15.¹⁴¹ In these circumstances, qualification of the detainees' status under international humanitarian law as lawful combatants or civilians posing risk to the occupying power was essential to the finding regarding the legitimacy of their detention. On the one hand, should the finding have been in favour of the former status, the detention would have a substantive legal ground *ipso facto*, and the very fact of such detention could not amount to the crime of persecution. Moreover, it is submitted that, if the victims were to be considered combatants, the prosecution of the defendant for crimes against humanity would be impossible. This is owing to a peculiarity in the formulation of the contextual element in Section 5.1 of UNTAET Regulation 2000/15, which attaches the requirement 'directed against civilian population' to the underlying acts, and not to the character of the attack.¹⁴² At this juncture, the acts of the accused going beyond detention would rather constitute war crimes as violations of laws and customs of war.¹⁴³

Thus, consideration of the question of whether or not the captured ESTAFET members could be considered as lawful combatants might enrich the discussion by the Court of Appeal of the appellate ground as to the alleged illegal character of detention, or even raise the question of correct qualification of violent acts committed against detainees. On the other hand, in case the captured ESTAFET members were to be regarded as unlawful combatants (civilians), their legitimate detention would require the existence of substantive grounds that are to be found, according to Article 9 of the ICCPR, in domestic law,¹⁴⁴ and that is where the issue of the alleged illegality of possession of the knife under Indonesian law was of particular relevance.

According to the analysis by Linton, the FALINTIL resistance fighters – including smaller fractions such as ESTAFET – did not belong to a High Contracting Party to the conflict (Portugal), in the sense of Article 4,

detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary and (ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.' See also, ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, T. Ch. III, 26 February 2001, Klip/ Sluiter, ALC-VII-249, par. 279.

¹⁴⁰ The organized resistance force that emerged as a military branch of the political party *Frente Revolucionária de Timor-Leste Independente* (FRETILIN) on 20 August 1975. On its formation, see S. Niner, *A Long Journey of Resistance: The Origins and Struggle of CNRT*, in R. Tanter *et al.* (eds.), *Bitter Flowers, Sweet Flowers: East Timor, Indonesia and the World Community*, Rowman & Littlefield, Lanham 2001, p. 17.

¹⁴¹ Section 20.1 of UNTAET 2000/15 ("A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.").

¹⁴² The inclusion of the word 'and' between 'attack' and 'directed' in the *chapeau* of Section 5.1 of UNTAET Regulation 2000/15 has been interpreted by commentators as excluding, in the framework of the SPSC, the possibility of prosecuting crimes against humanity committed against non-civilians. See G. Cumes, *Murder as a Crime Against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor*, *supra* note 127, p. 45, footnote 24; S. Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 *Melbourne University Law Review* 2001, p. 154. *Cf.* Article 7, paragraph 1 of the ICC Statute. This difference is a result of error, which contradicts international customary law and should be disregarded in practice, see K. Ambos and S. Wirth, *The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, *supra* note 128, p. 2 and 35-36.

¹⁴³ Section 6.1, sub b of UNTAET Regulation 2000/15. See S. Linton, *Prosecuting Atrocities at the District Court of Dili*, *supra* note 124, p. 425. War crimes were never charged in connection with the 1999 crisis in East Timor (Judicial System Monitoring Programme, *Digest of the Jurisprudence of the Special Panels for Serious Crimes*, *supra* note 3, p. 89). This is perhaps due to the complexities intrinsic in the qualification of the situation as an international armed conflict within the ambit of the Geneva Conventions, whereas the option of non-international conflict was inappropriate from both legal and political perspectives. (S. Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, *supra* note 142, p. 166; C. Kress, *The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes*, 13 *Criminal Law Forum* 2002, p. 465).

¹⁴⁴ Article 6 of the ICCPR provides that "[n]o one shall be deprived of his liberty *except on such grounds* and in accordance with such procedure *as are established by law*." (Emphasis added).

paragraph A, paragraph 2 of the Geneva Convention III.¹⁴⁵ The 1977 Additional Protocol I to the Geneva Conventions extends the applicability of the conventions to the “armed conflicts in which peoples are fighting against [...] alien occupation” and, consequently, to the status of lawful combatants to resistance fighters fulfilling requirements under Article 44, paragraph 3 of Additional Protocol I. However, the protocol, on this point diverging from customary international law,¹⁴⁶ remained inapplicable in the context of the occupation of East Timor and the protracted (international) armed conflict between Indonesia and the resistance movement, due to non-ratification of that instrument by Indonesia.

Therefore, under international humanitarian law, the guerillas in East Timor should have been considered as unlawful combatants – i.e. “civilians who took up arms against an alien occupier”.¹⁴⁷ This category of persons falls short of the entitlement under international law to engage in the belligerent activities against the occupying power and, thus, of the protections of the prisoner-of-war status in case of such engagement. The direct implications of non-recognition of their right to engage directly in hostilities are that all their military and subversive actions become subject to criminal law applied by the detaining power.¹⁴⁸ This does not preclude their detention as persons suspected of having been involved in the hostile activities and sabotage,¹⁴⁹ or of having committed criminal offences under applicable law (for example, the possession of katana, which, as noted, points to the relevance of the status of this weapon under applicable Indonesian law). Thus, the detention of victims might have been legal under international law by virtue of Article 9, paragraph 1 of the ICCPR, in as much as it could be legal under the domestic (anti-subversive or criminal) law in force.¹⁵⁰

This discussion shows that there was more for the Court of Appeal to say on the alleged lack of proof as to the illegality of detention. The single statement that the defendant had no ‘powers’ and no ‘legitimate mandate’ to detain the victims, not being followed by any legal analysis of their status in light of certain facts, including the existence of an armed conflict between, on the one hand, the Indonesian military (*Tentara Nasional Indonesia* (TNI)) and pro-autonomy militias, and resistance forces on the other, is irreconcilable with the requirement of ‘reasoned opinion’.

Thirdly, as far as the superior responsibility of Marcelino Soares is concerned, the Court of Appeal only addressed its relevant elements under Section 16 of UNTAET Regulation 2000/15¹⁵¹ in a highly sporadic and incomplete manner. This may be attributed partly to its failure, in the examination of the grounds for appeal, to articulate this issue distinctly.¹⁵²

On a number of occasions, the Court of Appeal indicates the elements essential to this mode of responsibility. Here and there, it alludes to the position of the defendant as Babinsa (‘village level commander of TNI’); the relations of subordination between him and the members of the Timorese TNI unit; his knowledge of the acts that the subordinates were about to commit or had committed; and the failure to punish them for mistreating the victims. However, it does not present and analyse each of these elements coherently so as to provide a reasoned view in response to the appellant’s challenge of the applicability of the command responsibility concept in the present case.

While the Court of Appeal could have been expected to address the omission by the SPSC to enumerate the elements of this legal construction and the factual findings matching those,¹⁵³ it even fails to indicate, for

¹⁴⁵ S. Linton, Prosecuting Atrocities at the District Court of Dili, *supra* note 124, p. 438-441.

¹⁴⁶ S. Linton, Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor, *supra* note 142, p. 165-166.

¹⁴⁷ S. Linton, Prosecuting Atrocities at the District Court of Dili, *supra* note 124, p. 447-448.

¹⁴⁸ S. Linton, Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor, *supra* note 142, p. 165.

¹⁴⁹ Article 5 of the Geneva Convention IV.

¹⁵⁰ As this argument is made solely to underline the relevance of the issue as such, the further inquiry into the status of ‘cold steel’ under Indonesian law in force at the time of events in question is not undertaken here.

¹⁵¹ Section 16 of UNTAET Regulation 2000/15 (“[T]he fact that any of the acts [...] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”)

¹⁵² See the analysis by D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, *supra* note 3, p. 74-75.

¹⁵³ *Ibid.*, p. 74.

each of the crimes charged, whether the defendant is convicted on the basis of individual or command responsibility. Ultimately, the Court of Appeal refers to the participation of Marcelino Soares in all three crimes against humanity, which also implies that he has been convicted for murder of the victim Luís Dias Soares on the basis of individual criminal responsibility.¹⁵⁴ However, the defendant was only indicted and convicted for this crime based on command responsibility, the reasons for which had been emphasized by the SPSC.¹⁵⁵

Apparently, the Court of Appeal lacks an elementary understanding of the doctrine of command responsibility and its elements. In particular, it evinces its incompetence when it imputes to the defendant the failure to impede the beating of the victims Luís Dias Soares and Rafael de Jesus Amaral by the members of the Indonesian TNI unit (Rajawali) deployed in the same village, who were neither defendant's subordinates nor under his 'effective control'.¹⁵⁶ Thus, one gets an impression that Marcelino Soares was convicted on the basis of command responsibility for acts for which he was neither obligated nor in a position to prevent and to punish and, thus, strictly speaking, not imputable to him under Section 16 of UNTAET Regulation 2000/15. Such attribution goes contrary to the requirement of a causal relationship between the actions or omissions and the consequences, thus undermining the integrity of *actus reus*.

The SPSC established the causal link between the accused's omissions and the death of one of the victims, irrespective of the Rajawali's contribution to mistreating that victim, by dismissing its effects for bringing about the death.¹⁵⁷ Although the SPSC's analysis is perfunctory, it does at least appreciate the importance of this issue and does apply a correct legal standard – that of 'substantive cause'.¹⁵⁸ However, in the appeal decision, the possibility that the contribution of Rajawali soldiers could sever the *nexus* between the acts and omissions of Marcelino Soares as the cause, and the death of Luis as the effect, passed completely unnoticed.

3.4 Umbertus Ena

Almost by way of exception, the Umbertus Ena appeal judgement satisfies the formal requirement of Section 41.5 of UNTAET Regulation 2000/30, in that it seems to address every appellate ground raised by the accused, as far as one may judge based on the summary in the decision, relative to both procedural and substantive issues. The Court of Appeal furthermore provides a concise reasoning to its findings that lead to the dismissal of the appeal, compared to other decisions considered here, yet it can hardly be taken as fully satisfactory.

With regard to the accused's complaint concerning the violation of his rights by disregarding his request to be interrogated by the parties on the content of his statement at trial, the Court of Appeal relied on Sections 30.5 and 30.7 of UNTAET Regulation 2000/30. Section 30.5 establishes the procedure to be followed in cases where a statement is made by the accused: the court may pose questions on the contents of such statement and then invite parties to ask additional questions. Section 30.7 guarantees the right of the accused to address the court "regarding any issue raised during the hearing, provided that such issue is relevant for proceedings". These provisions mirror the procedure adopted at the ICC and to a lesser extent the ICTY.¹⁵⁹

¹⁵⁴ *Ibid.*, p. 75.

¹⁵⁵ Judgement, *Prosecutor v. Marcelino Soares*, *supra* note 133, par. 13.

¹⁵⁶ Judgement (Criminal Appeal No. 2004/30), *Prosecutor v. Marcelino Soares*, *supra* note 1, par. IV(B) ("Later on, still during the day, two lorries arrived with Indonesian soldiers, who began to kick and beat Luís even more, despite him being seriously hurt and already suffering several injuries, *without the accused making any attempt to stop them* [the Rajawali soldiers].")

¹⁵⁷ Judgement, *Prosecutor v. Marcelino Soares*, *supra* note 133, par. 12 ("Since the amount and the severity of wounds inflicted by the Timorese TNI were a substantial cause for the death, the wounds inflicted by the Indonesian TNI are not in the nature to sever the chain of cause and effect.")

¹⁵⁸ Cf. the 'substantial cause' admitted in both national and international criminal law: ICTY, Judgement, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-T, T. Ch. II *quater*, 16 November 1998, Klip/ Sluiter, ALC-III-363, par. 424 and footnote 435.

¹⁵⁹ Cf. Article 67, paragraph 1, sub h of the ICC Statute, which provides that the accused shall be entitled "to make an unsworn oral or written statement in his or her defence"; Rule 84*bis* of the ICTY RPE allows the accused, upon authorization of the Trial Chamber, to make an unsworn statement not subject to examination after the opening statements by the parties or, where the defence defers its opening statement, after the opening statement of the prosecutor. A similar right is absent from the ICTR RPE. For differences between the ICC and ICTY, see S. Zappalà, Human Rights in International Criminal Proceedings, *supra* note 33, p. 141-142.

and are generally in line with the noticeable civil law inclination of the SPSC procedures.¹⁶⁰ The testifying accused is not treated as a witness, as is the case at common law, whereas the judges and not the parties are given a key role in directing the proceedings and coordinating the production of evidence. In the given situation, the Court of Appeal has rightly emphasized the discretionary power of the SPSC to allow the examination of the accused by the parties concerning the statement and the lack of any practical value of interrogating him by the defence counsel, as had been requested by *Umbertus Ena*.¹⁶¹

In response to the accused's allegation that the SPSC took into consideration his statement made during the police interrogation in the absence of counsel, the Court of Appeal stated that "it is true that the statements made by the accused at the police without his lawyer present cannot lead the Court to decide about the facts imputed to him."¹⁶² However, as noted by the Court of Appeal, the conviction by the SPSC was based not on the statements made in the absence of defence counsel, but on the numerous testimonies supporting the facts charged and on the accused's own statements during the trial proceedings.¹⁶³ In the view of the Court of Appeal, this evidence altogether amounted to a solid basis for a conviction.

Thus, the Court of Appeal fails to pronounce directly on the issue of whether or not the SPSC must have excluded the evidence concerned, as resulting from his statements that were uninformed and thus compromising the 'right to silence'.¹⁶⁴ Generally, the jurisprudence of the SPSC reflects the rule that pre-trial statements of accused, when obtained through a violation of the indicated right or even without such, should not be admitted.¹⁶⁵

What transpires from the quite brief discussion of these issues in the decision is that the Court of Appeal recognizes by implication that the violation of the accused's "right to be questioned in the presence of a legal representative"¹⁶⁶ renders the evidence obtained through such violation tainted. However, it does not seem to consider such evidence subject to mandatory exclusion by virtue of its being "obtained by methods that cast substantial doubt on its reliability", or as the evidence admission of which would be "antithetical to, and would seriously damage, the integrity of the proceedings".¹⁶⁷ While this conclusion may not appear unusual in light of the free admission of evidence within the flexible evidentiary process at the SPSC, it departs from an earlier practice of the ICTY with regard to the exclusion of statements obtained from a suspect during police interviews unattended by a legal representative.¹⁶⁸ Furthermore, it disregards Section 55.2, sub g of UNTAET Regulation 2000/30, stating that the situation "where the suspect or accused had no legal advisor [...] when such were required by law" must lead to the recognition of the ensuing acts as a nullity that cannot be remedied without new proceedings.¹⁶⁹

¹⁶⁰ "In the inquisitorial civil-law model [...] the defendant is not even allowed to take an oath, and may give unsworn statements in court on any subject relevant to the case. There is no sanction [...] for making a false statement. The defendant can be questioned by the court, by the Prosecutor and the Defence, but is under no obligation to answer." (G. Turone, *The Denial of the Accused's Right to Make Unsworn Statements in Delalić*, 2 *Journal of International Criminal Justice* 2004, p. 455). See also G. Boas, *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility*, 12 *Criminal Law Forum* 2001, p. 82-86.

¹⁶¹ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(1)(a) ("[T]he counsel of the accused can always advise the accused to respond or not to respond to a particular question and can advise him to provide clarifications that are deemed necessary, even where the counsel does not examine the accused.")

¹⁶² *Ibid.*, par. II(1)(b).

¹⁶³ *Ibid.*

¹⁶⁴ Section 6.2, sub a of UNTAET Regulation 2000/30.

¹⁶⁵ The pre-trial statements recognized as violating the right to silence in TL, Sentence, *Prosecutor v. Anigio de Oliveira*, Case No. 7/2001, SPSC, 27 March 2002, Klip/ Sluiter, ALC-XIII-511, par. IV(2). Such statements were considered admissible only if rendered after "voluntarily and knowingly waiving the right to silence". See, TL, Final Judgment, *Prosecutor v. Sisto Barros and Cesar Mendonca*, Case No. 1/2004, SPSC, 12 May 2005, in this volume, p. 813, par. 24 and 35; TL, Dissenting Opinion on the Defendant's Oral Motion to Exclude Statement of the Accused, *Prosecutor v. Francisco Pereira*, Case No. 34/2003, SPSC, 17 September 2004, in this volume, p. 221.

¹⁶⁶ Section 6.2, sub f of UNTAET Regulation 2000/30. Cf. Article 55, paragraph 2, sub d of the ICC Statute; Article 18 of the ICTY Statute and Rule 42, paragraph B of the ICTY RPE.

¹⁶⁷ Section 34.2 of UNTAET Regulation 2000/30. Cf. Article 69, paragraph 7 of the ICC Statute and Rule 95 of the ICTY RPE.

¹⁶⁸ In Mucić, such evidence was regarded "null and inadmissible in proceedings" before the ICTY and excluded. See, ICTY, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, *Prosecutor v. Mucić*, Case No. IT-96-21 -T, T. Ch. II *quater*, 2 September 1997, Klip/ Sluiter, ALC-I-227, par. 55.

¹⁶⁹ Consider Section 6.2 of UNTAET Regulation 2000/30, which provides that "[i]mmediately upon arrest, the suspect shall be informed [...] that he or she has [...]: (a) the right to remain silent and not to admit guilt, and that silence will not be interpreted as an

The Court of Appeal's failure to raise the issue of admission of tainted evidence entails a conclusion that the violations of rights enshrined in Sections 6.2, sub a and f of UNTAET Regulation 2000/30 are not considered by it as serious enough to be antithetical to the integrity of proceedings, or to cast substantial doubt on the reliability of statements supplied by the accused. To all appearances, such admission is not treated by the Court of Appeal as a 'nullity' as required by Section 55.2, sub g of UNTAET Regulation 2000/30, but rather as an irregular act similar to those indicated by Section 55.1 of UNTAET Regulation 2000/30. Apart from the fact that this is legally incorrect, it is indeed not conducive to the better protection of the right to be questioned in the presence of a legal representative and the right to silence existing in criminal proceedings in East Timor.

In the same infirm way, the Court of Appeal deals with the procedural response to the violation of the above-mentioned rights. It seems to be of an opinion that non-reproduction by the SPSC of the content of the statements supplied during the police interrogation in the impugned decision, amounts to an adequate remedy in that this assures of the SPSC's non-reliance on the tainted evidence. Whether this is actually of any relief to the accused whose right to legal assistance during interrogation was violated is questionable: the SPSC judgement nevertheless mentioned the fact of Umbertus Ena's confession to the police made on three occasions,¹⁷⁰ which indicates that it did consider such statements as possessing probative value.

The confession of the accused made before the SPSC itself at trial reveals two interconnected problems, neither of which was raised on appeal or revised by the Court of Appeal *proprio motu*. In the first place, this confession in itself did not receive any procedural qualification by the SPSC. Furthermore, Ena's confession contained a claim that he was forced to spear the victim under the threat of imminent death,¹⁷¹ which went unnoticed by the SPSC.

Scholars noted that admissions of guilt before the SPSC had frequently been attended by claims of coercion.¹⁷² The legal effects of such allegations of duress are that they make a confession an equivocal plea, as defined in the ICTY case law.¹⁷³ In contrast to the ICTY, duress is one of the grounds for excluding criminal responsibility in the framework of the SPSC,¹⁷⁴ and thus amounts to a full defence incompatible with the admission of guilt.¹⁷⁵

As regards the confession itself, it is not clear whether this plea was nevertheless regarded and accepted by the SPSC as the admission of guilt or rather as an equivocal plea leading to a full trial pursuant to Section 29A.3 of UNTAET Regulation 2000/30.¹⁷⁶ Should the former be the case in spite of the claim of duress, the SPSC must have satisfied itself that the accused understood the legal meaning and consequences of such a confession; that the confession was voluntary, informed and supported by the materials in the case, as set out in Section 29A.1 of UNTAET Regulation 2000/30. However, there are no indications of the proper execution by the SPSC of its obligation to assure itself of the above circumstances, nor to the rejection of the plea due

admission; [...] (f) the right to be questioned in the presence of a legal representative, unless the right is waived." There is no information in the case that Umbertus Ena waived the latter right.

¹⁷⁰ TL, Judgement, *Prosecutor v. Umbertus Ena and Carlos Ena*, Case No. 5/2002, SPSC, 23 March 2004, in this volume, p. 477, par. 61.

¹⁷¹ *Ibid.* ("Liberatus Mauno called me and took his machete to my neck and said if you don't kill that person you have to die; he gave me the spear and I speared him on the hand; Liberatus Mauno had already killed him.")

¹⁷² S. Linton and C. Reiger, *The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders*, 4 Yearbook of International Humanitarian Law 2001, p. 13.

¹⁷³ ICTY, Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997, Klip/Sluiter, ALC-I-547, par. 8 ("The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.")

¹⁷⁴ Section 19.1, sub d, sub ii of UNTAET Regulation 2000/15.

¹⁷⁵ See Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Prosecutor v. Erdemović*, *supra* note 173, par. 89, rejecting the equivocal character of the accused's plea because duress "does not afford a complete defence in international law" against the crimes charged. This is not the case under the *lex specialis* of Section 19.1, sub d of UNTAET Regulation 2000/15.

¹⁷⁶ *Ibid.*, par. 29 ("The requirement that a plea must be unequivocal [...] imposes upon the court in a situation where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, to reject the plea and have the defence tested at trial.") An equivocal plea (in connection with duress) was rejected in the Julio Fernandes case (TL, Judgement, *Prosecutor v. Julio Fernandes*, Case No. 2/2000, SPSC, 1 March 2001, Klip/Sluiter, ALC-XIII-123, par. 3). See Section 29A.3 of UNTAET Regulation 2000/30 ("Where the court is not satisfied that the matters referred to in Section 29A.1 are established, it shall consider the admission of guilt as not having been made, in which event it shall order that the trial be continued under the ordinary trial procedures provided in this Regulation.")

to its equivocal character. In these circumstances, the Court of Appeal should have held that the SPSC had legally erred in accepting the confession, which it failed to do.

Secondly, disregard shown of the allegation that the accused was coerced to inflict injury on a victim under threat of death reflects an incomplete analysis of the facts and a lack of appreciation of their legal implications in both the trial and appeal decisions. Neither the SPSC nor the Court of Appeal seem to attach any importance to this aspect of the confession, which – if duly established as the defence of duress – should serve as the ground for the exclusion of criminal responsibility for that act under Section 19.1, sub d of UNTAET Regulation 2000/15. In the present case, the implicit criterion for the applicability of the defence, namely that the accused did not voluntarily bring about the situation leading to duress,¹⁷⁷ appears to be met, as the SPSC acknowledged that the accused was forced by threats to join the militia. However, it did not go further than merely considering the latter fact as a mitigating circumstance,¹⁷⁸ thereby turning a blind eye to the issue of duress as alleged in respect of the imputed acts.

These salient issues remained unaddressed by the Court of Appeal *proprio motu* and constitute major omissions in the appellate judgement. Fundamental for ensuring the fairness of proceedings, each of the indicated aspects of the confession alone would suffice for a diligent Court of Appeal to order retrial or address the issue itself. These failures in the Umbertus Ena case underline the previously reported problem of the mishandling of the procedures regarding admissions of guilt and the defence of duress within the serious crimes process.¹⁷⁹

As to the admission into evidence of the human rights reports, the Court of Appeal found no violation of the rights of the accused, given that such admission was not prohibited and that this evidence did not constitute the (sole) basis for the SPSC's conclusion as to the facts.¹⁸⁰ No references are made to the general rule on the free admission of evidence under Section 34.1 of UNTAET Regulation 2000/30,¹⁸¹ or to the relevance and probative value of the reports, for example with regard to the contextual element of the crimes against humanity.¹⁸² On the contrary, and for incomprehensible reasons, the Court of Appeal states that the conclusions of the SPSC as to the facts have not been based on the human rights reports.¹⁸³

Thus, in relation to the procedural grounds raised by the appellant, it is to be regretted that the Court of Appeal missed the opportunity to identify the most relevant issues concerning the exclusion of evidence, to explore them in the context of the procedural law and practice of other tribunals and to provide legally sound conclusions.

Another set of grounds of appeal in the Umbertus Ena case related to the alleged groundlessness of the SPSC judgement. This encompassed three issues. The first of them, namely the wrong assessment of evidence and reliance on false and contradictory witness testimonies, has been touched upon in the context of the discussion on the standard of review regarding issues of fact.¹⁸⁴ It suffices only to repeat here that the Court of Appeal chose to defer to the factual findings of the SPSC and rely on the trial record, in spite of the complaints regarding the reliability of evidence contained therein. With the benefit of hindsight as to the

¹⁷⁷ ICTY, Separate and Dissenting Opinion Judge Cassese, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997, Klip/ Sluiter, ALC-I-601, par. 50 (“[T]he Trial Chamber [...] must first of all determine whether the situation leading to duress was voluntarily brought about by the Appellant.”)

¹⁷⁸ Judgement, *Prosecutor v. Carlos Ena and Umbertus Ena*, *supra* note 170, par. 99 and 102.

¹⁷⁹ S. Linton and C. Reiger, The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders, *supra* note 172, p. 21-22 and 32-33; Judicial System Monitoring Programme, Digest of the Jurisprudence of the Special Panels for Serious Crimes, *supra* note 3, p. 43-44.

¹⁸⁰ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(1)(c).

¹⁸¹ In the other case, the SPSC pointed out the ‘inclusionary’ (sic) as opposed to ‘exclusionary’ nature of its rules of evidence. See, Judgement, *Prosecutor v. José Cardoso Ferreira*, *supra* note 22, par. 293.

¹⁸² For example, Judgement, *Prosecutor v. Joni Marques et al.*, *supra* note 129, par. 679 (“[T]he reports on the situation in East Timor at the time of the charges alleged by the Prosecution [...] can therefore be assessed as important evidence on the political and social background required in relation to the context element for evaluating the offences as crimes against humanity.”) Regarding the practice of admitting human rights reports, see TL, Decision, *Prosecutor v. Mateus Lao*, Case No. 10/2003, SPSC, undated, par. 17-19; TL, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, *Prosecutor v. Rudolfo Alves Correia*, Case No. 27/2003, SPSC, 19 July 2004, in this volume, p. 217, par. 8-9; Judgement, *Prosecutor v. José Cardoso Ferreira*, *supra* note 22, par. 315.

¹⁸³ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(1)(c).

¹⁸⁴ See *supra* Paragraph 2.1 ‘Appellate grounds and standard of review’.

treatment of factual findings of the SPSC by the Court of Appeal in the Paulino de Jesus case, one notices that the Court of Appeal applied different tests for review in these two cases, unchangeably to the prejudice of the accused (unsurprisingly, both cases involved members of the pro-Indonesian militia). Thus, the selective application of a more rigorous factual review standard in the Umbertus Ena case is arguably unfair, as it amounts to a denial of the right to genuine review.

In the second place, Umbertus Ena claimed that the error of law had been committed by the SPSC when qualifying the sole incident of infliction of corporal harm as a crime against humanity under UNTAET Regulation 2000/15, because “it would be impossible to say that he has perpetrated systematic attacks”.¹⁸⁵ Citing the text of the SPSC judgement, the Court of Appeal averred, on the basis of the evidence produced, that he had “attacked the population on the political motives” and “on several occasions” and that, therefore, “he had mounted systematic attacks”.¹⁸⁶ The analysis of the *chapeau* elements of the definition of the crimes against humanity under Section 5.1 of UNTAET Regulation 2000/15 by the Court of Appeal is very cursory and reveals a deficient understanding by the judges of this basic concept of international criminal law.

First, the Court of Appeal fails to mention at all the required *mens rea* element (‘knowledge of the attack’) when it evaluates the performance of the SPSC. Secondly, one notices that the Court of Appeal tends to construe the ‘widespread or systematic attack’ contextual to the underlying acts as the ‘systematic or repeated commission of the underlying acts’. In this regard, it is not totally clear whether the ‘systematic character of the attack’ element is inferred by the Court of Appeal from the context of the operations of the pro-autonomy militia in the Oecússi enclave, or rather from the repeated character of the attacks by the militia unit with the participation of the accused. Thirdly, the Court of Appeal alludes to the political motives of the crimes in question and to the ‘population in favour of the independence’ being targeted, although none of those is an element of murder and other inhumane acts qua crimes against humanity charged in the present case.¹⁸⁷

The response by the Court of Appeal to the third argument of the appellant as to the lack of foundation for the SPSC judgement contains both the passage that is perhaps most commendable among the decisions that are subject-matter of this commentary, as well as the disenchanting discussion leading to a modification of the conviction for two crimes against humanity as one crime. Following the above observations on what may seem to be the Court of Appeal’s illiteracy in relation to the fundamental concepts of (international) criminal law, it would be logical to start with addressing the second issue.

With regard to the question of whether the first-instance panel and the prosecution had adopted the correct view that the accused had committed two crimes against humanity for the purposes of sentencing, the Court of Appeal stated:

“There cannot be as many crimes against humanity as the murders committed, or as the forms of murder (consummated or attempted) verified, or the crimes against humanity committed. In fact, one of the elements of the type of crime against humanity consist precisely of several crimes of forms of crime committed as part of a widespread or systematic attack against a civilian population.”¹⁸⁸

As rightly noted by Cohen, this renders the Court’s decision “confused and confusing” and the underlying reasoning “incomprehensible from a doctrinal standpoint”.¹⁸⁹ The Court of Appeal’s line of argument entails the impossibility of cumulatively convicting for multiple acts amounting to different types of crimes against humanity. In the given case, the cumulative conviction arose from a series of interlinked acts proscribed under Sections 5.1, sub a and k of UNTAET Regulation 2000/15: the murder of two persons, Ernesto Lafu and Vicente Quelo, and ‘other inhumane acts’ against Serafim Tolo qua crimes against humanity. When entering a single cumulative conviction, the SPSC relied on Article 64, paragraph 1 of the IPC.¹⁹⁰ For the

¹⁸⁵ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(2)(b).

¹⁸⁶ *Ibid.*

¹⁸⁷ Except for the crime of persecution, crimes against humanity do not require a discriminatory intent. See, K. Ambos and S. Wirth, *The Current Law of Crimes Against Humanity*, *supra* note 128, p. 45.

¹⁸⁸ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(2)(c)(ii).

¹⁸⁹ D. Cohen, *Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor*, *supra* note 3, p. 67-68.

¹⁹⁰ Article 64, paragraph 1 of the IPC provides that “[i]f among more acts, even though each in itself forms a crime or misdemeanour, there is such a relationship that they must be considered as one continued act, only one penal provision shall apply

purposes of sentencing, it considered each of the imputed acts – committed ‘in the close proximity of time and space’ and by a group of persons in pursuance of a ‘common criminal purpose’ – a part of a ‘continued criminal act’.¹⁹¹

Following the civil law terminology, the international criminal law doctrine labels a criminal transaction consisting of sequential acts as the ‘real concurrence of offences’.¹⁹² The real concurrence implies the existence of several distinct offences, “an accumulation of separate acts, each violative of a different provision”.¹⁹³ In contrast to a more complex issue of multiple convictions based on the same acts (‘ideal concurrence’), entering cumulative convictions for distinct multiple acts appears to be largely unproblematic¹⁹⁴ and is a normal practice in national legal systems and before international judicial *fora*, including the Court of Appeal itself.¹⁹⁵

Thus, every proven incident of murder and/ or ‘other inhumane acts’ committed in the context of widespread and systematic attack and with the knowledge of such attack, amounts to a distinct crime against humanity. The number of such crimes ultimately depends on the number of victims; and a cluster of offences naturally incurs a cumulative conviction. The Court of Appeal’s position in the *Umbertus Ena* case, which does not regard Sections 5.1, sub a k of UNTAET Regulation 2000/15 as distinct provisions and, consequently, the respective offences as self-standing crimes, is an erroneous application of the concept of the crimes against humanity.

Again, this points to the deficient knowledge by the Court of Appeal judges of the very law the proper application of which by the inferior panel they were entrusted to oversee and of which they were the ‘arbiters’. By contrast, the analysis of the law of crimes against humanity in the decision of the SPSC is extensive; it furthermore abounds with the references to the case law of the *ad hoc* tribunals and to decisions of SPSC.¹⁹⁶

Finally, and this is the positive part, the *Umbertus Ena* appeal judgement addressed the question of whether holding the appellant criminally responsible for the acts committed in 1999 under UNTAET Regulation 2000/15, which entered into force only in June 2000, is in conformity with the principle of legality envisaged in Section 12 of that Regulation.¹⁹⁷ While noting the absence of the notion of crimes against humanity in 1999 under both Timorese and Indonesian law, the Court of Appeal stated in this respect that “under general or customary international law, we can punish the conduct of the appellant as a crime against humanity, even in the absence of an explicit prior penal norm, without violating the principle ‘*nullum crimen sine lege*’.”¹⁹⁸ It then took the opportunity to provide a historical survey of the development of this category of crimes as customary international law offences, referring to the London Agreement of 8 August 1945 establishing the International Military Tribunal and the United Nations Security Council Resolutions 808 (1993) and 955 (1994) creating the ICTY and ICTR. Although quite scant¹⁹⁹ and falling short of the consideration of the formal aspects of customary international law (*opinio juris* and *usus*), the inclusion of this discussion is a pleasant surprise to any student of the Court of Appeal’s jurisprudence. The majority of its decisions contain not a single reference to the primary sources and prior practice of international criminal law. Furthermore,

whereby, in case of difference, the most severe penal provision shall be imposed.” Source: Penal Code of Indonesia, translation issued by Directorate General of Law and Legislation, Indonesian Department of Justice 1982. Available via: <http://www.unotil.org/legal/IndonesianLaw/english/codes/Penal-Code-E.pdf>; visited 28 September 2007.

¹⁹¹ Judgement, *Prosecutor v. Umbertus Ena and Carlos Ena*, *supra* note 170, par. 109.

¹⁹² ICTY, Judgement, *Prosecutor v. Kupreškić and others*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, Klip/ Sluiter, ALC-IV-703, par. 661) “ ‘Real concurrence’ occurs when the perpetrator commits several crimes, albeit in a single transaction, either by violating the same criminal provision against more than one person or by violating a number of distinct criminal provisions through disparate acts.” See also A. Cassese, *International Criminal Law*, *supra* note 33, p. 213.

¹⁹³ *Ibid.*, par. 678.

¹⁹⁴ *Ibid.*, par. 679; Judgement, *Prosecutor v. Delalić et al.*, A. Ch., *supra* note 93, par. 412 (“only multiple offenses may justify cumulative convictions.”)

¹⁹⁵ Note, for instance, that the Court of Appeal did not see it a problem to uphold a cumulative conviction of murder, torture and persecution as crimes against humanity in the Marcelino Soares case.

¹⁹⁶ See Judgement, *Prosecutor v. Umbertus Ena and Carlos Ena*, *supra* note 170, par. 79-92.

¹⁹⁷ *Cf.* Judgement, *Prosecutor v. Marcelino Soares*, *supra* note 133, par. 16-17.

¹⁹⁸ Judgement (Criminal Appeal No. 2004/54), *Prosecutor v. Umbertus Ena*, *supra* note 1, par. II(1)(c)(i).

¹⁹⁹ *Cf.* Final Judgment, *Prosecutor v. Sisto Barros and Cesar Mendonca*, *supra* note 165, par. 11-34.

the position taken by the Court of Appeal is a positive development in view of its previous pronouncement in the Armando dos Santos case that the enactment of UNTAET Regulation 2000/15 was at odds with the constitutional principle of legality, as far as crimes against humanity were concerned.²⁰⁰

As remarked earlier, the Umbertus Ena appeal judgement is of considerably higher quality than the other decisions under review and meets the formal requirements of an appeal decision under Section 41.5 of UNTAET Regulation 2000/30. Nevertheless, the indicated areas of concern altogether preclude one from considering it a solid opinion sufficiently reasoned and satisfactory in all respects. In particular, the Court of Appeal's adjudicatory achievements in the Umbertus Ena case, which might inspire respect and restore trust of the district level courts towards their higher authority, is stultified to a great extent by the deficient understanding and misapplication of the fundamental concept of international criminal law, such as crimes against humanity.

3.5 Vítor Manuel Alves

The Vítor Manuel Alves appeal judgement can with reason be considered controversial, and not only due to its delivery of a politically comfortable outcome confirming the unconvincing factual findings and dubious legal qualifications reached by the SPSC in this sensitive case. This is also owing to a number of substantial flaws in the SPSC judgement, which the Court of Appeal fails to address. In addition, from the angle of both the formal requirements that a written decision must fulfil and the material criterion of the quality of legal reasoning, the appeal decision leaves much to be desired. In order to be able to fully appreciate the scope of failures of the Court of Appeal in the Vítor Manuel Alves case, a preliminary discussion of the trial decision is necessary.

The SPSC convicted the accused of negligent homicide under Article 359 of the IPC, whereas he was charged with a crime of voluntary manslaughter (the Indonesian equivalent being *pembunuhan*) under Article 338 of IPC.²⁰¹ Already at this juncture, it is essential to note that it is highly doubtful whether the SPSC had material jurisdiction to convict for the crime of negligent homicide.²⁰² Thus, the first stumbling block is if the SPSC *could* at all enter this conviction.

The title of Section 8 of UNTAET Regulation 2000/15 explicitly refers to 'murder', which presupposes an unlawful and intentional taking of life of another person, if one is to follow the generic definition cast by the *ad hoc* tribunals.²⁰³ The notion of murder corresponds to the *corpi delicti* of crimes under Articles 338 and 340 of the IPC (setting out respectively simple voluntary and premeditated murder), rather than Article 359 of the IPC regarding negligent homicide.²⁰⁴ The SPSC recognizes itself as possessing jurisdiction over the crime of 'causing death by negligence' (Article 359 of the IPC), because it considers it to be 'a lesser included offence' in the sense of Section 32.4 of UNTAET Regulation 2000/30.²⁰⁵

²⁰⁰ See TL, Judgement, *Prosecutor v. Armando dos Santos*, Case No. 16/2001, CoA, 15 July 2003, in this volume, p. 103 ("[E]ven though the acts committed by the defendant in 1999 include the crime against humanity provided for under section 5.1(a) of UNTAET Regulation 2000/15, the defendant may not be tried and convicted based on this criminal law, which did not exist upon the date on which these acts were committed and, as such, may not be applied retroactively.")

²⁰¹ The initial charge advanced was the crime of premeditated murder under Article 340 of the IPC, but the indictment was amended on 10 February 2004, with a re-qualification to Article 338 of the IPC (TL, Judgement, *Prosecutor v. Vítor Manuel Alves*, Case No. 1/2002, SPSC, 8 July 2004, in this volume, p. 537, par. 7).

²⁰² This would also concern a case alluded to in the Vítor Manuel Alves SPSC judgement (TL, Judgement, *Prosecutor v. Gaspard Leké*, Case No. 5/2001, SPSC, 14 September 2002, Klip/ Sluiter, ALC-XIII-579, par. 47 *et seq.*) as well as the cases where the indictments regarding persecution were deemed to include charges of violence against property and persons under Article 170 of the IPC. See, for example, TL, Judgement, *Prosecutor v. Inacio Olivera, Gilberto Fernandes and Jose da Costa*, Case No. 12/2002, 23 December 2003, in this volume, p. 425, p. 13.

²⁰³ K. Ambos and S. Wirth, *The Current Law of Crimes Against Humanity*, *supra* note 128, p. 48.

²⁰⁴ TL, Judgement (Criminal Appeal No. 2003/50), *Prosecutor v. Domingos Amati and Francisco Matos*, Case No. 12/2003, CoA, 9 December 2003, in this volume, p. 155, par. II(3)(b) ("[T]he crime prescribed and punishable under Article 338 is not an involuntary homicide, but, certainly, simple voluntary homicide [...] and, on the other hand, the involuntary or negligent homicide is prescribed in and punishable under Article 359 of the Indonesian Penal Code. [...] The expression that corresponds to the type of crime foreseen in Article 338 is 'murder'.")

²⁰⁵ Section 32.4 of UNTAET Regulation 2000/30 provides that "a crime which is a lesser included offense of an offense which is stated in the indictment shall be deemed to be included in the indictment." See Judgement, *Prosecutor v. Vítor Manuel Alves*, *supra* note 201, par. 18.

Although the reasoning of the SPSC with regard to the latter may be correct,²⁰⁶ its first premise is apparently founded on a blatant neglect of the boundaries of the material jurisdiction of the SPSC, which is definitely not a matter to be ignored by the court. It is submitted that the SPSC may not convict of a crime with respect to which there is a primordial lack of jurisdiction, even if the crime in question constitutes – for the purposes of indictment – a ‘lesser included offence’ of an offence within the cognizance of that court.²⁰⁷ For example, a conviction of sexual offences could still be entered by the SPSC under Section 9 of UNTAET Regulation 2000/15 when rape is charged *qua* a crime against humanity, but not proven beyond reasonable doubt in relation to the perpetrator’s knowledge of the existence of a widespread and systematic attack, provided that the prerequisites of the respective offences under Indonesian penal legislation are met.

In this case, the said domestic offence falls within the SPSC’s jurisdiction. The same would hold true for the conviction by the SPSC of voluntary homicide instead of premeditated murder, since both of these crimes do fall within its jurisdiction; the former is the ‘lesser included offence’ with respect to the latter.²⁰⁸ However, that was not the case before the SPSC in the Vitor Manuel Alves case, given the crucial difference between the ‘murder’ and ‘negligent homicide’, for the purpose of establishing material jurisdiction by the SPSC. Thus, the lack of jurisdiction over ‘negligent homicide’ poses a limit to the scope of a *jura novit curia* power to re-qualify the offence under this heading.

The SPSC’s argument that the interests of judicial economy militate against the referral of the case of negligent homicide to the Dili District Court is, to a certain degree, cogent.²⁰⁹ However, these considerations can neither cure the jurisdictional defect nor outweigh the concern that the SPSC was legally not competent to enter the conviction of a crime over which it lacks *ratione materiae* jurisdiction. The consequence of the proceedings that were conducted without jurisdiction is their “nullity which cannot be remedied without new proceedings”.²¹⁰

Ideally, at the stage when it was satisfied of the lack of evidence to convict the accused for murder, the SPSC should have acquitted the defendant of that charge. Following that, a new indictment containing a charge under Article 359 of the IPC should have been brought to the competent court, namely, an ordinary bench of the respective District Court by the prosecutor.²¹¹ As regards the judicial economy concerns, those could arguably be accommodated by the judges in the framework of the new proceedings by admitting, upon the request of the prosecutor, the evidence regarding the relevant facts previously adjudicated on by the SPSC in the Vitor Manuel Alves case and facts not in dispute among the parties. Notwithstanding the unfortunate absence in both UNTAET Regulation 2000/30 and the Indonesian Code of Criminal Procedure (ICCP) of the explicit possibility of taking judicial notice of adjudicated facts,²¹² such notice might still be taken on the basis of ‘internationally recognized standards’ of (international) criminal procedure under Section 54.5 of UNTAET Regulation 2000/30.²¹³ Besides that, the SPSC’s factual findings could be admitted in the

²⁰⁶ Judgement, *Prosecutor v. Vitor Manuel Alves*, *supra* note 201, par. 18 (“Art. 359 IPC is a lesser offense included in Art. 338 IPC, as the material elements of the crime, namely causing death of the victim, is [sic] the same, and only the mental element is reduced from intent to negligence.”)

²⁰⁷ This distinction between the jurisdictional and procedural aspects of charging is aptly made in P. Caeiro, Commentary, Klip/Sluiters ALC-XIII-817, p. 825, with reference to Judgement (Criminal Appeal No. 2003/50), *Prosecutor v. Domingos Amati and Francisco Matos*, *supra* note 204.

²⁰⁸ This is confirmed in Judgement (Criminal Appeal No. 2003/50), *Prosecutor v. Domingos Amati and Francisco Matos*, *supra* note 204, par. II(3)(c).

²⁰⁹ Judgement, *Prosecutor v. Vitor Manuel Alves*, *supra* note 201, par. 18 (“in view of the requirement for overall economy and efficiency of the judicial process, it would be a waste of time and resources if the Special Panels, having heard all the witnesses, would have to refer the case to a Judge of the Dili District Court.”)

²¹⁰ Section 55.2 of UNTAET Regulation 2000/30 provides that “[a]n act which meets any of the following criteria is a nullity which cannot be remedied without new proceedings, and may be found by a court at any stage: [...] (d) Where the proceedings were conducted without jurisdiction.”)

²¹¹ The *ne bis in idem* principle will not present an obstacle in this context. See P. Caeiro, Commentary, *supra* note 207, p. 826.

²¹² Decision on the Prosecutor’s Motion for Judicial Notice and Admission of Evidence, *Prosecutor v. Rudolfo Alves Correia*, *supra* note 182, par. 1-5. Article 184, paragraph 2 of the ICCP allows for taking judicial notice of historical facts only.

²¹³ Cf. Rule 94, paragraph B of the ICTY, ICTR and SCSL RPE. It must be noted that the ICC Statute and RPE do not provide for a judicial notice of adjudicated facts, but parties may agree that certain facts alleged in the charges are not contested and the chamber may consider them as proven unless “a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.” (Rule 69 of the ICC RPE)

proceedings before an ordinary bench of a District Court under the general authority of Section 34.1 of UNTAET Regulation 2000/30, which enables the court to “admit and consider any evidence that it deems relevant and has probative value with regard to issues in dispute”.²¹⁴

Setting aside the jurisdictional issue, it is submitted that this major problem might not have arisen at all, if the conviction for negligent homicide had not been entered. The Vitor Manuel Alves SPSC judgement attracts criticism regarding the accuracy of the legal qualification of facts, leading one to wonder whether negligent homicide was a proper label of the accused’s conduct and whether the SPSC should have entered that conviction at all, in light of the evidence before it. In the circumstances of this case, the relatively lenient qualification of the offence as negligent homicide seems to understate the blameworthiness of the accused and to condone his misdeed, while the resultant mild sentence in particular inspires in the readers of the judgement an indelible impression of political bias and one-handed justice.

The accused, an influential pro-independence supporter and member of the Portuguese armed forces, shot to death the victim – António Pacheco, a former chief of the Beloi borough (Ataúro island). The incident occurred during a reconciliatory meeting of the inhabitants of Beloi on 23 September 1999, shortly after the atypically bloodless departure of the TNI from the island. Before shooting the victim in the back of the head, the accused first gave two shots in the air from a G3 rifle that he had brought to the meeting and gave his companion for safekeeping and then, as the quarrel with the victim unfolded, had grabbed back.

The circumstance of the incident essential to its legal assessment, namely the question of whether the accused had aimed at the victim when firing the third round as alleged in the indictment, remained obscure throughout the trial. During the pre-trial examination, several eyewitnesses testified to the effect that this was the case, but afterwards changed their statements.²¹⁵ In this connection, the SPSC upheld what yet may seem an implausible story; that the victim was killed by a pure accident through the negligence of the accused. The weakest material aspect of the trial decision is that it neither enunciates what the legal elements of negligence are nor does it name the facts in support of the finding of this form of guilt in the conduct of the accused. Strikingly, its legal analysis of *mens rea* is limited to a single meagre paragraph.²¹⁶

Perhaps to urge the readers of the judgement to believe this version, the SPSC provided a highly tendentious description of facts, whereby it paid particular attention to the provocative conduct of the victim and other circumstances that might be taken as (at least partially) indulging the acts of the accused.²¹⁷ For instance, it considered proven, albeit without providing any basis, that the victim had collaborated with the local TNI commander and harboured “intentions to kill at least five of the pro-independence supporters and to demolish several houses”.²¹⁸ These allegations sound outrageous to a lay ear, particularly if put against the SPSC’s account of facts, which positively characterize the accused and which it tacitly designated as eminently relevant to the case. This is indicated by the reconciliatory nature of the speeches and demeanour of Vitor Manuel Alves at the beginning of the meeting, as well as his positive role in ensuring general security on the island.

²¹⁴ In at least one case, judicial notice of facts adjudicated in other proceedings was indirectly taken under Section 34.1 of UNTAET Regulation 2000/30: see TL, Judgement, *Prosecutor v. Damiao da Costa Nunes*, Case No. 1/2003, SPSC, 10 December 2003, in this volume, p. 403, par. 37-44 (discussing this judicial notice and recognizing the SPSC’s authority to take it, see Decision on the Prosecutor’s Motion for Judicial Notice and Admission of Evidence, *Prosecutor v. Rudolfo Alves Correia*, *supra* note 182, par. 4-6). However, in the Rudolfo Alves Correia case, the request of the prosecutor to take a judicial notice of adjudicated facts was declined, given that Section 34.1 of UNTAET Regulation 2000/30 merely provided the SPSC with discretion, while a positive authorization of taking such a judicial notice was lacking in both UNTAET Regulation 2000/30 and the ICCP, and more direct evidence was available to the SPSC. (See, Decision on the Prosecutor’s Motion for Judicial Notice and Admission of Evidence, *Prosecutor v. Rudolfo Alves Correia*, *supra* note 182, par. 3 and 7) Thus, in the SPSC context, judicial notice was, on most occasions, taken of the facts of common knowledge rather than of adjudicated facts, the former frequently being the existence of ‘widespread and systematic attack against civilian population’. See, Judgement, *Prosecutor v. Damiao da Costa Nunes*, *supra* note 214, par. 45 and the decisions mentioned in *supra* note 182.

²¹⁵ Judgement, *Prosecutor v. Vitor Manuel Alves*, *supra* note 201, par. 13. See D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, *supra* note 3, p. 63.

²¹⁶ Judgement, *Prosecutor v. Vitor Manuel Alves*, *supra* note 201, par. 16.

²¹⁷ *Ibid.*, par. 9-12.

²¹⁸ *Ibid.*, par. 9.

When describing the third and fatal shot, the SPSC inappropriately underscored the unintentional character of the discharge, thus making a legal qualification of guilt already in the section setting out the proven facts, as if beyond dispute.²¹⁹

At the same time, the circumstances that might demonstrate intent are not indicated in the trial judgement and their significance is disregarded when making the conclusions in relation to guilt. These are the facts certified by witness testimonies that the accused took a *loaded* automatic firearm to the meeting, that he did grab it from another person in the course of the argument, and that he first made two ‘warning’ shots into the air. Finally, the localization and character of injury, the perforating wound of head, is a salient indication making the version of a spontaneous discharge very questionable, provided that the distance between the victim and the defendant was several meters.

The judgement does not enlighten as to what, in the opinion of the SPSC, truly happened and which version out of several possible and mutually exclusive scenarios it accepted: whether the defendant was deliberately taking the aim at the victim without intending to kill, or was just pointing at him by occasion at the moment of the fatal discharge, or even walking in the opposite direction with the arm pointing backwards. On this important point, the judgement fails to adhere to one of the versions, to draw a more or less coherent picture of the events and thus to establish truth.

In a vague factual pattern such as this, more active investigation should have been undertaken into the circumstantial evidence that would help establish the characteristics of *mens rea* – for instance, the demeanour of the accused immediately after the fatal shot (whether or not he showed sincere surprise in connection with the discharge, whether or not he was shocked by and repentant of what had happened). No such evidence seems to have been collected and adduced during trial, besides the fact that, immediately after the incident, the accused said that “the victim should be respected and buried properly, and that he would take responsibility for his death”.²²⁰ Even more importantly, verification of all versions of a story by the ballistic examination was indispensable as a way of identifying with precision the trajectory of the bullet, position of the firearm at the moment of the shot and the reason for discharge. Regrettably, no such examination was conducted by the Serious Crimes Unit (SCU), due to the lack of this type of expertise.²²¹

In the spirit of the presumption of innocence (and, one would be inclined to say, in disregard of the compelling indication of the presence of intent), the SPSC had nothing left but to alter the accusation of murder to negligence, for lack of incriminating evidence. The latter fact is only partially to the prejudice of the prosecution, since “at trial, all six of the eyewitnesses, including the son of the victim, changed their previous statements”.²²² Indeed, the credibility and probative value of the pre-trial statements cannot compete with that of the oral sworn testimony before the court that is subject to cross-examination.²²³ However, the fact that even the victim’s next of kin reversed testimony in favour of the accused could serve to a diligent bench as alerting that perhaps tampering with the witnesses has occurred.²²⁴

This, in turn, could have raised the issue of that evidence’s unreliability and, hence, of its diminished weight for the purposes of evaluation. At the same time, the SPSC eagerly dismissed the possibility of admitting

²¹⁹ *Ibid.*, par. 12 (“When Antonio Pacheco kept shouting at him and turned as if to walk away, a third shot was fired from the gun held by the accused, *unintentionally* hitting the victim that was several meters away.” (Emphasis added)). The fact that the SPSC resorts to passive voice to omit ‘any agency on the part of the accused’ is pointedly noted by Cohen. See D. Cohen, *Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor*, *supra* note 3, p. 63.

²²⁰ Judgement, *Prosecutor v. Vítor Manuel Alves*, *supra* note 201, par. 12.

²²¹ D. Cohen, *Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor*, *supra* note 3, p. 64. On the lack of (qualified) personnel, difficulties with obtaining United Nations contracts for experienced forensic specialists and deficiency of UNTAET budget, which were all obstacles strong enough indeed to obstruct the use of more sophisticated investigative techniques by the SCU investigators. See O. Olsen, *Investigation of Serious Crimes in East Timor*, in K. Ambos and M. Othman (eds.), *New Approaches in International Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, Max-Planck Institut für ausländisches und internationales Strafrecht, Freiburg im Breisgau 2003, p. 120 and 123.

²²² D. Cohen, *Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor*, *supra* note 3, p. 63.

²²³ Judgement, *Prosecutor v. José Cardoso Ferreira*, *supra* note 22, par. 299 referring to ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, Klip/Sluiters, ALC-II-399, par. 137.

²²⁴ D. Cohen, ‘Justice on the Cheap’ Revisited: The Failure of the Serious Crimes Trials in East Timor, *supra* note 4, p. 5 (“The accused had access to witnesses both at the courthouse and, in many cases, in their communities. [...] [T]he prosecutors were aware of a significant number of serious cases of witness intimidation.”)

into evidence the prior statements of witnesses, in the absence of ‘exceptional circumstances’ under Section 36.3 of UNTAET Regulation 2000/30.²²⁵ One may argue, however, that it was within the SPSC’s cognizance – according to the broadly formulated Section 34.1 and 36.1 – to admit them, or that it was, by virtue of Section 36.4, within its discretion to use such statements ‘to refresh the recollection of the witness who made them’ and, failing which, to use them as substantive evidence.

David Cohen illuminated the probable reasons behind both the reversal by the witnesses of their pre-trial testimonies and the SPSC’s contenting itself with a finding of negligence in the face of strong indications of *dolus*. On the basis of the insider’s information received from an anonymous interviewee in the prosecution office that he regards trustworthy, Cohen reports that inappropriate interactions between one member of the bench and the prosecutor in that case took place. According to that source, the security of that judge was at stake, given the wealth, political connections of the accused and his reputation as a hero earned for having killed an ‘Indonesian collaborator’.²²⁶

Just as in the trial judgement, the Vitor Manuel Alves appeal judgement presents a number of problems. First, the Court of Appeal seems to be unconscious of the jurisdictional deficiency underlying the first-instance conviction of negligent homicide, since it takes no action to declare the nullity of the outcome of the previous proceedings on the basis of the lack of jurisdiction, as Section 55.2, sub d of UNTAET Regulation 2000/30 prescribes. Secondly, the legitimate expectation that the Court of Appeal would provide a sensible and reasoned opinion on all issues submitted before it strikingly fails as one reads the 7-pages long decision. Thirdly, the Court of Appeal concurs with the SPSC in its incomplete account of facts and crippled assessment of evidence. In the context of these failures, the increase of the sentence from one to two years in prison could be regarded as a welcome development, were it not to seem yet too limited a modification in light of the – in the Court of Appeal’s view – grossly negligent behaviour of the accused.²²⁷ An aspect of the decision that can be considered fortunate is the relatively extended discussion of the notion of negligence, in a stark contrast to the SPSC judgement. The key elements of the Court of Appeal’s decision will now be addressed in light of the formal and material requirements towards final appellate decisions.

Out of three grounds of appeal submitted by the prosecutor,²²⁸ the Court of Appeal only addressed the error of fact and law, to the total neglect of the ground of the alleged procedural error. As mentioned earlier, this is at variance with the formal requirement towards appeal decisions established in Section 41.5 of UNTAET Regulation 2000/30, since nowhere does the decision seem to find that appellate ground ‘to be patently frivolous or without merit’.

When addressing the alleged error of fact, the Court of Appeal merely reproduces the facts considered proven by the SPSC and does not raise a question of whether “the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact” or whether the evaluation of evidence adhered to by the first instance was not “wholly erroneous”. Instead of articulating and applying transparently the relevant standard of review, the Court of Appeal proceeded in its habitual instinctive way. Should it have duly asked itself the above question, it might well have found that the version of events as reflected in the SPSC judgement based on the testimonies of, in all likelihood corrupt and/ or intimidated eyewitnesses, was unacceptable by ‘any reasonable tribunal of fact’ or that the SPSC’s evaluation of evidence was wholly erroneous.

As mentioned, the Court of Appeal’s discussion of the alleged error of law with regard to the qualification of the conduct of the defendant as negligent homicide foreseen in Article 359 of the IPC appears a considerable

²²⁵ Judgement, *Prosecutor v. Vitor Manuel Alves*, *supra* note 201, par. 13.

²²⁶ D. Cohen, *Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor*, *supra* note 3, p. 64 (“According to this informant, who was in a position to have direct knowledge, the prosecutor in that case was approached by one of the judges from the Panel to drop prosecution because of security concerns involving the accused’s political connections. The prosecutor refused and the Judge asked the prosecutor to plea-bargain the case at two years. The prosecutor refused again.” (footnotes omitted))

²²⁷ For discussion, see *infra* Paragraph 4 ‘Sentencing aspects’.

²²⁸ As with respect to other decisions, one can only rely on the enumeration of appellate grounds made in the Court of Appeal’s decision (Judgement (Criminal Appeal No. 2004/60), *Prosecutor v. Vitor Manuel Alves*, *supra* note 1, par. 1), given the unavailability of the written appeal statement or other credible information on the grounds of appeal.

improvement from the SPSC judgement, despite the fact that it fails to address the jurisdictional defect with respect to this crime. The conclusion of the Court of Appeal on the defendant's *mens rea* reads as follows:

“Despite the fact that the accused, now appellant, did not intend to kill the victim, the truth is that he knew that (the victim) and other persons were a few meters away from him (the accused) and still he shot into that direction, having, unfortunately, deadly hit the victim. In face of such facts, we must conclude that the behaviour of the accused was negligent and that he committed a crime foreseen and punished by art. 359 of the IPC. [...] We are, in this case dealing with a conduct of clear lack of reflection or thoughtlessness or lack of precaution required by elementary prudence or advised by the most elementary predictions regarding ordinary actions in one's life.”²²⁹

In reaching this conclusion, the Court of Appeal neither enumerates nor sets out explicitly the necessary elements of negligent conduct, so as to provide a satisfactory explanation of why it considers the characterization of the *mens rea* of Vítor Manuel Alves with regard to the imputed acts as negligence correct. In all fairness, UNTAET regulations and the IPC are both silent on what is to be considered negligence and thus are – on the face of it – of little help in applying this concept.²³⁰

Since UNTAET Regulation 2000/15 can be interpreted as covering negligent acts in its rules dealing with command and superior responsibility,²³¹ a useful guidance for discerning the mental element of criminally liable negligent conduct could be sought from Section 16 of that regulation. Reformulated in general terms and in light of Section 18, Section 16 allows holding one responsible when that person had no intent, nor knew but ‘had reason to know’ that ‘a circumstance exists or a consequence will occur in the ordinary course of events’. In the context of superior responsibility, the ‘should have known’ element can be extracted from a person's position of formal authority and effective control over a subordinate. Beyond this doctrine, the ability and the obligation to ‘know’ as well as responsibility for dereliction of that duty may be inferred from the natural expectation of any reasonable and average person to make assumptions and calculations as to the most likely consequences of his or her acts or omissions.

Based on this interpretation, the term of negligent conduct that could be relied on by the SPSC can be defined, in terms of will and knowledge, as the conduct that the person did not mean to engage in or that caused the consequence not meant by the person, who did not foresee that such a consequence would occur in the ordinary course of events (due to general unawareness or reckoning on some factors to prevent such consequences), whereas he should and could have known thereof.²³² By way of distinguishing the culpable (advertent) negligence from recklessness (*dolus eventualis*),²³³ one can speak of the latter when the person actually knew of the consequences of the act in the ordinary course of events and – consciously – ignored or even accepted the risks involved (which presupposes a higher degree of culpability).²³⁴

The Court of Appeal reveals its awareness of the (thin) boundary between the notions referred to above.²³⁵ Yet it endeavours to struggle with the intractable concept of negligence unarmed, without articulating the legal criteria that indicate the conscious and intellectual aspects of the ‘negligent mindset’. Even so, it succeeds in identifying a circumstance relevant to showing the actual knowledge of the dangerous nature of

²²⁹ Judgement (Criminal Appeal No. 2004/60), *Prosecutor v. Vítor Manuel Alves*, *supra* note 1, par. IV (emphasis added). Note that in the passage quoted and elsewhere the Court of Appeal erroneously refers to the defendant as appellant, albeit the prosecutor was the party lodging the appeal.

²³⁰ Section 18 of UNTAET Regulation 2000/15 only defines *mens rea* through intent and knowledge; cf. Article 30 of the ICC Statute.

²³¹ On this analogy with regard to the *ad hoc* tribunals, see W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, *supra* note 91, p. 294. See also K. Kenneth, *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence*, 14 *Leiden Journal of International Law* 2001, p. 622-623 (“The standard of *mens rea* arising from this ‘duty to know’ is essentially a ‘should have known’ standard based on negligence; a superior should have known of the acts of subordinates if he had fulfilled his duties.”)

²³² A. Cassese, *International Criminal Law*, *supra* note 33, p. 161 and 171-172.

²³³ On the difficulty of distinction, see W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, *supra* note 91, p. 294, citing the Blaškić Trial Chamber: “recklessness [...] may be likened to serious criminal negligence.”

²³⁴ For a more detailed account on *dolus eventualis* / recklessness, see G. Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague 2005, p. 113 *et seq.*; see also A. Cassese, *International Criminal Law*, *supra* note 33, p. 161 and 168-169.

²³⁵ Judgement (Criminal Appeal No. 2004/60), *Prosecutor v. Vítor Manuel Alves*, *supra* note 1, par. IV (“The truth is that we cannot neglect that “in casu” we are dealing with something which is on the border, or very close to the border, of negligent murder and the so called *dolus eventualis*, or are we dealing with a case of grave negligence.”)

conduct and possible consequences. Namely, the defendant, due to his previous background in the Portuguese army, was familiar with the proper handling of the firearm that became an instrument of crime and, consequently, was especially well placed to know the “risks inherent in the use of G3 in the proximity to persons”.²³⁶ Some paragraphs down, the Court of Appeal referred to the ‘reasonable person’ test,²³⁷ which appears somewhat excessive, given that the lower threshold of the ‘actual knowledge and the duty to know’ has already been met, being applicable to the defendant because of his military experience.

All other criteria of *mens rea* are neither pronounced distinctly nor applied to the circumstances of the case, as they should have been. Thus, the Court of Appeal failed to consider and decide whether or not the evidence before it indicated that the defendant actually meant to engage in the conduct in question and to cause the consequences, or deliberately accepted and ignored the possibility of such consequences, which, where established, would indicate intent or advertent recklessness. Some terms that the Court of Appeal refers to as the properties of negligent conduct, such as ‘hastiness’ or ‘blunder’, as interpreted in the context of the decision, are equivocal and may not serve well for the purposes of establishing negligence. The fact that the person in a furious state of mind is acting hastily and impulsively may signify the absence of premeditation, but by no means does it exclude a criminally liable intensity of guilt in the moment of the commission of the offence in a form of *dolus directus* or *eventualis*. As stated earlier, with due respect to the presumption of innocence, the circumstantial evidence before the court – particularly, the conduct of the accused immediately before the fatal shot – may strongly indicate direct intent on his part.

The Court of Appeal missed the opportunity to ensure the delivery of justice in this ambiguous case. The establishment of truth would certainly benefit from a consistent application of the standard of review on the issues of fact, which in the present case appeared a ‘reverse image’ of the standard applied in the Paulino de Jesus case, and a more rigorous application of the criteria of *mens rea*. While it is beyond the purview of this commentary to delve into what and how the Court of Appeal could have done to remedy the omissions of the SPSC, at least two avenues may be indicated. The first and the optimal one would be to recognize the conviction by the SPSC of negligent homicide null and void, for lack of material jurisdiction, or quash it based on the erroneous assessment of evidence, and order new trial proceedings, using this opportunity to instruct the SPSC with regard to the identified errors. Failing the above due to ‘expediency’ concerns, the Court of Appeal could have modified the conviction under Section 41.4 of UNTAET Regulation 2000/30, after having repaired the SPSC’s errors itself, on the basis of the record of evidence presented during the trial and the newly called evidence, without necessarily (and to a significant degree) modifying the sentence.

4. Sentencing aspects

The fact that all of the four Court of Appeal decisions at hand devote considerable attention to the theory and modalities of sentencing warrants a cursory look at the Court of Appeal’s approach towards those issues. This is of special interest due to the alleged absence of a consensual theory of sentencing rationales in the context of international and hybrid criminal jurisdictions,²³⁸ which is more likely than not a vestige of the lack of unique sentencing theory at the domestic level. Notwithstanding the fact that the fully operational and fairly successful international criminal courts such as ICTY and ICTR have generated a considerable amount of sentencing case law, it was conceded by the tribunals themselves that the entire area still remains obscure and essentially in the discretion of the Trial Chambers.²³⁹ Furthermore, the elaboration of a definitive list of sentencing guidelines was considered inappropriate.²⁴⁰

4.1 Purposes of punishment

Two out of the four decisions commented on hand down a new conviction/ sentence or increase the sentence entered by the first instance (respectively, the Paulino de Jesus and Vítor Manuel Alves cases). The Umbertus

²³⁶ *Ibid.*

²³⁷ *Ibid.* The Court of Appeal links the lack of precautions on the part of the accused to the “required [...] elementary prudence or advised by the most elementary predictions regarding ordinary actions in one’s life.”

²³⁸ M. Bagaric and J. Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 *International Criminal Law Review* 2006, p. 196. See generally R. Henham, *The Philosophical Foundations of International Sentencing*, 1 *Journal of International Criminal Justice* 2003, p. 65 *et seq.*

²³⁹ W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, *supra* note 91, p. 545; J. Jones and S. Powles, *International Criminal Practice*, *supra* note 109, p. 777, par. 9.35.

²⁴⁰ *Judgement, Prosecutor v. Furundžija*, A. Ch., *supra* note 28, par. 238.

Ena appeal judgement (erroneously) modified the two charges relating to crimes against humanity to a single one. This could result in a decrease of the sentence; strangely, the Court of Appeal did not consider that option and only stated that the modification was precluded because of the prohibition of *reformatio in peius*. Anyway, in cases such as these, one might expect that the Court of Appeal would engage in determining the sentence anew and, consequently, in a full reassessment of all relevant circumstances along with the underlying purposes or functions of punishment.

The Court of Appeal appears to be cognizant of such expectations; however, it lives up to them only to a limited extent. It embarks on the assessment or new determination of sentence by setting out the purposes served by a penalty, amongst which it mentions the following four traditional objectives: i) fair retribution of the crime and guilt; ii) social reintegration of the defendant, which is to apply retribution so as not to damage the social situation of the convict in excess of what is strictly necessary; iii) special prevention (protection of the society against further offences by the same type of offenders); and iv) general prevention (contribution of the sentence to the strengthening of the community's legal consciousness; satisfaction of the zeal for justice).²⁴¹

It is submitted that the description of the above functions of sentences by the Court of Appeal departs from the jurisprudence of the *ad hoc* tribunals and is insufficiently precise. Thus, at least three immediate remarks are due with regard to the interpretation of the objectives of punishment by the Court of Appeal.

First, while the Court of Appeal indicates the protection of the society against the *same type of offenders*, the special deterrence is more frequently denoted as aiming at the prevention of the further offences by the same individual (*punitur quia peccatur*).²⁴² Secondly, the general prevention as formulated by the Court of Appeal seems to encompass not only the pre-emption of the offences by whomever else apart from the convict (*punitur ne peccatur*), but also the purpose of reaffirming the value of the violated legal norm through reprobation. Although closely linked to general prevention in a strict sense, the latter has often been indicated as a self-standing goal.²⁴³ This also concerns the objective of the protection of the society ('incapacitation of the dangerous').²⁴⁴

Thirdly, the Court of Appeal does not specify the earlier mentioned reprobation and the oft-proclaimed, in the context of other international and internationalized jurisdictions (including the SPSC themselves), goals such as the contribution to the establishment of truth, national reconciliation and the restoration of peace.²⁴⁵

The objectives of sentencing by the SPSC are not explicit in the constituent UNTAET regulations and there are no *travaux préparatoires* that could be consulted similar to the declarations made by the members of the

²⁴¹ See Section V of Judgement (Criminal Appeal No. 2004/29), *Prosecutor v. Paulino de Jesus*, *supra* note 1; Judgement (Criminal Appeal No. 2004/30), *Prosecutor v. Marcelino Soares*, *supra* note 1; Judgement (Criminal Appeal No. 2004/60), *Prosecutor v. Vítor Manuel Alves*, *supra* note 1.

²⁴² ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17/I-T, T. Ch. II, 10 December 1998, Klip/ Sluiter, ALC-III-685, par. 288; J. Jones and S. Powles, *International Criminal Practice*, *supra* note 109, p. 772.

²⁴³ Judgement, *Prosecutor v. Kordić and Čerkez*, A. Ch., *supra* note 31, par. 1073 and 1081; ICTY, Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, T. Ch. I, 29 November 1996, Klip/ Sluiter, ALC-I-503 par. 65; Judgement, *Prosecutor v. Kupreškić et al.*, T. Ch., *supra* note 192, par. 848.

²⁴⁴ ICTY, Judgment, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, T. Ch. II, 15 March 2002, Klip/ Sluiter, ALC-VIII-755, par. 508; ICTY, Judgement, *Prosecutor v. Kunarac, Kovač and Vuković*, Cases No. IT-96-23-T and IT-96-23/1-T, T. Ch. II, 22 February 2001, Klip/ Sluiter, ALC-V-617, par. 843; Judgement, *Prosecutor v. Delalić et al.*, T. Ch., *supra* note 158, par. 1232.

²⁴⁵ See the preamble of United Nations Security Council Resolution 827 of 25 May 1993, U.N. Doc. S/RES/827 ("Convinced that [...] the establishment [...] of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law [...] would contribute to the restoration and maintenance of peace." (emphasis added)). On the affirmation of the reconciliatory and peace-restorative functions of punishment, see Judgement, *Prosecutor v. Joni Marques et al.*, *supra* note 129, par. 980; Judgement, *Prosecutor v. Agostinho Cloe et al.*, *supra* note 129, par. 22; Judgement, *Prosecutor v. Damiao da Costa Nunes*, *supra* note 214, par. 85. For the *ad hoc* tribunals, see Sentencing Judgement, *Prosecutor v. Erdemović*, *supra* note 243, par. 21; ICTR, Judgment and Sentence, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, T. Ch. II, 22 January 2004, Klip/ Sluiter, ALC-XVII-531, par. 754.

United Nations Security Council at the time of adopting the resolutions regarding the ICTY and ICTR.²⁴⁶ Thus, it is not clear where the Court of Appeal derives those purposes from.²⁴⁷

It neither provides the analysis of the specific needs of the serious crimes process based on its legal framework, nor does it consider to what extent the traditional rationales justifying punishment that emerged at a national level are applicable to international crimes adjudicated by a hybrid court. For instance, it has been stated that the ‘special deterrence’ may be of lesser relevance in this context, since international crimes are committed always in a “political context the existence of which goes well beyond the will of any particular individual”.²⁴⁸ Similarly, it was noted that, apart from its morally reproachable content (‘punish one to deter the others’, which may be at odds with the Kantian categorical imperative), the ‘general deterrence’ function of the sentencing with regard to international crimes has hardly any basis in the empirical data.²⁴⁹

The Court of Appeal endeavours to prioritize the purposes of sentencing, though quite indistinctly and without taking into consideration the relevant experiences of the ICTY and ICTR. Thus, it places both retribution and reintegration on the top of the hierarchy. As regards the special and general prevention, it seems to be inclined to view them as more remote and consequential goals to which the punishment is to eventually contribute.

International criminal law as it now stands does not provide a single authoritative hierarchy of the goals of sentencing; nor does it appear to be in a strong need of the same, which may indicate that the priority of goals may shift from case to case. The jurisprudence of the *ad hoc* tribunals is quite varied, if not dissonant, in this regard and mirrors diverse and frequently shifting approaches. However, on many occasions, the primary role of retribution and deterrence has been underscored,²⁵⁰ which was also recognized in the Los Palos case before the SPSC.²⁵¹ In contrast to the Court of Appeal’s pronouncement, reintegration (rehabilitation) has been acknowledged by international tribunals²⁵² but generally refused a pride of place.²⁵³ Thus, the position of the Court of Appeal is not accurately aligned with the piece-meal international case law and the positions previously adopted by SPSC.

Finally, in none of the decisions at hand does the Court of Appeal elaborate on how the referred purposes can best be served by the specific sentence upheld or modified on appeal, in the particular circumstances of the case before it. Therefore, while being of interest from a doctrinal viewpoint, the Court of Appeal’s vision of the teleology of punishment is barely a progressive step from the judgements delivered by the *ad hoc* tribunals, or a meaningful contribution to the debate on the sentencing in international criminal law in general.

Absent more concrete reflections by the Court of Appeal on the purposes of sentencing in the individual cases, the practical importance of its entire discussion on the ideology of punishment in the Paulino de Jesus, Marcelino Soares and Vitor Manuel Alves cases remains largely marginal. This comes as no surprise, given

²⁴⁶ For example, Sentencing Judgement, *Prosecutor v. Erdemović*, *supra* note 243, par. 58.

²⁴⁷ Three decisions under discussion refer, however, to the Spanish edition of the ‘Penal Law Treaty’ by H. Jescheck.

²⁴⁸ W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, *supra* note 91, p. 558.

²⁴⁹ *Ibid.*

²⁵⁰ Sentencing Judgement, *Prosecutor v. Erdemović*, *supra* note 243, par. 64; Judgement, *Prosecutor v. Aleksovski*, A. Ch., *supra* note 39, par. 185; Judgement, *Prosecutor v. Delalić et al.*, T. Ch., *supra* note 158, par. 1234; Judgement, *Prosecutor v. Furundžija*, T. Ch., *supra* note 242, par. 288; ICTY, Sentencing Judgement, *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, T. Ch. I, 31 July 2001, Klip/ Sluiter, ALC-VII-773, par. 29-30; ICTR, Judgement and Sentence, *Prosecutor v. Kambanda*, Case No. ICTR-97-23-5, T. Ch. I, 4 September 1998, Klip/ Sluiter, ALC-II-793, par. 28; ICTR, Judgement and Sentence, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, T. Ch. I, 27 January 2000, Klip/ Sluiter, ALC-VI-469, par. 986.

²⁵¹ Judgement, *Prosecutor v. Joni Marques et al.*, *supra* note 129, par. 979.

²⁵² Particularly in connection with the young age of the defendants. See ICTR, Sentence, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, Klip/ Sluiter, ALC-II-693, par. 26; Sentencing Judgement, *Prosecutor v. Erdemović*, *supra* note 243, par. 16; ICTY, Sentencing Judgement, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, T. Ch. I, Section A, 2 December 2003, Klip/ Sluiter, ALC-XV-731, par. 93.

²⁵³ Judgement, *Prosecutor v. Delalić et al.*, A. Ch., *supra* note 93, par. 806; Judgment, *Prosecutor v. Krnojelac*, T. Ch., *supra* note 244, par. 508; Judgement, *Prosecutor v. Kunarac et al.*, T. Ch., *supra* note 244, par. 844; Judgement, *Prosecutor v. Kordić and Čerkez*, A. Ch., *supra* note 31, par. 1079.

that the *ad hoc* tribunals have not “intimated exactly how particular sentencing purposes might be linked to guidance in determining punishment” either.²⁵⁴

4.2 Foundations and methodology of sentencing

Compared to the statutes and RPE of the *ad hoc* tribunals, SCSL and ICC,²⁵⁵ the legal framework of the serious crimes process provides even more limited guidance with respect to the methodology of imposing sentences. Section 10 of UNTAET Regulation 2000/15 enumerates the available penalties²⁵⁶ and the factors to be taken into account. Furthermore, as regards the term of imprisonment, it establishes that the SPSC *shall* either “have recourse to the general practice regarding prisons sentences in the courts of East Timor and under international tribunals”, or directly apply the tariffs of penalties prescribed in the IPC, depending on whether the offence in question is international or domestic.²⁵⁷ In imposing the sentence, the SPSC must take into consideration the gravity of the offence and the individual circumstances of the convicted person.²⁵⁸ Importantly, this provision should be read, in this author’s view, as urging the SPSC to strike a proper balance between rendering an individualized sentence based on the facts of each particular case²⁵⁹ and ensuring consistency so as to punish similar defendants for similar offences alike.²⁶⁰

The major regulations set out above give rise to at least two criteria against which the discussion on sentencing may be assessed: firstly, whether the Court of Appeal implements properly its duty under Section 10.1, sub a of UNTAET Regulation 2000/15 to have recourse to the appropriate sentencing practice; and, secondly, if the relevant circumstances, including those serving to mitigate or aggravate the sentence, are given due weight.

The duty to ‘have recourse to the general practice in courts’ is familiar from the ICTY and ICTR Statutes, which designate the general practice regarding prison sentence in the courts of the former Yugoslavia and Rwanda respectively as reference points for sentencing at these tribunals.²⁶¹ Likewise, the SCSL Statute prescribes that recourse should be had to the general practice regarding prison sentences in the ICTR and in courts of Sierra Leone.²⁶² The tribunals have generally endeavoured to comply with this requirement,²⁶³ but they have hardly regarded the respective national practices as a substantial source of reference.²⁶⁴

In the Paulino de Jesus case, the confusion over the applicable law (murder as a crime against humanity *versus* murder as a domestic offence) led to a failure by the Court of Appeal to resort to the general practice of sentencing in international criminal tribunals, as prescribed under Section 10.1, sub a of UNTAET Regulation 2000/15.²⁶⁵ The sentencing part in the appellate decision in question is completely based on the provisions of the IPC which set out the sentence for premeditated murder (Article 340) and for attempted crimes (Article 53), to the disregard of the extensive practice of international criminal tribunals with respect to crimes against humanity. In the Marcelino Soares case, where resort to the sentencing practices by international criminal tribunals was mandatory, the Court of Appeal also based its assessment solely on the provisions of the IPC. The Vítor Manuel Alves appeal judgement properly referred to Article 359 of the IPC

²⁵⁴ R. Henham, *The Philosophical Foundations of International Sentencing*, *supra* note 238, p. 69.

²⁵⁵ Article 42 of the ICTY Statute and Rule 101 of the ICTY RPE; Article 23 of the ICTR Statute and Rule 101 of the ICTR RPE; Articles 77-78 of the ICC Statute and Rules 145-147 of the ICC RPE.

²⁵⁶ Imprisonment up to 25 years; a fine up to a maximum of US\$ 500,000; and a forfeiture of proceeds, property and assets derived directly or indirectly from the crime. Note that Article 77 of the ICC Statute provides for life imprisonment and the maximum term of imprisonment for a specified number of years not exceeding 30 years.

²⁵⁷ Section 10.1, sub a of UNTAET Regulation 2000/15.

²⁵⁸ *Ibid.*, Section 10.2.

²⁵⁹ Judgement, *Prosecutor v. Delalić et al.*, A. Ch., *supra* note 93, par. 717; Judgement, *Prosecutor v. Furundžija*, A. Ch., *supra* note 28, par. 222; Judgment, *Prosecutor v. Krnojelac*, T. Ch., *supra* note 244, par. 507; Judgment, *Prosecutor v. Jelisić*, A. Ch., *supra* note 101, par. 101; Judgment, *Prosecutor v. Krstić*, A. Ch., *supra* note 101, par. 241.

²⁶⁰ Judgment, *Prosecutor v. Krnojelac*, T. Ch., *supra* note 244, par. 526; Judgment, *Prosecutor v. Jelisić*, A. Ch., *supra* note 101, par. 96.

²⁶¹ Article 24, paragraph 1 of the ICTY Statute and Article 23, paragraph 1 of the ICTR Statute.

²⁶² Article 19, paragraph 1 of the SCSL Statute.

²⁶³ For example, Judgment, *Prosecutor v. Aleksovski*, A. Ch., *supra* note 39, par. 188.

²⁶⁴ J. Jones and S. Powles, *International Criminal Practice*, *supra* note 109, par. 9.55 stating that the tribunals paid scant attention to the national sentencing practices, as the result of their reluctance to shackle themselves to fixed penalty tariffs.

²⁶⁵ Judicial System Monitoring Programme, *The Paulino de Jesus Decisions*, *supra* note 4, p. 17.

as the foundation of the inflicted sentence, but did not outline the Indonesian sentencing practices with regard to negligent homicide that may have guided it to slightly increase the sentence.

The above shows that the assessment and determination of punishment as carried out by the Court of Appeal are weak aspects of the decisions under review, as far as reliance on the practices indicated by UNTAET as respective points of departure in sentencing (particularly the practice of international criminal tribunals) is concerned.

As regards the methodology of sentencing, the discussion of the relevant factors in the appeal decisions in question is verbose, ill-structured and obfuscating. Irrespective of the express requirement laid down in Section 10.2 of UNTAET Regulation 2000/15 to take into consideration the gravity of the offence and the individual circumstances of perpetrator for the determination of sentence *in personam*, the Court of Appeal neglects those criteria. In particular, the judgements contain no reference to Section 10.2 and proceed directly to stating that the determination of sentence should be predicated on: i) the legally protected value endangered by the crime; ii) culpability; iii) the effects of the penalty on the subsequent life of the convict in the society; and iv) the necessity for the society to safeguard itself from the convict, maintaining its confidence in the protection of the violated norm. Whereas the first two circumstances are of relevance for the determination of sentence,²⁶⁶ the second two appear to stem from a confusion by the Court of Appeal of the relevant considerations with the abstract purposes of punishment.

The Court of Appeal furthermore enumerates the ‘unfavourable’ circumstances, with respect to which it is unclear whether it regards them as relating to the ‘overall gravity of the crime’ or as the aggravating circumstances. From all factors mentioned by the Court of Appeal in the Paulino de Jesus judgement, only the ‘method of commission’, the ‘helplessness of the victims’ and ‘cold-bloodedness’ might serve as either of those descriptions,²⁶⁷ unless intrinsic to the offence in question. For example, the other description mentioned in the Paulino de Jesus, Marcelino Soares and Vítor Manuel Alves judgements, such as the ‘high degree of illegality’ and ‘direct intent’ (or ‘gross negligence’), are encompassed by the *actus reus* or *mens rea* of the offences for which the defendants are convicted and are already reflected in the penalty *per se*. To the extent that those factors are the constitutive elements of the crimes *in abstracto*, they may not be double-counted as contributing to the gravity of the offences *in concreto*, or as separate aggravating circumstances.²⁶⁸

As to the notion of ‘remote consequences of the crime and the impact on the third persons’, the content of which the Court of Appeal never clarifies, it appears so abstract and immeasurable as to be deprived of any legal meaning. If interpreted as the effects of the crime on the relatives and family of the victim, this has not been always accepted as an apt aggravating circumstance by international criminal tribunals.²⁶⁹

In both the Paulino de Jesus and Marcelino Soares judgements, the Court of Appeal finds no attenuating circumstances, because the accused showed no signs of repentance and at all times denied the commission of the crime. Thus, the Court of Appeal fell short of exploring other relevant factors. The Umberto Ena appeal judgement identifies, as attenuating circumstances of diminished importance, the absence of a previous criminal record and the fact that the convict had a wife and children, which is in line with the previous SPSC decisions and complies with the sentencing practices at the *ad hoc* tribunals regarding

²⁶⁶ See Rule 145, paragraph 1, sub a of the ICC RPE.

²⁶⁷ See, for example, Sentence, *Prosecutor v. Kayishema and Ruzindana*, *supra* note 252, par. 18; ICTY, Sentencing Judgement, *Prosecutor v. Rajić*, Case No. IT-95-12-S, T. Ch. I, 8 May 2006, par. 119; Judgement, *Prosecutor v. Furundžija*, T. Ch., *supra* note 242, par. 283. On the suggestion that one and the same factor may be taken as either elevating gravity or an aggravating circumstance, see Judgment, *Prosecutor v. Krnojelac*, T. Ch., *supra* note 244, par. 517; ICTY, Sentencing Judgement, *Prosecutor v. Jokić*, Case No. IT-01-42/1-S, T. Ch. I, 18 March 2004, to be published in volume XIX, par. 65.

²⁶⁸ ICTY, Sentencing Judgement, *Prosecutor v. Babić*, Case No. IT-03-72-S, T. Ch. I, 29 June 2004, to be published in volume XX, par. 58; ICTY, Judgement, *Prosecutor v. Krstić*, Case No. IT-98-33-T, T. Ch. I, 2 August 2001, Klip/ Sluiter, ALC-VII-575, par. 707; Sentencing Judgement, *Prosecutor v. Todorović*, *supra* note 250, par. 57.

²⁶⁹ Judgment, *Prosecutor v. Krnojelac*, T. Ch., *supra* note 244, par. 512 (“[S]uch effects are irrelevant to the culpability of the offender, and [...] it would be unfair to consider such effects in determining the sentence.” See also Judgement, *Prosecutor v. Delalić et al.*, T. Ch., *supra* note 158, par. 1223. Cf. *contra* Rule 145, paragraph 1, sub c of the ICC RPE and ICTY, Sentencing Judgement, *Prosecutor v. Mrđa*, Case No. IT-02-59-S, T. Ch. I, 31 March 2004, to be published in volume XIX, par. 41; ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 31 July 2003, Klip/ Sluiter, ALC-XIV-545, par. 910.

previous good character.²⁷⁰ The Vitor Manuel Alves appeal judgement denotes as mitigating circumstances the reconciliatory demeanour of the convict at the outset of the village meeting, where the shooting incident occurred, and his positive role in ensuring security in the island of Ataúro.

Strangely enough, the Court of Appeal at times overlooks obvious aggravating and attenuating circumstances. For instance, in the Marcelino Soares judgement, it puts no emphasis on the fact that the convict, as a superior, actively participated in the crimes committed by his subordinates. In the view of the ICTY's Appeal Chamber, this increases the gravity of the failure to prevent or punish those acts and may therefore aggravate the sentence.²⁷¹ In the Umbertus Ena case, the statement of the defendant that he was acting under duress resulting from a threat of imminent death received no qualification from the Court of Appeal, neither as a complete defence nor as a mitigating circumstance.

In the Vitor Manuel Alves case, the Court of Appeal attaches no importance to the fact of the provocation by the victim of the commission of the crime as an attenuating circumstance.²⁷² Nor does it allude to the circumstance that the deceased victim left *seven* children behind, which is undoubtedly a strong consideration against the convict. Yet, the resultant sentence of two years imprisonment, replacing one year, conditionally (with the probationary period of two years and the obligation to pay compensation to the dependants of the victims within one year) appears way too lenient in light of the high intensity of negligence on the part of the defendant established by the Court of Appeal. Ironically, the trial sentence quashed by the Court of Appeal, which included the obligation to pay compensation to the dependants of the deceased victim, would have certainly been a far better redress of the negative impact of the crime on the family of the victim and the local community than the two year sentence, which the convict never served as a result of commutation.²⁷³

As a final note, one may have serious doubts as to whether the assessment of the relevant circumstances for the purpose of determination of sentence by the Court of Appeal in the decisions in question is genuine and diligent, in light of the requirement of individualization. The analyses in the Marcelino Soares and Vitor Manuel Alves appeal judgements are clearly a result of a 'copy-paste' exercise, as they reproduce *verbatim* the relevant part of the Paulino de Jesus appeal judgement.

5. Concluding remarks

It remains to summarize the above account of the performance of the Court of Appeal, based on a catalogue of its jurisprudential achievements and failures in the Paulino de Jesus, Marcelino Soares, Umbertus Ena and Vitor Manuel Alves cases.

The overview of the appeals from final judgements within the jurisdiction of SPSC has confirmed that the fashion in which its flexible and generous appellate mechanism was employed fell short of observing the standard pertaining to the requirement of 'genuine review'.²⁷⁴ It neither properly safeguarded the interest of fairness towards the defendant, nor accommodated the effective administration of justice in particular cases.

The Court of Appeal continuously demonstrated its inability to articulate and consistently apply the legal test for appellate review, particularly problematic being the review of the alleged errors of fact. Instead of trying to distil an applicable standard of review from the relevant internationally recognized principles and rules, as well as extensive jurisprudence of the ICTY and ICTR, as required by Section 54.5 of UNTAET Regulation 2000/30, the Court of Appeal invariably opted to proceed by intuition. This resulted in its inconsistently reversing the – acceptable under the 'reasonableness' standard – factual findings of the SPSC

²⁷⁰ TL, Sentencing Judgement, *Prosecutor v. João Fernandes*, Case No. 1/2000, SPSC, 25 January 2001, Klip/ Sluiter, ALC-XIII-115, par. 20; Judgement, *Prosecutor v. Damiao da Costa Nunes*, *supra* note 214, par. 78; Judgement, *Prosecutor v. Blaškić*, T. Ch., *supra* note 136, par. 780-781; ICTY, Judgement, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, T. Ch. I, 14 December 1999, Klip/ Sluiter, ALC-IV-669, par. 124; Judgement, *Prosecutor v. Furundžija*, T. Ch., *supra* note 242, par. 284; Judgement, *Prosecutor v. Kunarac et al.*, A. Ch., *supra* note 114, par. 362 and 408; Judgement, *Semanza v. Prosecutor*, A. Ch., *supra* note 92, par. 398.

²⁷¹ Judgement, *Prosecutor v. Aleksovski*, A. Ch., *supra* note 39, par. 183; Judgement, *Prosecutor v. Delalić et al.*, A. Ch., *supra* note 93, par. 736; Sentencing Judgement, *Prosecutor v. Todorović*, *supra* note 250, par. 61.

²⁷² Recognized in TL, Judgement, *Prosecutor v. Carlos Soares*, Case No. 9/2002, SPSC, 8 December 2003, in this volume, p. 357, p. 8.

²⁷³ *Supra* note 9 and accompanying text.

²⁷⁴ Judicial System Monitoring Programme, The Role, Practice and Procedure of the Court of Appeal, *supra* note 8, p. 13.

in the Paulino de Jesus case, while leaving undisturbed what may seem an evidently incongruous, if not preposterous version of events found by the SPSC in the Vítor Manuel Alves case.

In the Paulino de Jesus case, the uncertainty regarding the review standard was exacerbated by the fact that the Court of Appeal convicted and sentenced to 12 years imprisonment a person acquitted by the SPSC of all charges. This reversal entailed effective denial of the right to appeal, contrary to the requirement envisaged in Article 14, paragraph 5 of the ICCPR. The second case leads one to wonder if its outcome was not shaped to a considerable degree by the improper influence exerted on the judiciary and witnesses by interested individuals. Moreover, the Vítor Manuel Alves case exposed the fact that, beyond the enormous political pressure affecting the shape and outcome of trials, the lack of the security programme for SPSC personnel and witnesses rendered the serious crimes process highly susceptible to the interferences from the local community, as rightly noted by Cohen.²⁷⁵ It goes without saying that this is fully incompatible with the notion of impartial justice and the failure was capable of undermining the goals of the SPSC proceedings, including their expected reconciliatory effects.

In three of the reviewed decisions, the Court of Appeal dealt with the grounds of appeal submitted by the appellant summarily and in a sweeping fashion, frequently failing to discharge the obligation to address each issue raised without dismissing those passed over as ‘frivolous’. It is against this background that the judgement in the Umbertus Ena case, reported by Judge Cláudio de Jesus Ximenes, occasionally stands out. However, the fact that this judgement meets the formal requirements embodied in Section 41.5 of UNTAET Regulation 2000/30 may not be fully satisfactory, in light of its confusion over substantive criminal law.

Similarly, with the sole exception of the Umbertus Ena case, the judgements reviewed fall short of fulfilling the material requirement to provide reasons for the conclusions reached. Even where such reasons are provided, the analyses on the merits are impermissibly concise and hasty in stark contrast with the considerable space afforded to the – frequently repetitive and superfluous – summaries of facts and quotations from the SPSC judgements.

All four decisions are controversial and disappointing when it comes to any demonstrated expertise in international criminal law and procedure, depth of legal analysis, quality of argumentation and the coverage of relevant issues. This is not confined to the Court of Appeal’s inability to apply the basic concepts of international criminal law, including crimes against humanity, superior responsibility and duress, which may be explained by the lack of training and judicial experience in those areas. What is most striking is that one notices the incompetence of judges regarding the fundamental legal precepts and notions of criminal law, such as the presumption of innocence and concurrence of offences. In addition, the Paulino de Jesus judgement contemplates the obfuscation of judges regarding the choice of applicable substantive criminal law. The Umbertus Ena judgement, despite showing the bench’s lack of competence as to the legal qualification of crimes against humanity, indicates a certain improvement in the quality of analysis and reasoning with respect to the submitted grounds of appeal.

In all cases, quite symptomatic errors and inconsistencies in the original texts further complicate comprehension of the decisions and underlying legal grounds.

The composition of the appeal panels was identical in the Umbertus Ena and Vítor Manuel Alves cases²⁷⁶ and only one member of the bench was different in the other two cases.²⁷⁷ A glimpse on the texts of the judgement reveals that at least three of them – in the Paulino de Jesus, Marcelino Soares and Vítor Manuel Alves cases – evince a significant uniformity *inter se* with regard to general style and (extremely scarce) legal authorities cited. As concerns the sentencing parts of these three judgements, that uniformity attains a degree inconsistent with the individualization of punishment, as their texts allow no room for in-depth analysis and genuine assessment of the individual circumstances in each case.

²⁷⁵ D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, *supra* note 3, p. 64.

²⁷⁶ Judges Cláudio de Jesus Ximenes (East Timor/Portugal), José Maria Calvário Antunes (Portugal) and José Luís da Goia (Guinea-Bissau).

²⁷⁷ Judge Jacinta Correia da Costa (East Timor) in place of Judge José Luís da Goia in the Paulino de Jesus case and in place of Judge Cláudio de Jesus Ximenes in the Vítor Manuel Alves case.

By and large, the above observations confirm the deplorable fact noted at the beginning, that the entire legacy of legal thought left after the Court of Appeal, even when judged by its best specimens, is no peer to the jurisprudence of the ICTY and ICTR. Knowing that, how should one assess the role of the Court of Appeal in and its contribution to the accomplishments of the serious crimes project, in light of the jurisprudential goals of appellate proceedings?

By the time the judgements were delivered, the SPSC had gone through over four years of intensive adjudication of international and serious domestic crimes. Normally, as one might reasonably expect, the accumulated institutional wisdom and judicial expertise would culminate and obtain its most refined expression in the decisions of the appellate instance, especially given its formal supreme position in the judicial system. Yet, the decisions of the Court of Appeal testify to its very limited ability to benefit from the advantages of the continuity of adjudicatory process, as they hardly ever rely on the previous decisions delivered within the serious crimes process, let alone on the jurisprudence of the ICTY and ICTR or other authorities.

Although it might seem misguided to judge an entire institution by a handful of decisions, it appears justified to aver, as far as the appellate process of SPSC is concerned, that, even in its 'better times', the Court of Appeal performed at a level far below that of any average SPSC. Its failures manifest already with regard to the most immediate – correctional – appellate goal, that is to ensure fair and effective administration of justice in an individual case. This could not be without consequences for the effective attainment of the jurisprudential goals of the appellate process in East Timor: the uniform handling of cases within that jurisdiction and providing guidance for inferior courts on problematic areas of law.²⁷⁸ The Court of Appeal dealt with most issues before it in an almost absolute legal and doctrinal vacuum; in the majority of cases the task of gap-filling and clarification of law did not come up in the appeal proceedings, inasmuch as the gaps and uncertainties often simply went unnoticed. There is no need to dwell on how unfortunate this is and how important the fulfilment of these goals was in the conditions of post-conflict East Timor, with its devastated and disoriented legal system.

It is submitted that poor and ill-founded judgements delivered by the Court of Appeal could barely serve as an authoritative source for the SPSC, and in certain cases were rather there to disorient them and to frustrate the results of their work. In these circumstances, ridiculing the authority of the Court of Appeal by refusing to follow its directions, despite the statutory obligation to the contrary, proved to be the only option available to a conscientious and competent district panel judge, as was the case in the Domingos Mendonça case.²⁷⁹ Admittedly, the interests of fair trial in a particular case had to prevail over the formal requirement of consistency with a decision of a higher judicial instance, be that at the cost of judicial hierarchy and certainty of law vital to steady development of a fledging legal system. The fact that the normally consistent and mutually bolstering goals of justice were put at tension by the appellate process in East Timor indicates that, irrespective of its highest position in the domestic legal system, the Court of Appeal's contribution to the accomplishments of the serious crimes process is not to be overestimated.

Finally, this brings us once again to the causes of the failures of the serious crimes process, and to the question of the attribution thereof. One has to be mindful of the fact that the position of SPSC was at all times that of an 'orphan' in the family of international criminal courts. Therefore, as emphasized from the outset, a fair commentator inevitably feels discomfort to be outspoken and harsh about the quality of their decisions, given the logistical and financial inadequacies and political hurdles impairing their work. Moreover, there is a risk that all criticism in relation to the SPSC decisions can be misinterpreted as directed against the individual judges who signed them, as well as many other persons who worked in a professional and highly devoted manner to bring the serious crimes process to fruition. Quite the contrary, their commitment and efforts deserve utmost admiration.

²⁷⁸ System Monitoring Programme, The Role, Practice and Procedure of the Court of Appeal, *supra* note 8, p. 16, stating that the Court of Appeal is not discharging its function of "testing and applying difficult areas of law" properly.

²⁷⁹ See TL, Decision on the Defense (Domingos Mendonça) Motion for the Court to Order the Public Prosecutor to Amend the Indictment, *Prosecutor v. João Sarmiento and Domingos Mendonça*, Case No. 18a/2001, SPSC, 24 July 2003, in this volume, p. 19.

The tremendous obstacles with which the SPSC had heroically struggled throughout their short life-span, interrupted their work in early 2005,²⁸⁰ and require one to look beyond the actual decisions and names. Individual attribution is deceitful, for it entails the undeserved indulgence towards the highest echelons in the United Nations administration and those states involved, whose infirm decision-making, mismanagement and undisguised sabotage condemned a promising venture for the quest of justice for East Timor to a congenital institutional and financial derangement. The flaws in the jurisprudential legacy of the SPSC are an expressive record of a lack of concern by and profound structural failures of the international community. Accordingly, nothing in the foregoing analysis may be interpreted as detracting from its collective 'authorship' for these failures and the moral responsibility it incurs.

Sergey Vasiliev

²⁸⁰ The mandate of UNTAET's successor, the United Nations Mission of Support in East Timor (UNMISSET), ended on 20 May 2005, about five years after the establishment of the SPSC. The completion of all trials by that date at the latest was prescribed under United Nations Security Council Resolution 1543 of 14 May 2004, U.N. Doc. S/RES/1543, par. 8.

