

Wearing his Jacket: A Feminist Analysis of the Serious Crimes Process in Timor-Leste

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Abstract

This article aims to examine the gender jurisprudence of the serious crimes process in Timor-Leste. It focuses on whether the cases arising from the process delivered 'justice' for women and did justice to the experience of women in armed conflict. The article asks what 'justice judgments' the Timorese community have made about the trials; that is, whether the Special Panel's processes were accepted and understood in the general population. This examination sheds some light on the benefits, if any, that the existing framework of international law has provided for women engaged with transitional justice processes. This is judged by reference to the participation of women in the system and to any new international criminal jurisprudence, as well as by whether the process fairly represented the experience of women during the occupation and whether it added any material benefit to their lives in the independence period.

Introduction

In the Serious Crimes [Investigation] Unit [SCIU], we punish some militias who are stupid enough to come back. I also think that the UN ["United Nations"] is spending too much money on the Serious Crimes Unit. The lawyers there earn more than I earn as President. And there is no infrastructure for the judicial system in East Timor. We need a working competent, free and functioning judicial system, not only in Dili, but also in the country. I think the SCIU can be there for 100 years for all the stupid to come back across the border. In practical terms we don't see any benefit from this.¹

In June 2005, United States Judge Phillip Rapoza reflected on his two years of service on the Special Panels for Serious Crimes in Dili, the capital of Timor-Leste. He expressed particular regret about the situation of a woman he met in Maliana. Judge Rapoza recounted that the woman said she often saw the two men who killed her husband when she went to the local

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¹ Xanana Gusmão, 'Notes on comments by Xanana Gusmão and José Ramos-Horta on dealing with past human rights violations made during a panel discussion' (Paper read at German Council on Foreign Relations — Deutsche Gesellschaft für Auswärtige Politik (DGAP), Berlin, 20 October 2004) <<http://www.watchindonesia.org/notes02.11.04.htm>>.

market. What bothered her more was that one man wore her late husband's jacket. Judge Rapoza stated, 'They knew that she knows that they will never be prosecuted'.²

The aim of this article is to explore the gender jurisprudence of the serious crimes process in Dili. The focus is on whether the cases delivered 'justice' for women, in the sense of whether they did justice to the experience of women in armed conflict. Christine Bell and Catherine O'Rourke propose that feminist theorists should focus on how transitional justice debates help or hinder broader projects of securing material gains for women through transition.³ Similarly, Katherine M Franke argues that transitional justice outcomes for women should be judged on whether they provide *recognition* and *redistribution*.⁴ Recognition deals with establishing facts and identities, such as who are the victims and perpetrators of criminal practices. Redistribution deals with redistributing money and land, but also shame or symbolic and cultural resources.⁵ While transitional justice mechanisms can do both, Franke decides that they are mostly engaged with recognition-based justice projects and that this has come at a cost to the individual women involved, while the limited script offered to women casts them only as victims of sexual violence.⁶

Fionnuala Ni Aolain and Michael Hamilton go further and suggest that what may appear to be a moment of opportunity for gender equality in transitional societies can become what they term 'a moment of retrenchment'. They argue that despite substantive advances in dismantling the public/private divide in many western societies, those same western states through 'rule-of-law proselytizing' can entrench the operation of this divide in transitional states.⁷ Ni Aolain further explores this role of international masculinities, and the 'patriarchy that is imported with international oversight of transitional societies', in relation to issues such as the predominance of intimate partner and family violence in post-conflict states.⁸

Prima facie, these theories would seem to resonate with the current realities for Timorese women. Women in Timor generally lack political power and representation in comparison to men, and maintain the worst socio-economic indicators of the Timorese population.⁹ Where women have been recognised at all in legal processes in Timor, there is

² Joao Ferreira, 'Judge Rapoza Reflects on East Timor Tribunal', *The Standard Times* (New Bedford, Massachusetts), 12 November 2005, A1.

³ Christine Bell and Catherine O'Rourke, 'Does feminism need a theory of transitional justice?' (2007) 1 *International Journal of Transitional Justice* 23, 23; Katherine M Franke, 'Gendered Subjects of Transitional Justice' (2006) 15(3) *Columbia Journal of Gender and Law* 813.

⁴ Franke, above n 3, 813.

⁵ Ibid.

⁶ Ibid.

⁷ Fionnuala Ni Aolain and Michael Hamilton, 'Gender and the Rule of Law in Transitional Societies' (Minnesota Legal Studies Research Paper No 09-12; University of Minnesota Law School, March 2009) 102.

⁸ Fionnuala Ni Aolain, 'Women, Security and the Patriarchy of Internationalized Transitional Justice' (Minnesota Legal Studies Research Paper No 08-40, University of Minnesota Law School, October 2008). See also Naomi R Cahn and Fionnuala D Ni Aolain, 'Gender, Masculinities and Transition in Conflicted Societies' (George Washington University Law School Public Law Research Paper No 481, 2010).

⁹ Women make up 49.4% of the population of East Timor. Fretilin won an absolute majority in the 2001 Constituent Assembly election leading to the first Parliament. Several women unsuccessfully stood as independent candidates for the Constituent Assembly. Under Fretilin's leadership, 27.6% of the Members of Parliament were women, 20%

[footnote continued on the next page]

a danger that it has only led to marginalisation and stigmatisation of survivors of sexual violence.¹⁰ Trials have not contributed to a material rise to the basic living standards and status of women.¹¹ There may also be negative consequences for survivors of domestic violence if there is no confidence in the judicial sector to acknowledge and protect women.¹² East Timorese women themselves have continuously stressed the need for justice to encompass their ongoing economic and social rights.¹³

This article further asks what 'justice judgments' the Timorese community have made about the trials — namely, whether the Special Panel's processes were accepted and understood in the general population, especially the difference between rape as an 'ordinary' crime and as an international crime.¹⁴ This examination sheds some light on the benefits, if any, that the existing framework of international law has for women engaged with transitional justice processes. This has traditionally been judged by reference to the participation of women in the system, any new international criminal jurisprudence, or the application of novel precedents on gender violence in a different context. This feminist analysis seeks to discover what impact the trials had on recognition and redistribution for women.

The Timor process was globally significant because the United Nations Transitional Administration in East Timor ('UNTAET') Regulations adopted the offences of the *Rome Statute of the International Criminal Court* ('*Rome Statute*').¹⁵ The trials can, therefore, be considered the first state application of the new global provisions, particularly crimes against humanity.¹⁶ Moreover, it is the first clear example of a 'hybrid tribunal'.¹⁷ As such, the Dili

of the ministers and administrators were women, 24.3% of civil servants were women, and 27.6% of the village councillors were women (each council contains two women's representatives and a female youth representative). In the May 2007 Parliamentary elections, it was required of parties that one out of every four candidates on their candidate lists be women, although the women were mostly placed fourth. Polling data was disaggregated by gender for the first time; 27.69% or 18 women were successful from a total number of 65 seats. Eight candidates stood for election as President, including Lucia Lobato as the one woman candidate. See Manuela Leong Pereira and Jill Sternberg, 'Women's Involvement in Timor-Leste's Presidential Elections', 1325 *Peacewomen E-News*, Issue 89, 24 May 2007; Asian Development Bank and United Nations Development Fund for Women ('UNIFEM'), *Gender and Nation Building in Timor-Leste: Country Gender Assessment* (November 2005); United Nations Development Programme ('UNDP'), *Human Development Report 2006 Timor-Leste: The Path out of Poverty, Integrated Rural Development* (2006).

¹⁰ Susan Harris Rimmer, 'After the guns fall silent: Sexual and gender based violence in Timor-Leste', *Issue Brief: Timor Leste Armed Violence Assessment* No 5 (November 2009).

¹¹ See Jelena Subotic, *Hijacked justice: Dealing with the past in the Balkans* (2009).

¹² In 2009, the Judicial System Monitoring Programme ('JSMP') Women's Justice Unit monitored a total of 52 gender-based violence cases, composed of 36 cases of domestic violence and 16 cases of sexual violence: JSMP, *Overview of the Justice Sector 2009* (February 2010).

¹³ Commission for Reception, Truth and Reconciliation ('CAVR'), *Women and the Conflict: National public hearing 28–29 April 2003* (2005). See also the *Women's Charter of Rights in East Timor*, 2000.

¹⁴ The term 'justice judgments' was coined by criminologist Susanne Karstedt. It refers to the acceptance of the outcomes of the prosecution process and the legitimacy of the court in the minds of the general public. See Susanne Karstedt, 'Coming to Terms with the Past in Germany after 1945 and 1989: Public Judgments on Procedures and Justice' (1998) 20(1) *Law & Policy* 15.

¹⁵ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

¹⁶ See Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers: 1997).

process is judged by what impact it has had on recognition of women's experiences, and on redistribution of material benefit and shame from survivors to perpetrators.¹⁸

I. Background

The UN chose to set up two transitional justice mechanisms in the territory of East Timor: the serious crimes¹⁹ process and the Commission for Reception, Truth and Reconciliation ('CAVR'). Indonesia set up its own domestic trial process and truth commission against the backdrop of UN threats to establish an international tribunal.²⁰ Each of these mechanisms had novel features, and all are interconnected. The serious crimes process operated from 6 June 2000 until the withdrawal of UN support on 20 May 2005.²¹

Instead of an international tribunal, the UN chose a 'hybrid' tribunal for East Timor.²² A 'hybrid' tribunal utilises domestic and international judges and considers international (and, occasionally, some national) laws. The Special Panels (the Trial Chamber and Appeals Court) within Dili District Court were set up by UNTAET pursuant to *UNTAET Regulation No 2000/15*.²³ The Panels had exclusive jurisdiction over genocide, crimes against humanity, and war crimes wherever and whenever they occurred; this included murder, sexual offences and torture that occurred in Timor-Leste between 1 January and 25 October 1999.

The broad aim of the serious crimes process was to ensure that those responsible for serious crimes committed in 1999 were brought to justice. This was reiterated by the UN Secretary-General in his report to the Security Council dated 29 April 2004 noting that:

In its resolution 1410 (2002), the Security Council stressed the critical importance of cooperation between Indonesia and East Timor, and with UNMISSET, to ensure that those responsible for serious crimes committed in 1999 are brought to justice.

The Special Panels were directed to apply three sources of law.²⁴ The first was the UNTAET Regulations and directives. The second source was composed of applicable

¹⁷ Definition taken from Suzanne Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor' (2000) 16(6) *Harvard Human Rights Journal* 245, 245.

¹⁸ Franke, above n 3, 820.

¹⁹ The term 'serious crimes' draws upon the distinction in the *Penal Code of Indonesia* between felonies and misdemeanours. See *Penal Code of Indonesia* (applicable to Timor-Leste), 27 February 1952 (last amended 1999) ('*Indonesian Penal Code*').

²⁰ See Susan Harris Rimmer, 'Beloved Madam: Gender Issues at the Indonesian ad hoc Human Rights Court' in William Binchy (ed), *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past* (2009).

²¹ A limited serious crimes process continues in 2010. As of January 2010, 391 persons were indicted, of whom 87 were tried, 3 were acquitted and 84 were convicted. Of those only one remains in prison. 303 accused remain at large with arrest warrants. There are 2 persons currently in detention awaiting trial.

²² John Magro, 'Is there Justification for an International Criminal Tribunal for East Timor?' (2000) 7(3) *Murdoch University Electronic Journal of Law*.

²³ *Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Crimes*, UN Doc UNTAET/REG/2000/15, 6 June 2000 ('*UNTAET Regulation No 2000/15*').

²⁴ *Regulation on the Organization of Courts in East Timor*, UN Doc UNTAET/REG/2000/11, 6 March 2000 ('*UNTAET Regulation No 2000/11*') s 5.

treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict. The third source was the law validly applied in East Timor prior to 25 October 1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as the laws did not conflict with either the internationally recognised human rights standards, the fulfilment of the mandate given to UNTAET under UN Security Council Resolution 1272 (1999)²⁵ or UNTAET Regulations or directives.²⁶ As decided by the Transitional Administrator for purely practical reasons, this was interpreted to mean Indonesian law.

Due to lack of cooperation from Indonesia in handing over suspects still in Indonesian territory, both the Special Panels and the CAVR were forced to focus on Timorese nationals who participated in violent acts, either as guerrillas in Falintil or as collaborators with the Indonesian forces.²⁷

The United Nations, therefore, gave the Special Panels jurisdiction over two categories of crimes: international and domestic, with each category dealing with sexual offences against women.

Notably, there is no explicit delineation in *UNTAET Regulation No 2000/15* as to when a sexual assault might fall under the *Indonesian Penal Code* or when it becomes an element of one of the serious crimes as defined. As a ‘hybrid’ tribunal, one of the claimed advantages of the Dili process was that it would assist in the creation of the formal legal sector in Timor. The mandate of the Special Panels goes beyond providing a role model. The Dili Special Panel assumed sole responsibility for murder and sexual offences in the post-conflict state. Therefore, the way that the Special Panel dealt with gender issues was an extremely important factor for future ‘ordinary’ criminal proceedings.

2. Gender analysis of the serious crimes process

A. Representation of women

The role of the East Timorese judges in the Special Panel was important. As Suzannah Linton notes:

²⁵ SC Res 1272, UN SCOR, 4057th mtg, UN Doc S/RES/1272 (25 October 1999).

²⁶ Strohmeyer has noted that, in practice, this requirement of reconciling Indonesian law with international human rights laws proved difficult to apply in East Timor. The Regulation did not actually spell out the laws or specifically identify the elements that were inconsistent with internationally recognised human rights standards, which then had to be interpreted by inexperienced officials. He says, as an example, that determining that a provision allowing 20 or more days of detention without a judicial hearing violates international human rights standards is relatively easy, but consistently defining the standard that should apply instead is much more difficult. See Hansjörg Strohmeyer, ‘Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor’, Symposium: State Reconstruction After Civil Conflict (2001) 95 *American Journal of International Law* 46, 59. See also Annemarie Devereux, ‘Accountability for human rights abuses in East Timor’ in Damien Kingsbury (ed), *Guns and Ballot Boxes: East Timor’s vote for independence* (2000).

²⁷ See Susan Harris Rimmer, *Gender and Transitional Justice* (2010).

The entire process is historic, for despite international domination of the process, never before have East Timorese judges sat in judgment over their fellow people, and never before have East Timorese prosecutors and defence lawyers appeared as legal professionals in their own land.²⁸

Given this perspective, the gender composition of the legal sector in East Timor is concerning. Feminist scholars have consistently pushed for equal representation of female judges and counsel, especially in trials relating to sexual violence in armed conflict.²⁹ In August 2004, the tiny legal and judicial sector in East Timor had only a smattering of women but there was considerable success in securing judicial positions for women. In the Court of Appeal, there was one female judge out of a total of three judges. In the Special (Trial) Panel there were three female judges out of a total of six judges. One female judge had unique insight into the 1999 violence. Justice Pereira, appointed to the Special Panel at age 31, had lost her home to arson, was threatened with death by armed men and was subsequently deported, with her five children, into a militia-controlled camp in West Timor.³⁰

Dili District Court and Baucau District Court each had two female judges. Currently, of the 15 prosecutors in East Timor, 2 are female. Currently, of the 7 Public Defenders, 3 are female. There are only 2 female private lawyers out of a total of at least 20. At present there appears to be no formal government or United Nations program to encourage women entering into the legal sector. Despite a commitment to 'gender mainstreaming', where appointments have been made by the United Nations, gender composition has been even worse.³¹ While 2 of the 3 Timorese judges have been women, only 1 of the 11 international judges has been female.

In contrast to the Dili trials, article 36(8)(a)(iii) of the *Rome Statute* requires the need for a 'fair representation of female and male judges' to be taken into account in the selection process. The same provision applies to the selection of staff in the Office of the Prosecutor and in all other organs of the Special Panel. Further, the *Rome Statute* requires that, in the selection of judges, prosecutors and other staff, the need for legal expertise on violence against women or children must be taken into account.³² Finally, the Prosecutor is required to appoint advisers with legal expertise on specific issues, including sexual and gender violence.³³

²⁸ Suzannah Linton, 'Prosecuting Atrocities at the District Court of Dili' (2001) 2 *Melbourne Journal of International Law* 414, 416.

²⁹ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), 310–12. See also Richard J Goldstone and Estelle A Dehon, 'Engendering Accountability: Gender Crimes Under International Criminal Law' (2003) 19 *New England Journal of Public Policy* 121; Rana Lehr-Lehnardt, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court' (2002) 16 *Brigham Young University Journal of Public Law* 317.

³⁰ Seth Mydans, 'Modest Beginnings for East Timor's Justice System', *The New York Times* (New York), 4 March 2001.

³¹ See generally Hilary Charlesworth and Mary Wood, 'Gender Mainstreaming: The Case of East Timor' (2001) 26 *Yale Journal of International Law* 313; 'Women and Human Rights in the Rebuilding of East Timor' (2002) 71 *Nordic Journal of International Law* 325.

³² *Rome Statute* art 44(2), 36(8).

³³ *Rome Statute* art 42(9).

The next section examines the jurisprudence on gender-based violence produced by the serious crimes process and questions whether the outcomes were affected by this lack of representation of women.

B. Jurisprudence on gender persecution from the serious crimes process

The International Center for Transitional Justice ('ICTJ') in their report *Justice Abandoned?* acknowledged that 'very few' gender crimes were indicted by the Serious Crimes Investigation Unit ('SCIU').³⁴ The ICTJ point out that progress was made only when a female Deputy Prosecutor, Siri Frigaard, was appointed. A special gender investigation team composed of three women was established to investigate rapes and other sexual violations. However, Frigaard has stated that the reluctance of female victims to testify in open court prevented the SCIU from proceeding with many gender crime prosecutions.³⁵

This is despite considerable progress in recognising patterned sexual violence under international law.³⁶ Article 7(g) of the *Rome Statute* explicitly enumerates rape as a crime against humanity. Prosecutions for gender-related crimes in international criminal law have also been hailed as revolutionary. Both the ad hoc tribunals for Yugoslavia and Rwanda have successfully indicted, prosecuted and convicted defendants for gender-based crimes for the first time in history. This included: rape as a crime against humanity; an element of genocide in the *Akayesu* case before the International Criminal Tribunal for Rwanda ('ICTR'); and the *Čelebići*, *Furundžija* and *Kunarac* cases before the International Criminal Tribunal for the Former Yugoslavia ('ICTY') relating to rape as torture, and sexual slavery and sexual acts as inhumane treatment.³⁷ There have been significant decisions by regional human rights courts, such as *Mejía Egocheaga v Peru* in the Inter-American Commission of Human Rights, which accepted rape as torture.³⁸

The only three cases that were decided by the serious crimes process represent a series of steps. The first step, the *Kasa* rape case, represents a serious step backwards.³⁹ The second, *Lolotoe*, defined rape as a crime-against-humanity case, could be seen as a limited

³⁴ Megan Hirst and Howard Varney, *Justice Abandoned: an assessment of the serious crimes process in East Timor*, International Center for Transitional Justice Occasional Paper Series (2005) 7.

³⁵ Siri Frigaard (Address delivered at the Domestic Prosecutions and Transitional Justice Conference organised by the ICTJ and the Foundation for Human Rights, 18 May 2005, Johannesburg, South Africa). Although as Wandita et al have observed '[t]he CAVR has demonstrated that, given the right conditions, Timorese women will speak out about the violations they have experienced'; Galuh Wandita, Karen Campbell-Nelson and Manuela Leong Pereira, 'Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims' in Ruth Rubio-Marin (ed), *What Happened to the Women?: Gender and Reparations for Human Rights Violations* (2006) 316.

³⁶ See also Askin, above n 15.

³⁷ *Prosecutor v Akayesu* (ICTR, Case No ICTR-96-4-T, 2 September 1999); *Prosecutor v Delalić (Judgment)* (ICTY, Trial Chamber, Case No IT-96-21-T, 16 November 1998) ('*Čelebići*'); *Prosecutor v Kunarac (Judgment)* (ICTY, Trial Chamber, Case No IT-96-23/1-T, 22 February 2001); *Prosecutor v Furundžija (Judgment)* (ICTY, Trial Chamber, ICTY-95-17/1-T, 10 December 1998).

³⁸ *Mejía Egocheaga v Peru* (1996) 1 Butterworths Human Rights Cases 229 (Inter-American Commission of Human Rights). See Charlesworth and Chinkin, above n 29, 330–32.

³⁹ *Prosecutor v Kasa (Judgment)* (Dili District Court Special Panel for Serious Crimes, Case No 11/CG/2000, 9 May 2001) ('*Kasa*').

step forward.⁴⁰ The third case, the *Soares* rape case, contains some useful obiter dicta regarding rape within marriage, but basically represents marking time.⁴¹ Other indictments issued by the Prosecutor, discussed briefly below, give some indication of systemic gender persecution, but the accused remain at large in Indonesia. The question therefore needs to be asked — did women receive any material benefit from the trials?

C. The *Kasa* case: a step backwards

The *Kasa* case was decided by the Special (Trial) Panel in May 2001. It illuminates three key challenges to the realisation of justice for women in East Timor. First, the case illustrates that no knowledge of the international advances in the prosecution of gender-based crimes was ever displayed or applied in the judgment. Second, the trial proceeded without any reference to the context of systematic gender-based violence in West Timor. Third, the outcome for the alleged victim has actually deteriorated, rather than improved, as a result of the case.

The facts of the case are straightforward. Leonardus Kasa was an alleged member of Laksaur militia from Cova Lima district. He was arrested and detained by the Civilian Police ('CIVPOL'), pursuant to the *Indonesian Criminal Procedure Code*. The Public Prosecutor, Raimund Sauter, indicted him in December 2000 with one charge of rape of a woman in Betun village, West Timor, in September 1999. At the preliminary hearing in February 2001, the Defence claimed that the Special Panel lacked jurisdiction to hear the case. They insinuated that the alleged rape occurred outside the territory of East Timor and the sex was consensual, it should be classified as adultery, which is not a serious crime.⁴²

On 9 May 2001 the Special Panel declared that it had no jurisdiction in the case.⁴³ The defendant had already been released from detention in February 2001, but was prevented from approaching the victim's home. Immediately after the judgment was given, the Special Panel announced that such restrictions on the defendant no longer applied. An appeal was filed by the Prosecution on 11 October 2001 and withdrawn on 5 April 2004.

The judges of the Special Panel were Luca Ferrero (Presiding Judge, Italy), Maria Natercia Gusmao Pereira (Judge Rapporteur, East Timor) and Sylver Ntukamazina (Burundi). The judges stated that the same charges might be raised before courts in Indonesia or in East Timorese courts if jurisdictional issues were clarified by way of amendment to the regulations, which seemed to influence their judgment. The Special Panel also emphasised that it could make no finding as to the defendant's innocence or guilt on the charge of rape.

⁴⁰ *Prosecutor v Da Silva* (Dili District Court Special Panel for Serious Crimes, Case No 4/CG/2000) ('the *Lolotoe* trial').

⁴¹ *Prosecutor v Soares (Judgment)* (Dili District Court Special Panel for Serious Crimes, Case No 14/2001, 12 September 2002).

⁴² *Kasa (Indictment)* (Dili District Court Special Panel for Serious Crimes, Case No 11/CG/2000).

⁴³ JSMP, 'Dili court increases pressure on Indonesia' 10 May 2001 <http://www.jsmp.minihub.org/News/news9_5.htm>.

Disturbingly, the Special Panel makes no reference to the background to this case. The alleged victim, Maria da Costa, and her two children were displaced on 5 September 1999 from East Timor and brought to a refugee camp located in the warehouse of Betun in West Timor. This occurred a week after the popular consultation, where militias, organised and supported by the Indonesian military, were forcibly removing up to 250,000 Timorese into camps in West Timor, wreaking widespread and systematic violence on those perceived to be pro-independence supporters and their property in the process.⁴⁴

The Indictment does not refer to this context at all and, furthermore, the context changes the nature of the offence that should have been charged in the Indictment. The mass deportation and rape of women in East Timor was an absent fact in the case. The defendant claimed he was not aware of the chaos around him. The *New York Times* reported in early 2001:

In an interview at the Dili courthouse, Mr. Casa put forward a defence that ... he knew his victim. She belonged to him. The sex was consensual. Beyond that, Mr. Casa said, he knew less than just about anybody else in East Timor about the violence occurring around him. 'I never saw any massacre or any destruction,' he said. 'I never even left my house'.⁴⁵

The consequence of this lack of context is that the Prosecutor charged Kasa with the crime of rape in violation of section 9 of *UNTAET Regulation No 2000/15* and article 285 of the *Indonesian Penal Code*. Section 9 'Sexual offences' merely states that the provision of the applicable Penal Code in East Timor shall, as appropriate, apply. As noted above, the Special Panels exercise exclusive jurisdiction with respect to genocide, war crimes, crimes against humanity, murder, sexual offences and torture. However, it does not exercise universal jurisdiction with regard to 'ordinary' murder or sexual offences that occurred 1 January and 30 October 1999, which must be prosecuted under the *Indonesian Penal Code*.⁴⁶ The sexual offences in the *Indonesian Penal Code* are contained in the section 'Crimes against Decency'. Adultery is a criminal offence under article 284(1), and the definition of rape is 'any person who ... forces a woman to have sexual intercourse with him out of marriage' (article 285).⁴⁷ This dissonance between the context of the offence and what was charged created jurisdictional problems for the Special Panel to resolve.

The Special Panel cited the arguments regarding jurisdiction from the Prosecutor, who was aware of potential problems from the indictment stage. His Motion read:

⁴⁴ Commission for Reception, Truth and Reconciliation (CAVR), *Chega! Final Report* (2005).

⁴⁵ Seth Mydans, 'Sexual Violence as Tool of War: Pattern Emerging in East Timor', *The New York Times* (New York), 1 March 2001.

⁴⁶ *UNTAET Regulation No 2000/15*.

⁴⁷ Note Suzannah Linton, 'Experiments in International Justice' (2001) 12 *Criminal Law Forum* 210. The ICTR defined rape in the *Akayesu* case as 'a physical invasion of a sexual nature committed on a person under circumstances which are coercive' at [6.4] and [7.7]; see *Indonesian Penal Code*, art 285 <<http://www.unhcr.org/refworld/docid/3ffbcee24.html>>.

Since the crime (of rape) was committed outside East Timor and since it does not belong to the crimes listed under Sect. 10.1 (a), (b), (c) and (f) of U.R. 2000/11 as specified in Sect. 4 to 7 of U.R. 2000/15 for which the Special Panel of the District Court of Dili shall have 'universal jurisdiction' the jurisdiction of the Special Panel might be questionable.⁴⁸

The Prosecutor instead based his case on the extraterritorial provisions in the *Indonesian Criminal Code*, which he argued should be applied, *mutatis mutandis*, to this situation.⁴⁹

It was undisputed that the crime occurred outside the East Timorese territory. The Special Panel worked through the criteria used to determine the applicability of national criminal law to crimes that occurred out of the country: (a) universality (or total extraterritoriality); (b) territoriality; (c) active personality (or nationality, or personal status) of the perpetrator; and (d) the defence or security principle. The Special Panel noted:

Modern states usually don't adopt a single principle. They rather choose a combination between territoriality and other principles. It can be said that the kind of combination depends on the international relations of the state.⁵⁰

The Special Panel decided that the United Nations transitional administration had chosen to adopt the principle of territoriality with very few exceptions:

This choice could be said mandatory for a transitional administration empowered by the United Nations Security Council, which has also the mandate of administration of justice. How could such a temporary and 'neutral' administration have jurisdiction for crimes committed out of the territory administrated?⁵¹

The judges relied on section 5 of *UNTAET Regulation No 2000/11*, which provides that:

5.1 In exercising their jurisdiction, the courts in East Timor shall apply the law of East Timor as promulgated by Section 3 of UNTAET Regulation No. 1999/1.

5.2 Courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET regulation. The alleged rape occurred in September 1999.

The Panel decided that the only exception to the principle set out in section 5 of *UNTAET Regulation No 2000/11* is contained in section 2.2 of *UNTAET Regulation No 2000/15*, which grants the Panel universal jurisdiction for the crimes of genocide, war crimes, crimes against humanity, and torture. The Special Panel noted that serious crimes:

⁴⁸ *Kasa (Judgment)* (2001), 3.

⁴⁹ A Latin legal term meaning 'making the necessary changes'. When an argument from one situation is applied in another, certain elements will have to be altered to fit the new situation. These alterations are made *mutatis mutandis*.

⁵⁰ *Kasa (Judgment)* (2001), 4.

⁵¹ *Ibid.*

deserve universal jurisdiction due international customary laws and (more recently) international laws. That means that the aforementioned Indonesian rules are no longer applicable because they are not consistent with UNTAET Regulation and the principles of the United Nations mandate.⁵²

The Special Panel, therefore, did not accept the Prosecutor's argument, but did accept the idea of universal jurisdiction for international crimes happening in West Timor.

However, because the charge brought was rape under domestic law, rather than rape in the context of a crime against humanity, the Special Panel found it had no jurisdiction. The Special Panel deemed the applicable criminal law to be section 9 of *UNTAET Regulation No 2000/15* and article 285 of the *Indonesian Penal Code*, and therefore held that only Indonesia had the jurisdiction on the case. This meant that the East Timorese courts and the Special Panels of Dili District Court did not have jurisdiction over a crime of rape committed in West Timor before 25 October 1999 — 'no East Timorese Court, according to the laws in force at the present time, could try this case'.⁵³

The Judicial System Monitoring Programme ('JSMP') in East Timor speculated that the judgment was designed to increase pressure on Indonesia to prosecute:

According to the [Special Panel], the universal jurisdiction they have over the international crimes of genocide, war crimes, crimes against humanity and torture, does not extend to individual cases of murder and sexual offences, including rape.

...

Although rape and murder committed between 1 January and 25 October 1999 are considered 'serious crimes' by UNTAET, yesterday's decision means that no suspected perpetrators of such crimes, if committed in West Timor, can be tried by the Special Panel of the East Timorese courts unless the crimes can be categorised as any of the international crimes over which the court enjoys universal jurisdiction.⁵⁴

In my view, the Special Panel erred in its failure to consider the principle of active personality (or nationality) of the perpetrator as a basis of jurisdiction. Universal jurisdiction is generally only relied upon where the crime is a gross human rights violation and when there is no link with the territory where the crime took place, the offender or the victim.⁵⁵ There was no impediment to assessing the other grounds of jurisdiction under customary international law, especially the nationality principle, even if universal jurisdiction in this case was found not to exist due to the judicial interpretation of *UNTAET Regulation No 2000/11*. The Special Panel is able to apply 'recognised principles and norms of international law' and it is unquestionable that the extraterritorial application

⁵² Ibid 5.

⁵³ Ibid 6.

⁵⁴ JSMP, above n 43.

⁵⁵ See further International Law Association Committee on Human Rights Law and Practice, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', *Report of the Sixty-Ninth Conference* (London, 25–29 July 2000), 403.

of criminal jurisdiction in certain circumstances — for example, on the ground of the nationality principle — is one of these norms.⁵⁶

It was also open to the Court to ask the Prosecution to justify why this act of rape was an ‘ordinary’ crime and only opportunistic, or else reframe the charge.⁵⁷ Had the Prosecutor charged the case as an international crime, the jurisdictional arguments could have been handled quite differently. Both the Prosecutor and the Special Panel seemed to completely fail to entertain the idea that a single rape by a militia leader could have been characterised as a crime against humanity if part of: a ‘widespread and systematic attack’, as envisioned by section 5.1(g); a war crime under section 6.1(b)(xxii) in an international armed conflict or section 6.1(e)(vi) in a non-international armed conflict; or an act of torture under section 7.1.

The Special Panel is directed to apply ‘established principles of international law of armed conflict’, but fails to mention the *Furundžija* case in which the ICTY decided that the rape of a single victim is a crime serious enough to warrant prosecution by an international war crimes tribunal.⁵⁸ The defendant in that case was charged and convicted with rape and torture as war crimes.⁵⁹ This oversight can only be explained by speculating that either the Panel or Prosecutor or both lacked sufficient knowledge of recent precedent in international criminal law.⁶⁰

The Panel’s inattention to international criminal jurisprudence is not limited to the *Kasa* case. The JSMP trial report of the first Serious Crimes Court convictions in the *Los Palos* case⁶¹ observed that ‘it is surprising that the Panel’s arguments seem not to be based on international jurisprudence’, noting that the Panel did not mention the *Tadić* case when assessing the elements of an armed conflict.⁶² Suzannah Linton has argued cogently that the first two initial decisions handed down by the Special Panel in the cases of Joao and Julio Fernandez⁶³ should have been dealt with as international crimes, rather than a violation of domestic law.⁶⁴ In that case, the authors of the Maliana POLRES massacre,⁶⁵

⁵⁶ UNTAET Regulation No 2000/11 s 5.

⁵⁷ Judge Pillay asked the Prosecution to amend the Indictment and undertake further investigation in the *Akayesu* case before the ICTR, leading to the first judgment of rape as a crime against humanity; Bill Berkely, ‘Judgment Day’, *Washington Post Magazine*, 11 October 1998, W10.

⁵⁸ UNTAET Regulation No 2000/11 s 5.

⁵⁹ *Furundžija* (Judgment). See also Charlesworth and Chinkin, above n 29, 322–3.

⁶⁰ The JSMP has raised concerns over the training and experience of both local and international public defenders in the *Los Palos* case: *A JSMP Trial Report The General Prosecutor v John Marques and 9 Others (The Los Palos Case)* (2002), 23.

⁶¹ In the *Los Palos* case, eight people, mostly nuns and deacons who had gone to distribute food and medicine to refugees, were gunned down by the road in September 1999. The judgment in the first ‘crimes against humanity’ trial, the *Los Palos* case, was delivered on 11 December 2001 and convicted 10 suspects of committing crimes against humanity: UNTAET Fact Sheet 7: *Justice and Serious Crimes* (April 2002).

⁶² JSMP, above n 60, 30.

⁶³ *Prosecutor v Joao Fernandez* (Dili District Court Special Panel for Serious Crimes, Case No 001/00.CG.2000, 25 January 2000); *Prosecutor v Julio Fernandez* (Dili District Court Special Panel for Serious Crimes, Case No 002/00C.G.2000, 1 March 2000).

⁶⁴ Linton, above n 28.

⁶⁵ The Maliana massacre in September 1999 was one of the worst in East Timor, in which 47 civilians were hacked to death with machetes while seeking refuge at a police station.

one of the SCIU's top ten priority investigations, were charged and subsequently convicted, not with crimes against humanity, but with murder.⁶⁶ Timorese civil society treated the decision with scorn.⁶⁷ In an unreported dissenting judgment, the only Timorese judge, Maria Natercia Gusmao Perreira J questioned how the practice of prosecuting acts such as these as a domestic crime 'could bring justice to a people who had suffered so much during the many years of occupation'.⁶⁸

But the *Kasa* judgment could also be read as the panel members and counsel having insufficient insight into the crime of rape during armed conflict. There has been a long struggle by feminist legalists to have rape considered as a weapon of war, not a private, unavoidable circumstance unconnected to the conflict. The legal errors above could be illustrative of a type of gender-blindness.⁶⁹

In summary then, the *Kasa* case can be seen as combination of problems with the Indictment, the verdict and jurisdictional confusion, which culminate in a judgment representing a step backwards for the women of East Timor, and for international gender jurisprudence.

D. The Lolotoe trials: Rape as a crime against humanity

Criticism of the *Kasa* case had an influence on the *Lolotoe* crimes-against-humanity trials, which were decided before a Special Panel for Serious Crimes in 2000.⁷⁰ The *Lolotoe* case was the second of 10 priority cases to be tried by the Special Panels and the first crimes-against-humanity case in East Timor to include charges of rape and charges against superiors based on the actions of their subordinates.⁷¹ Section 26.2 of *UNTAET Regulation No 25/2001* clearly states that the record of criminal proceedings 'shall be made available to the public'. The Indictment and judgment have been made available by the Berkeley War Crimes Centre and the JSMP. A July 2004 JSMP report contains unofficial transcripts of the hearings taken by JSMP observers beginning with the first preliminary hearing on 6 April 2001.⁷²

The three defendants in the *Lolotoe* case — *Kaer Metin Merah Putih* (KMMP) militia commanders José Cardoso Ferreira and João França da Silva and former Guda village chief Sabino Gouveia Leite — were accused of waging a terror campaign in the Lolotoe area of Bobonaro district during the months surrounding the 1999 Popular Consultation on the

⁶⁶ Linton, above n 28.

⁶⁷ Ibid fn 30.

⁶⁸ Ibid 422.

⁶⁹ Charlesworth and Chinkin, above n 29, 19.

⁷⁰ The *Lolotoe* trial, above n 40; *Prosecutor v Da Silva (Indictment)* (Dili District Court Special Panel for Serious Crimes, Case No BO-06.1-99-SC, 25 May 2001) ('*Lolotoe Indictment*') <www.jsmp.minihub.org/indictmentspdf/lolotoe2.pdf>.

⁷¹ UNTAET Daily Briefing, 'Lolotoe Trial Begins Phase of Hearing Witnesses' (7 May 2002).

⁷² JSMP, *The Lolotoe Case: A Small Step Forward* (JSMP Report, July 2004).

future of East Timor.⁷³ The three defendants were arrested and detained separately in the period from 19 May 2000 to 5 February 2001.⁷⁴

An important aspect of the case was the maintenance by the accused of a 'rape house' where three women suspected of being related to Falintil guerrillas were raped repeatedly from May to July 1999. According to the Indictment, sometime in May 1999, José Cardoso, about 50 KMMP militia and a few soldiers from the TNI (Indonesian Armed Forces), armed with automatic weapons, grenades, machetes and knives, went to Guda to give a speech to the villagers.⁷⁵ Acting on the information of Sabino Leite, they named Mariana Da Cunha, Victim A, Victim B, and Victim C as FALINTIL supporters. They claimed these four women were supplying FALINTIL with food and were in relationships with its members. At different times, these four women were taken to Lolotoe and detained in Sabino Leite's house. From there, Victims A, B, and C were taken to Jhoni Franca's house and then to a hotel in Atambua on 27 June. At this stage the three women had been detained for a number of weeks. At Atambua, it was stated that José Cardoso would have intercourse with Victim A, Bambang Indra with Victim B, and Francisco Noronha with Victim C. On various nights in late June, the three women were injected with medicine that they were told would prevent them from getting pregnant. The three victims were then sexually penetrated by the men, with José Cardoso also raping Victim B. The women were threatened that if they did not obey the men they would be killed.

This was a prime opportunity for the Special Panel to apply the jurisprudence of the *Akayesu* case in the ICTR and the *Kunarac* case in the ICTY, where rape was determined to be a crime against humanity. The *Kunarac* case is based on a fact situation in the town of Foča, Bosnia, involving a 'rape hotel', which was comparable to the Lolotoe 'rape house'. The case also examines the issue of enslavement.⁷⁶

The Indictment in the *Lolotoe* case was filed on 25 May 2001 and the accused had already been in detention at that stage for more than two years.⁷⁷ The trial ran from 5 March 2002 until 5 April 2003, with numerous delays.⁷⁸ In October 2002, Jhoni Franca pleaded guilty to one count of torture and four counts of imprisonment and was sentenced to five years' imprisonment. In November 2002, Sabino Leite pleaded guilty and received

⁷³ Ibid 2.

⁷⁴ The two KMMP commanders were accused of illegal imprisonment, murder, torture, rape, persecution and inhumane treatment of civilians in Lolotoe sub-district, near the border with West Timor, Indonesia. Gouveia Leite was accused of being an accomplice in the offences allegedly committed by the KMP and members of the Indonesian Armed Forces ('TNI'). The original Indictment filed on 6 February 2001 charged 5 co-accused with various counts of crimes against humanity: murder, serious maltreatment, unlawful deprivation of liberty of persons and rape. Two defendants, 2nd Lt Bambang Indra (sub-district commander ('DANRAMIL') of the TNI forces in Lolotoe, with alleged de facto control of the KMMP militia), and Francisco Noronha (an East Timorese member of the KMMP), were severed from the original Indictment as they were still at large, presumed to be in Indonesia. The Court issued an INTERPOL arrest warrant on 6 April 2001 that has so far not been enforced. JSMP, *Digest of the Jurisprudence of the Special Panels for Serious Crimes* (April 2007), 14.

⁷⁵ *Lolotoe Indictment*.

⁷⁶ *Kunarac (Judgment)*.

⁷⁷ JSMP, above n 72.

⁷⁸ Ibid 15.

three years' imprisonment, but was conditionally released by the Special Panel.⁷⁹ On 5 April 2003, José Cardoso Ferreira was sentenced to 12 years' prison for crimes against humanity.⁸⁰ The judgment is not available, but non-governmental organisation (NGO) transcripts of the court hearings attest to a much stronger reliance on international law and recent jurisprudence on gender-based persecution than the *Kasa* decision.⁸¹

The breakthrough in the *Lolotoe* judgment was the fact that the Special Tribunal considered relevant jurisprudence from the ICTR and ICTY, and also looked to the *Rome Statute* for the first time to consider gender persecution. The relevant international jurisprudence was raised comprehensively in the Final Statement of the Prosecutor.⁸²

The Court relied on jurist M Cherif Bassiouni to make a finding that the crime of rape was a part of customary international law:

Rape and other forms of sexual violence were not explicitly listed as crimes against humanity in Article 6(c) of the London Charter nor in Article 5(c) of the Tokyo Charter. However, both charter contained the term 'other inhumane acts', and rape and other forms of sexual violence clearly constitute other inhumane acts, under general principle of law.¹⁶ Rape and sexual violence is included in article 5 of the ICTY Statute, Article 3 of the ICTR Statute and Article 7 of the ICC Statute. It is therefore clear that rape is part of customary international law.⁸³

However, the Court managed to come to some of its findings without applying international jurisprudence to the facts of the case before it, especially in the areas of consent and aiding and abetting. The Special Panels made a single statement that they particularly relied on the ICTY decision in *Kumarac* and noted that, 'this Court considers as persuasive the absence of consent as the central element of the definition of the crime of rape'.⁸⁴

The international jurisprudence does state that wartime conditions, such as the breakdown of law and order, can be taken into account when determining consent issues, but the fact of an armed conflict does not mean consent issues do not have to be examined at all.⁸⁵ The Court relied on the definition of rape as established under the *Rome Statute* as the offence is not defined in the UNTAET Regulation. The *Rome Statute* definition of rape in article 7 notes the absence of consent as a crucial element of the offence.

José Cardoso claimed that he committed the rape only due to superior orders and that one of the victims allegedly consented to the intercourse. The Court did not address Cardoso's claim of consent directly. According to the JSMP report on the trial, the Special

⁷⁹ Ibid.

⁸⁰ *Prosecutor v José Cardoso (Judgment)* (Dili District Court Special Panel for Serious Crimes, Case No 04c/2001, 5 April 2003).

⁸¹ Ibid.

⁸² The *Lolotoe* case (*Final Statement of the Prosecutor*) (1 April 2003), 37–46.

⁸³ *José Cardoso (Judgment)*, [274] citing M Cherif Bassiouni, *Crimes against humanity in international criminal law* (2nd ed, 1999) 344.

⁸⁴ *José Cardoso (Judgment)*, 128, quoted in JSMP, above n 72, 6.

⁸⁵ Kelly Dawn Askin, 'The jurisprudence of the international war crimes tribunals' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (2005) 132.

Panel turned to evidentiary provisions in *UNTAET Regulation No 2000/15* that relate to sexual assault cases to determine what circumstances negate consent. Section 34.3(b) of *UNTAET Regulation No 2000/15* disallows consent as a defence to sexual assault if the victim: (1) has been subjected to or has had reason to fear violence, duress, detention, or psychological oppression; or (2) reasonably believed that if the victim did not submit, another person might be so subjected, threatened, or put in fear. The Court used the circumstances in this provision, which related to consent as a defence, as general examples of situations that negate consent in the execution of rape as a crime against humanity. The JSMP criticises the fact that the Court held that José Cardoso personally raped Victim A and B without systematically applying the definition of rape to the facts of the case, especially the aspects of consent and superior orders raised in defence. The opportunity was lost to make it clear that the existence of superior orders is not a defense to a rape charge, rather than ignoring the claim. While the JSMP does not find fault with the decision, they find the reasoning behind the decision inadequate.⁸⁶

The Court further analysed the role of José Cardoso in aiding and abetting the rape of Victims B and C by the two Indonesians severed from the original Indictment by reference to the ICTY trial case of *Furundžija*⁸⁷ and both the trial and appeal judgments of *Aleksovski*.⁸⁸ The Court accepted the facts that José Cardoso threatened the victims that they would be killed if they did not have sexual intercourse and took the victims to the rooms where they were raped by the Indonesian men. The Court referred to the ICTR judgment of *Akayesu*:

The accused having had reason to know that sexual violence was occurring, aided and abetted acts of sexual violence by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement or in other acts of sexual violence that, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.⁸⁹

Accordingly, the Court held that José Cardoso aided and abetted the rape of Victims B and C. Under section 15 of *UNTAET Regulation No 2000/15*, aiding and abetting the commission of a crime results in individual criminal responsibility. Applying this provision, José Cardoso was convicted of the rape of all three victims.

Was this a fair outcome? The fairness of the trial is relevant to whether the quest for gender justice has been realised on a deeper level than merely gaining a judgment. Unless the process can be seen as fair, the aim of transitional justice in promoting the rule of law is diminished, with consequences that may be severe for women in post-conflict societies.⁹⁰

⁸⁶ JSMP, above n 72, 30–1.

⁸⁷ *Furundžija* (Judgment).

⁸⁸ *Prosecutor v Aleksovski* (Judgment) (ICTY, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999); *Prosecutor v Aleksovski* (Appeal Judgment) (ICTY, Trial Chamber, Case No IT-95-14/1-A, 24 March 2000).

⁸⁹ *José Cardoso* (Judgment), 458 quoted in JSMP, above n 72, 31.

⁹⁰ See Rimmer, above n 27.

There is a question as to whether the trial met basic standards of fairness to the Defence. The JSMP note that, in this case, there were lengthy delays that created long periods of pre-trial detention, as well as problems in achieving ‘equality of arms’ before the Special Panel. Cardoso had five lawyers represent him throughout the trial at various times, while the Defence generally had far fewer resources than the Prosecution.⁹¹ The JSMP also note continuing problems with interpreters; uncertainty over plea bargaining processes and admissions of guilt; and lack of access to court transcripts.⁹²

The charge of selectivity can also be made of the judgment; that the Court was being too hard on the ‘small fish’ in custody despite the more severe guilt of the defendants at large in Indonesia.⁹³ Defence counsel emphasised the relatively minor role the defendant had as commander of the KMMP militia in their closing statement:

Where are the perpetrators – hiding in West Timor. I want to warn the court away from the temptation of convicting the accused. I know the burden is heavy and because witnesses came that lost their husbands, fathers who lost their sons. It does not necessarily mean that because the accused is the one in charge, he is the one to pay for their losses.⁹⁴

As a 2nd Lt, Bambang Indra did not face trial. The role of the TNI in the Lolotoe attacks was not heavily scrutinised, although it was an important factor. Therefore, the judgment does not address the systematic nature of the crimes or the culpability of the people who organised the attacks. However, it does not follow that because the access to the main perpetrators is denied, that defendants, proven to have raped women as a crime against humanity, should walk free. Overall, the outcome of the trial was fair.

The manner in which the trial was conducted has ramifications for gender justice. Admirably, the Special Panel granted protection orders for Victims A, B, and C (with some debate over whether it was prejudicial to label them ‘Victim’ instead of ‘Witness’).⁹⁵ These protection orders were, therefore, granted to protect the rape victims from any intimidation, harassment, or interference by the accused or their family members. Specifically, the protection orders stipulated that: documentary evidence related to protected witnesses should only be shown to the Prosecution, Defence, and defendants; no identifying information should be given to a third party, the public or the media; and any person acting on behalf of the witness should not contact the witnesses or their families without the consent of the Prosecutor or a judge.⁹⁶

The Court accepted the affidavit of a SCIU investigator stating that the protection orders were required due to the situation of the victims:

⁹¹ JSMP, above n 72, 32.

⁹² Ibid 33–4.

⁹³ Ibid 33.

⁹⁴ JSMP unofficial transcript of *Lolotoe* trial (2 April 2003), ibid 15.

⁹⁵ Ibid 25.

⁹⁶ Ibid.

The kidnapping and rape have traumatized the victims. Their mistrust and emotional breakdowns in the presence of investigators attempting to pursue finer details from them demonstrate this. The victims live in remote villages, and have limited knowledge of the legal system. Any attempt to force the victims to testify in public would exacerbate the trauma they have suffered. They have shown a reluctance to speak any further about the matters, unless it is to see justice being done.⁹⁷

When Victims A, B, and C did actually give testimony, the Court was completely closed to the public. This included JSMP monitors who protested against it.⁹⁸ The JSMP reported that despite the protective measures put in place, Victims A, B, and C informed the Prosecution that they were yelled at by the accused's family on court premises after the close of proceedings. The Prosecution requested the Court to take action as these witnesses did not feel safe in the courtroom due to the presence of family members of the accused. Upholding the importance of a public trial and the need for the accused to have moral support from their family, the Court permitted the family members to stay, providing they did not speak to or have direct contact with the three witnesses. A similar request was made from the Defence counsel of José Cardoso, in response to which, the Court banned family members of the witnesses from intimidating or harassing the accused.⁹⁹

The *Lolotoe* trials set an important jurisprudential precedent and were the high water mark of the Dili trials for gender justice — notwithstanding some concerns about the conduct and fairness of the trial and its selective nature, as examined above. However, that high water mark was set very low in Timor compared to the international tribunals. As Alexander Zahar comments, the part of the judgment dealing with rape was better written and reasoned relative to the rest of the judgment, which he describes as ‘tedious’, ‘behind its times, obviously produced on a shoestring judgment’, and ‘far from being integrated with the world of international criminal justice’.¹⁰⁰ Traditional legal analysis of the trials would stop at this point. Feminist analysis would go deeper, arguing that material benefit to the women involved in these cases was thin or non-existent. In the remaining cases, we can see the real danger of inadequate legal processes undermining gender equality in the transitional period in the treatment of ‘ordinary’ crime.

E. The Soares and Santos cases: Rape as ‘ordinary’ crime

In September 2002, the Special Panel handed down its first and only conviction for rape. Francisco Soares, a former militia commander, was sentenced to four years’ jail for raping a

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid, noting the unofficial transcript of *Lolotoe* trial (14 November 2002).

¹⁰⁰ Alexander Zahar, ‘Commentary on Trial Judgments of the East Timor Special Panels in the Cases of Jose Cardoso Ferreira and Agostinho Atolan’ (1 December 2008) in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals Vol. 13: The Special Panels For Serious Crimes, 2001-2003* (2008) 765.

woman taken from the TNI 744 base in Becora in September 1999.¹⁰¹ The maximum penalty for the crime was 12 years.

The Panel found Soares guilty under section 285 of the *Indonesian Penal Code*, which states that '[w]hosoever uses force or the threat of force to coerce a woman who is not his wife to have sexual relations with him is liable to imprisonment of 12 years'. One member of the three-judge panel dissented on whether not being married to the victim remained an element of the crime of rape under East Timorese law,¹⁰² given that Indonesian law continued to prevail in East Timor only to the extent that it is compatible with international human rights law.¹⁰³ Once again, in this case the rape was portrayed as an 'ordinary crime' despite the context of conflict in 1999, but at least the defendant was arrested in the jurisdiction and jailed. However, in terms of the 'justice judgments' by the Timorese community, the message was not clear that the rape was linked to the 1999 conflict. This also confuses the legal message of accountability for crime with the social responsibility to treat the woman concerned as a survivor of the war and a contributor to Timor's independence.

This complexity arises again in the *Laksaur* militia case, which concerned charges of 51 counts of crimes against humanity against a total of 11 accused.¹⁰⁴ The accused were each members of the Laksaur militia, which operated in Covalima District and around Suai near the border with Indonesian West Timor. An important gender aspect of this Indictment concerned the case of Juliana dos Santos. The crimes alleged against the Vice Commander of the LAKSAUR militia group, Egidio Manek, included participation by the Laksaur militia in the Suai Church Massacre of 6 September 1999, which resulted in the death of three priests and an estimated 200 civilians. Her family alleges that then 15-year-old Juliana dos Santos watched as her brother was murdered by Manek during the massacre, before being taken by Manek and his militia men, across the border into West Timor. After being paraded as a war trophy, she was repeatedly raped and became pregnant. She gave birth to a son, Carlos, on 27 November 2000.¹⁰⁵

Juliana was held by Manek in Rai Henek Ho'an, West Timor, from where he led the activities of pro-Indonesian militias under his command. He was arrested in July 2001 by Indonesian authorities and is being held on corruption charges, in spite of the fact that he is wanted for crimes against humanity in East Timor.¹⁰⁶ The Indonesian Government

¹⁰¹ *Prosecutor v Soares (Judgment)* (Dili District Court Special Panel for Serious Crimes, Case No 14/2001, 12 September 2002), <<http://www.jsmp.minihub.org/Court%20Monitoring/spscaseinformation2001.htm>>.

¹⁰² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against Women*, CEDAW 11th sess, UN Doc A/47/38 (1992), [23] <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=453882a422&skip=0&query=A/47/38>>.

¹⁰³ JSMP, 'Timor serious crimes panel hands down first rape conviction' (12 September 2002).

¹⁰⁴ See *Deputy General Prosecutor for Special Crimes v Manek (Indictment)* (District Court of Dili Special Panel for Serious Crimes, Case No 9/2003, 2003) ('*Laksaur* militia case'), <<http://www.jsmp.minihub.org/Court%20Monitoring/spscaseinformation2003.htm>>.

¹⁰⁵ Diane Farsetta, 'East Timorese Refugees in Militia-Controlled Camps' in M H C Pus (ed), *The Devastating Impact of Small Arms & Light Weapons on the Lives of Women: A Collection of Testimonies*, WILPF for International Action Network on Small Arms (IANSA) Women's Caucus (2001).

¹⁰⁶ Kirsty Sword Gusmão, 'The Case of Ms Juliana Dos Santos', *Alola Foundation Report* (October 2001).

consented to two family visits to West Timor to visit Juliana, but at rare sightings Juliana has expressed her consent to be with Manek. The voluntariness of that 'consent' and her continued presence in Indonesia is the subject of debate. Due to a campaign by Kirsty Sword Gusmão, Juliana dos Santos became the public face of the women trapped in West Timor but with layers of ambiguity laid over her ability to exercise any real agency.¹⁰⁷ During the independence anniversary celebrations in 2009, the Government released Manek's close associate and fellow indictee Martenus Bere.

Conclusion

Despite the inauspicious beginnings of the *Kasa* decision, when the serious crimes process finished in 2005 the Special Panels and the SCIU appeared to be making progress in applying their mandate of international criminal law to the investigation and prosecution of gender-based persecution, and breaches of international humanitarian law generally.¹⁰⁸ All other indictments dealing with gender persecution were left hanging when the SCIU closed, as the indicted perpetrators were at large in Indonesia. The lack of resources and constant disruptions the Court faced makes it difficult to judge the success or otherwise of the gender dimensions of the trials.

Were the trials worth holding from a gender perspective? Trials may contribute to leaving an accurate historic record. Successful prosecutions may: lead to the removal of a perpetrator from where he or she could access the victim again; provide a form of punishment in the form of detention; and rehabilitate the perpetrator so that the perpetrator may not commit the offence again.¹⁰⁹ In other words, at least, trials might stop the perpetrator from wearing the jacket of the deceased husband.

However, in case of Timor, the one jurisprudential breakthrough of rape as a crime against humanity does not outweigh the overall failure of the serious crimes process to acknowledge the needs of female survivors more generally. The narrative of trials such as

¹⁰⁷ Mark Dodd, 'A Family in East Timor Grieves for a Daughter', *International Herald Tribune* (New York), 22 December 2000.

¹⁰⁸ Outstanding cases involving women include the *Atabae* case, in which three militia members were charged with 13 counts of crimes against humanity that include multiple rapes and torture between April 1999 and late September 1999 that took place in Atabae sub-district, Bobonaro district. The offences include claims that several women, who along with their families were suspected to be pro-independence, were repeatedly targeted and subjected to sexual violence by the militia: *Deputy General Prosecutor for Special Crimes v Gonsalves* (District Court of Dili Special Panel for Serious Crimes, Case No 8/2002) ('*Atabae* case'). On 5 April 2003, the SCIU issued an indictment for the arrest of five accused TNI soldiers in West Timor who allegedly raped a number of women from the Cailaco sub-district of Bobonaro district for an extended period of time: *Deputy General Prosecutor for Special Crimes v Loeasa Soares* (District Court of Dili Special Panel for Serious Crimes, Case No 15/2003). The *Covalima* Indictment filed 6 December 2004, charges Mahidi militia members Domingos Mau Buti and Adriano Nascimento with crimes against humanity including murder, attempted murder and rape: *Deputy General Prosecutor for Special Crimes v Mau Buti* (District Court of Dili Special Panel for Serious Crimes, Case No 8/2004). The *Ermera* Indictment filed on 15 December 2004 alleges facts relating to the rape and murder of a prominent female CNRT member and UNAMET staff member by Indonesian military: *Deputy General Prosecutor for Special Crimes v Nur* (District Court of Dili Special Panel for Serious Crimes, Case No 12/2004).

¹⁰⁹ Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39, 47.

the *Kasa* case do not do justice, in any way, to the suffering of Timorese women under the occupation and withdrawal of Indonesia; nor meet the expectations of feminist international lawyers hoping for progress in gender jurisprudence. The cases represent only a tiny snapshot of the violence against women in East Timor from 1975 until 1999, as is made clear in the CAVR *Chega!* Report.¹¹⁰ From a feminist viewpoint, the Prosecution strategy did not prioritise violence against women. Even where some measure of formal justice was obtained in these cases, there were limitations. There was generally no subsequent material benefit to the women involved or to their surviving families. Although the definition of international crimes in Timor's domestic jurisdiction of the Special Panels is taken almost verbatim from the subject matter jurisdiction of the *Rome Statute*, the compensation provisions were not included. The limited transcripts available chronicle the horrors of the victims' experiences, but none of their heroism and resistance.

In terms of their impact on women, the answer must be that the Timor trials were mostly irrelevant to women. Even in this internationalised process, run by the United Nations, international law was actually rendered extremely marginal to the experience of gender violence in Timor. The promise of international human rights law to help women in the formal legal system proved illusory. The man will go on wearing the dead husband's jacket in Maliana.

¹¹⁰ CAVR, above n 44.