REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRITAL de DILI

SECÇÃO CRIMES GRAVES

Case No. 11/2001
Date: 13/11//2003
Original: English

Before:
Judge Dora Martins De Morais
Judge Antonio Helder Viera do Carmo
Judge Francesco Florit, presiding and rapporteur

Case NO : 11/2001

Registrar: Joao Naro

Judgement of: 13.11.2003

The prosecutor
V.
Anastacio Martins and Domingos Goncalves

JUDGEMENT

The Office of the Public Prosecutor:
Mr. Per Halsbog

Counsel of the accused
Ms. Radmila Dimitijevic for Anastacio Martins
Ms. Beatriz Sanchez for Domingos Goncalves

INTRODUCTION

The trial of Anastacio Martins- around 45 years old, farmer, married, residing in Gleno- and of Domingo Goncalves- around 40 years old, residing in Liquica district, Bazartete Sub-district- before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereinafter: the "Special Panel") started on the 1st September 2003 and ended today, the 20th October 2003, with the rendering of the decision.

After considering the plea of guilt made by the accused Anastacio Martins, all the evidence presented during the trial and the written and oral statements from the defense and from the Office of the Public Prosecutor (hereinafter: the "Public Prosecutor"), the Special Panel renders its judgement.

PROCEDURAL BACKGROUND

On 2nd May 2001, the Public Prosecutor filed before the District Court of Dili a written indictment (in English version) against the accused charging them with several counts of crimes against humanity.

Copies of statements of several witnesses and copies of statements of the accused Anastacio Martins himself, were attached to the indictment. Sketches and pictures of the crime scene, of the burial sites and of the body examination of victims, as well as maps of the area and ancillary documents, were also attached.

The Court clerk provided notification of the receipt of the indictment to the accused and to the parties pursuant to Sect. 26.1 and 26.2 of UNTAET Reg. 2000/30 (as amended).

After the preliminary hearing, the trial started on the 1st September 2003.

After the preliminary formalities (including a visit to the actual residence of the accused Domingos Goncalves by judge Dora De Morais and the presiding judge) the accused Anastacio Martins pleaded guilty to the first and the third of the four counts contained in the indictment against him. Counts 2 and 4 of the indictment were withdrawn by the Prosecutor. The Court proceeded to the verification of the validity of the guilty plea, as required by Sec. 29 A of UNTAET Reg.2000/30.

The trial of Domingos Goncalves continued with the testimonies of numerous witnesses.

Following the guilty plea entered by Anastacio Martins, the trial of the two accused was severed but they were eventually joined again for the closing statements.

At the end of the trial, the Parties were admitted to the closing statements.

The hearing was then postponed to the present date for the final written decision.

Interpreters for English, Portuguese and Tetum assisted every act before the Court, where needed.

FACTS OF THE CASE

The Public Prosecutor submitted that, in the context of the events that disrupted the country in 1999, the presence of militia in Liquica District involved a group called Besih Mera Putih, to which the two accused belonged.

In several occasions, according to the Prosecutor's version, the two accused participated in the activity of the militia in raiding villages, threatening the population and menacing people about the consequences of a vote for independence in the popular consultation. After the consultation, they are alleged to have taken part in the brutal act of vengeance that flagellated the area of Liquica and brought death, devastation and deportation in many villages in that District.

Specifically, Anastacio Martins was charged for the murders of three men, Jacinto Dos Santos, Francisco Da Silva and Pedro Alves, committed on the 4th September 1999 in the *suco* of Metagou in the course of an attack targeting CRNT members and their families.

The second charge against the same accused relates to the murder of Celestino Coreia, committed in Atambua, where the victim had been forcibly deported together with his family. This was described in the indictment as an act of vendetta. The Public Prosecutor submitted that the act was within the competence of the Special Panel because the Court could exercise its universal jurisdiction with respect to crimes against humanity.

With respect to Domingos Goncalves, the Prosecutor alleged his direct involvement in the murder of Gulhermo Alves, Clementino Goncalves and Paulo Goncalves, committed in the course of an attack against the *suco* of Buku Mera on the 7th September 1999. Furthermore, he was accused of deportation of villagers from the communities of the District of Liquica to West Timor in the aftermath of the popular consultation.

The Public Prosecutor underlined that the acts of the accused were undertaken as part of a widespread or systematic attack directed against the civilian population, and especially targeting those who were considered to be pro-independence, linked to or sympathetic to the independence cause for East Timor, with knowledge of the attack. To reach such conclusion, not only the presence and the general activity of the militia was evoked, but, specifically, a meeting of Besih Mera Putih members was mentioned. This meeting was held on the 2nd of September, in Bazartete, during which those who formed the rank and file of the militia were inflamed and expressly invited to destroy the villages that had given shelter and supported Falentil members.

FACT FINDING

For reasons that don't deserve much explanation, the condition of the two accused, in relation to the evidence, is radically different: while Anastacio Martins, having chosen to admit his guilt renounced the trial, admitting the evidence collected by the Prosecutor without cross examination, the ritual collection of evidence before the Court was the option for Domingos Gocalves.

The different approach does not mean a different probationary threshold: the guilt of the two accused must be found beyond any reasonable doubt.

Having stated this, it is clear that the amount and the kind of evidence on which the Court can rely in the two cases is markedly different, since in relation to Anastacio Martins, in the absence of the cross-examination, the statements of those who were interviewed in the course of the inquiry are not subject to the contradictions, vacuum of memory, uncertainty and other typical deficiencies which can affect a testimony and impair its capacity to convince and to convey the knowledge of facts. Ultimately, the admission of guilt, based on the confession of the facts, provides corroboration of the credibility of the two charges.

In the case of the accused Anastacio Martins, the murder of Celestino Correia is sufficiently well depicted in the words of the witnesses present at the crime scene in Atambua, where the fact took place: from the statements of Rita Dos Santos, widow of the deceased and of the son of his, Abel Castro, the brutality of the aggression against the victim fully emerges. The violence against the defenseless man was triggered by a previous skirmish between the victim himself and the son of one of the aggressors; it ended only after several tens of minutes in an escalation of brutalities. There are no reasons to doubt the genuineness of the declarations of the relatives of the victims, who previously knew the person and the name of the accused, coming from the same district.

Similarly, the attack to the village of Metagou, with its deadly conclusion, finds a description in the statements of some fellow fighters of the accused Anastacio Martins and in the words of the same accused. He confessed to taking part to the attack and to participating to the action that led to the death of Francisco Da Silva. From the statements of Januario Dos Santos and Armendo Da Concecau comes a detailed picture of the murder with the participation of many militia members who share some responsibility for the crime. Here as well it is not possible to find any reason to weaken the credibility of the witnesses, who don't have any motive to lie and who give versions of the episode that are totally compatible and sound. With respect to the role of Anastacio Martins, they only refer to the death of Francisco Da Silva; they add that in the course of the same incursion in the village two other villagers were killed in analogous circumstances. They refer of the leading role of the accused during the attack and afterwards, when he harangued villagers dissuading them, with threats, to support Falentil.

On these premises, the role of the accused Anastacio Martins for the murders to which he pled guilty is clear and undisputable: the consistency and quality of the testimonies and of the same statement of the accused is such that no doubt is left about the material participation of Anastacio Martins to the murders of Celestino Correia and of Francisco Da Silva. The same level of undisputable certainty is achieved, if not for the direct participation of the accused in the killing of Jacinto Dos Santos and Pedro Alves, at least for the presence and the role of the accused in the raid to the village of Metagou on the 4th September 1999. The only attempt, by the accused, to justify or to diminish his role in the murder of Francisco Da Silva (in the statement of 3/5/2000) is weak and untenable: he says he didn't stab the victim but he only tried to take the knife away from his body. This version conflicts not only with common sense but more importantly, with the declarations of the two fellow militia members who recalled him stabbing the victim.

The two remaining charges against the accused Anastacio Martins (the murder of three people in the course of the attack against the village of Buku Mera on the 7th of September and the deportation or forcible transfer of population from Liquica District to West Timor between the 5th and the 11th September 1999) have been withdrawn by the Prosecutor. This

procedural choice of the Prosecutor could not be wiser, since is clear that a similar case would not have had much hope of a positive result for the Prosecutor, given the vagueness of the statements on the issues (the presence of the accused at any relevant stage in the attack against the village of Buku Mera and in the deportation that followed that attach).

In the case of the accused Domingos Goncalves, only the evidence collected in Court can be used to assess his responsibility in relation to the charges.

In brief, he is accused of the murder of three villagers supposedly supporting independence in Buku Mera on the 7th September 1999 and of deportation of population from East to West Timor.

Following the order in which witnesses were heard:

1) Mateus Dos Santos, a policeman in Bazartete in 1999: he remembered and described the meeting of the militia members, held in Bazartete on the 2nd September 1999, during which the militia leaders Jacinto Goncalves, Laurindo and Henrique harangued the subordinates saying that the villages of Laurema and Buku Mera were Falentil strongholds and that as such they had to be attacked and supporters killed; he added that the two accused were attending the meeting as simple militia members;

2) Jorge Goncalves, adoptive son of Guilhermo (or Giliano) Alves: he basically knew nothing by direct knowledge and what he referred to was hearsay; declarations received by his two mothers (the natural and the adoptive) and by brothers who were present at the crime scene when the deceased was killed. He received their declarations soon after the event (pg. 19, hearing 9/9/03) and he made reference to the fact that the militia members present at the time of the killing were Vito and Domingos Goncalves; if the latter was not directly involved in the act of killing, the first participated by stabbing to death the victim, immediately after he had been shot by a TNI soldier;

3) Filomena De Jesus, partner of Paulo Goncalves: she did not know in any direct detail about the death of her partner, she refered, generically, of the forcible transfer, on the 5th September, by the militia, to Bazartete and then to Atambua

4) Leopoldina Dos Santos, widow of Clementino Goncalves: she gave a detailed testimony regarding the death of her husband, an event that she directly saw. She blamed Vito and Joanito as the material perpetrator of the crime. She recalled the presence of Domingo Goncalves at the village on that day, but negated his direct involvement in the lethal aggression against her husband. She added that Domingos Goncalves, together with other militia members, forced the women out of the village and to Bazartete; finally, she remembered the presence of two Domingos, the accused ('the one I'm talking about is the one with the leg that is not good') and the son of Nasiso and she added that the second was 'the one who took us to stay with them (in Atambua) because if we had stayed up the top with the first Domingos, we would all be killed'.

5) Tomas Goncalves, brother-in-law of Paulo Goncalves: he was the pivotal witness for the murder of his relative; Domingo Goncalves and Vito forced the victim out of his house and then Vito, in the direct presence of Domingos, hacked Paulo Goncalves to death; the witness fled at some stage and was chased by Domingos;

6) Eva Ciqueira Alves: she gave a scarcely reliable testimony, the witness gave a largely imprecise picture of the attack by the militia and of the deportation which followed. The presence of Domingo Goncalves was evoked in a confused and contradictory manner. The influence of the interviewer on the witness was evident.

7) Berta Dos Santos, second wife of Guilhermo (or Giliano) Alves. She mentioned Vito as the perpetrator of the murder of her husband.

8) Anita Dos Santos, first wife of Guilhermo (or Giliano) Alves: she mentioned Vito and others, but not Domingos, as the murderers of her husband. This witness was of scarce relevance.

Subject to there being the deletion of a part of the charge of deportation (since no evidence has been collected of the alleged deportation from Metagou and Legumea or for days different from the 7th of September), what is described in the first and second count against Domingo Goncalves happened in a single episode: the raid of the village of Buku Mera on the 7th September 1999. The presence and the active role of the accused in that contest can be considered as proven beyond any reasonable doubt. Indeed the declarations at least of Tomas Goncalves and Leopoldina Dos Santos testify of the presence of Domingos Goncalves as an active participant to the attack to the village and as a person directly involved in the death at least of Paulo Goncalves.

The Court can not share the perplexities illustrated by the Defense Counsel about the declarations given in Court by Tomas Goncalves: his illustrations of the fact did not show the contradictions alleged by the defense and the attempt to disqualify his testimony by simply alleging that he nourished a sense of revenge for what militias did to his family is inherently weak. On the contrary, his narration of the facts was very simple and consistent with those heard in many similar cases. This kind of attack, mainly in the aftermath of the popular consultation, had a similar pattern in different districts, and was obviously a response to a common policy of destruction and revenge. To think of a personal motive as the trigger of a false testimony does not justify why the testimony is so isolated and sporadic that even the widow of Paulo Goncalves is not able to mention the same accused (she was not in the village at the moment of the attack but she was informed that the killers were Vito and a men called Ameu, not Domingos Goncalves) Had there been the will to deceive the truth, at least this minimum coordination would have been achieved.

Other perplexities illustrated by the Defense Counsel are unjustified as well: what relevance can questions like 'why didn't you escape if you knew that the militia would have come again?' or 'why were you together that day?'. These questions would be of little use in a developed context but are basically incomprehensible, if not misplaced, in a downtrodden cultural environment. It is typical of these witnesses, of whom many examples can be found in East Timor, people with a very modest culture and obviously not prepared or aware of the rules and customs of the examination in court, to be exposed to contradictions and loss of face.

The truth is that the testimony of Tomas Goncalves refers an ordinary story of brutalities, common of those days, and does it through the words of a simple man who doesn't care and doesn't see contradictions because his a mind without complexities that concentrates on the

essence of his part of the truth, giving little weight to details and with no search for explanations.

On the other hand, if the accusation against Domingo Goncalves is a lie, if Goncalves is the target of an infamous and defamatory accusation based on an unrepressed desire of evil revenge, it's not clear why the accusation identified him, a simple militia member of many, as the scapegoat. It is also unclear why the orchestration of revenge itself was so poorly built.

Ultimately, the only defense that was put forward by the Counsel- the defense of a vindicative lie- is not a sound argument and its rebuttal, emphasizing the lack of reasonable grounds of disqualification of the testimony, consolidates and corroborates the testimony itself.

It is useful here to make one last point with respect to witness testimonies. The testimony of Mateus Dos Santos, a policeman in Bazartete at the time of the facts, elucidated the scenario in which the criminal activity described in the indictment took place, by referring to the meeting held in the sub-district town of Bazartete on the 2nd of September, attended by many militia members, the two accused included; during the meeting, the plans of persecution against the so-called 'Falentil strongholds' were set out and illustrated with the usual inflamatory words by militia leaders. Specifically, in the words of the witness, Jacinto Goncalves and Laurindo, heads of the militia, spoke of "hurting people and burning houses"; they added that Buku Mera and Laurema were Falentil strongholds and that, as such, they would go and attack those villages. They said "they would go and assault the Falentil and, if not there, they would kill the people". Answering the question of the Defense Counsel about what Domingo Goncalves did in the course of the meeting, the witness replied: "He is like from the people so he just received orders from Jacinto and Laurindo". There can not be much doubt with respect to the meaning, the function and the outcome of this meeting or on the credibility of the witness, against whom is not reasonable to find any shade of suspect or bias.

LEGAL FINDINGS

Before focusing on the issue of the individual criminal responsibility of the two accused, the Panel must address two different questions raised from the decision taken by the Court of Appeal of 15th July 2003 in the case of the Prosecutor against Armando dos Santos. This decision, by addressing the issues of the subsidiary applicable law and the issue of not retroactive applicability of Regulation 2000/15, has purported to introduce a totally different scenario for the judgment of the crimes falling within the competence of the Special Panel.

Indeed,this pannel has not yet had the possibility to express its opinion on the issues, but in case of disagreement with the new interpretation, it can't simply ingore the precedent of the superior Court neglecting application to it. On the opposite, in case of contrast, it is proper, for this inferiour court to express openly its disagreement, in order to offer to the superior body arguments and lines of thought which could evenutally bring to a better definitions of the issues on the floor. This dialogue between the Courts may help a better distillation of juridical concepts and aims to contribute to the evolution of the interpretation of the law in East Timor.

So, the first issue on the agenda is that of the subsidiary applicable law, which in the mentioned decision was held to be Portuguese. The Parliament has already voted the bill which states that Indonesian Law, on the opposite, must be taken as the subsidiary applicable law of this Country. Though, at this point, the bill has not yet been signed by the President of Republic for aproval and has not yer gone through the following finishing steps which are needed for a bill to become an enforceable and binding piece of legislation (publication on the Gazette and *vacatio legis*). Accordingly, the Panel still have to face the intepretation of Section 3, UNTAET Regulation 1999/1, offered by the Court of Appeal.

This Panel is not inclined to follow the viewpoint on the applicable law set by the decision of the Court of Appeal in the case of Armando do Santos and in other recent cases for the reasons already outlined in an interlocutory decision issued in the case 2002/06, Prosecutor against Carlos Soares a.k.a. Carman.

If the interpretation of the Sec. 3 of UNTAET Reg.1999/1 were based on the Portuguese version of the Regulation, which refers to "as leis vigentes em Timor Leste antes de 25 de Outubro 1999", the use of the present participle "vigentes" would clearly leave the door open to a (maybe formalistic, but surely not 'unconstitutional') reading of the legal text as a reference to the laws or statutes of Portugal which, though not applied or *de facto* not applicable under the Indonesian rule because of the unlawful occupation (when Portuguese statutes were not *de facto* enforceable), could still have the pretence of being the legal text of the (former) colony, despite the Indonesian invasion and subsequent occupation. Indeed, "vigentes" means, literally, in this context, simply 'applicable' and applicable in theory, not in practice. But the English version of Section 3, in the relevant passage, mentions the "laws *applied* in East Timor prior to 25 October 1999" and not *applicable*, which means a reference to those laws which were enforced *in practice*. This discrepancy in legal terminology has given rise to the different interpretation of the law. The confirmation of the ambiguity of the translation can be found in the title of the same section which, in the English text, is "Applicable law in East Timor" (which means the law that 'in the future' will be taken as the law) while in Portuguese is, again, 'Lei vigente em Timor Leste'.

In other words, in the Portuguese text, the same expression (vigente) is used to refer to two different concepts, which in the English text deserved two different words (applicable in the future and applied in the past).
The divergence is easily solved according to section 3.1 UNTAET Reg.1999/3, on the Official Gazette of East Timor: In case of divergence, the English text shall prevail. Accordingly, the reference is to the laws applied in practice, which indisputably were Indonesian.

Other arguments could be offered (e.g., listing Indonesian statutes which have been enforced or deleted, or noting that the application of Portuguese Statutes would not be supported by any level of legal 'knowledge' of the law, a prerequisite commonly required in any civilized country, not only for criminal law) but the literal argument appears so clear-cut that it does not need further support (*in claris non fit interpretatio*).

The other relevant issue raised by the decision of the Court of Appeal of 15th July 2003 in the case Prosecutor against Armando dos Santos is that of the principle of "nullum crimen sine lege" in relation to UNTAET Regulation 2000/15

The Court held that UNTAET Regulation 2000/15 (which entered into force on 6th June 2000) is not applicable to events that took place in 1999 since Section 31 of the Constitution, stating the principle 'nullum crimen, nulla poena sine lege', prevents the criminalization of behaviours pursuant to a statute brought in after those behaviours took place.

The words used in the Court of Appeals' decision are clear: after mentioning Section 31 of the Constitution, the Court goes on saying (pg. 17, last part) that "So, despite what the Prosecutor and the Special Panel understood, though the facts committed by the accused in 1999 could be qualified as Crimes against Humanity pursuant Section 5.1 –a) UNTAET Reg.2000/15, he (the accused) can not be judged and convicted on the basis on this criminal law, which was not in existence at the time of the facts and, accordingly, can not be applied retroactively. Being posterior to facts, that Section only could be applicable retroactively if it were more favourable to the accused, what does not happen in the case."

With this classically positivistic approach, the Court has solved in the simplest but also most elegant way the issue of retroactivity in the application of the criminal Statute, UNTAET Regulation 2000/15.

Despite its clarity, that passage has been misunderstood and read as declaring Regulation 2000/15 unconstitutional.

It does not. There is no passage in the decision of the Court of Appeal which can be interpreted as an explicit or implicit declaration of unconstitutionality of the mentioned Regulation. The Court simply states that the Regulation, promulgated after the facts brought before its attention took place, is not applicable to those facts, by virtue of Section 31 of the Constitution.

There is no conflict between norms (between the Regulation and the Constitution) and the Court of Appeal never dared to declare that.

To add more, it is worth noticing that the misunderstanding of the commentators is derived from a confusion regarding the relations between norms: the relation between a Statute and a Constitution promulgated after the promulgation of the Statute (in case of conflict between the two sources) is not resolved by way of a declaration of unconstitutionality, but simply by way of abrogation (Section 165 Const.). The superior source prevails because it is posterior and incompatible with the inferior source which is abrogated. General principles state that the same result would be achieved if the norms were on an equal level.

So, according to the Court of Appeal, the Regulation was not unconstitutional but rather, interpreted in harmony with the Constitution.

The conclusion reached by the Court of Appeal attracted great criticism and gave rise to a debate based on arguments that are themselves exposed to the criticism that they mixed, without justification, principles coming from different legal contexts. The Court of Appeal applied the traditional positivistic approach, common to all *civil law* countries, which attributes the qualification of source of norms only to those factors or instruments that are recognized within the system and not to *extra ordinem* sources. Accordingly, they didn't consider giving value to customary international criminal law since, when the events took place, it was not a source of norms applicable in the Country.

The Court of Appeal continued by reinterpreting the legal qualification of the events in 1999 in light of the Portuguese Criminal Code, in the assumption that the requalification of the facts as crimes of genocide (included in the Portuguese Criminal Code of 1994) would satisfy the requisite of "nullum crimen sine lege".

This Panel can not share the same view: it does appear congruous that the Court of Appeal elevated the principle of nullum crimen sine lege- which itself is designed to promote a guarantee of clarity and stability in terms of the applied law- while at the same time, declaring that Portuguese was the applied law. By declaring Portuguese as the applied law, the Court of Appeal created a fiction that could not give the stability and clarity implicit in the principle of nullum crimen sine lege because, in fact, there was no way the Portuguese law was known in East Timor during this period. There was no Gazette (or indeed publication) of Portuguese laws in East Timor and the Portuguese law was as extraneous in East Timor during Indonesian rule as any other foreign statute.

Abandoning the approach of the Court of Appeal, it is fitting to consider the principle of 'nullun crimen sine lege' as it was framed within Indonesian law.

The plain reality is that the principle of 'nullun crimen sine praevia lege' is a principle of the Indonesian legal system, always present in the legislation of the Republic of Indonesia at the level of ordinary legislation (Section 1 of the Indonesian Penal Code states "No act shall be punished unless by virtue of a prior statutory penal provision") and now risen to the constitutional level by the Second Amendment of Indonesian Constitution, introduced on 18th August 2000. Obviously, this Constitutional Amendment happened in Indonesia after the popular consultation of August 1999 and at the end of the process of independence of East Timor and therefore has no relevance here.

The framing of the principle of nullum crimen sine lege in the Indonesian legal system is a statement of the principle in its simplest form, making reference only to statues as source of criminalization. The principle as it is stated in Section 1 of the Indonesian Penal Code would, on its face, prevent the formulation of indictments for crimes against humanity because until the end of Indonesian occupation of East Timor, Indonesia did not have any legislation (i.e. a statute) criminalizing behaviours falling within the definition of crimes against humanity. Nor could a similar source be found in an international conventional instrument agreed upon by the Republic of Indonesia, since there's no international treaty or convention providing for the criminalization of crimes against humanity.

However, it must be stated clearly that while Indonesian law was the applied law in East Timor during this period, the Indonesian occupation was an abusive one. The Indonesians, by their acts of occupation, introduced by force in East Timor their own legal system. Recognising this, it would be a cruelly ironic contradiction that an abusive power should benefit from the protections in their legal system to the extent that they are immune from the criminal consequences of their abuse.

In an analogous line of reasoning, the European Court of Human Rights denied that East German officials enjoyed the protection from criminal prosecution conferred upon them by tailor-made 'justification clauses' (European Court of Human Rights: Decision Streletz, Kessler and Krenz vs. Germany, 22.3.2001). The Court reasoned that "By such means those

vested with State power set up a system so contrary to justice that it can survive only for as long as the State authority which bought it into being actually remains in existence."

It cannot obviously be said that the principle of 'nullum crimen sine lege' is in itself an abusive one nor that, in itself, the Indonesian political system is abusive. However, in the context of East Timor, the act of bringing the Indonesian legal system to East Timor by way of force and usurpation, makes of a Legality an Illegality and those who acted on the basis of that Illegality could wrongly expect to be shielded by it. In the context of an abusive regime committing crimes against humanity and widespread abuses of human rights, the effect of the principle of 'nullum crimen sine lege' establishes immunity from prosecution that would be intolerable. The conclusion therefore which follows must be the removal of the protection which indeed was only, in this context, a corollary of an abusive occupation.

Abandoning the approach of the principle as it is framed in the Indonesian legal system, it therefore becomes necessary to consider the principle as it was introduced into East Timor by UNTAET Regulation.

The Transitional Administration, acting as a political administration akin to a sovereign power, established a framework of applicable law in UNTAET Regulation 1999/1. According to Section 3, the applicable law must not be incompatible with various human rights instruments detailed in Section 2. Section 2 includes the International Covenant on Civil and Political Rights (ICCPR). This covenant frames the principle of "nullum crimen sine lege" in a way that it qualified (unlike in Section 1 of the Indonesian Crimnal Code). Section 15.1 provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Section 15.2 states:

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Section 15.2 thus provides for the retroactive qualification as criminal of acts that are clearly recognised as criminal in customary international law and, following from the eradication of the immunity created by the 'nullum crimen sine lege' principle in the context of the abusive power of Indonesia in East Timor, this is a perfectly acceptable formulation.

In other words, after the removal of the shield as a consequence of the Indonesian illegal occupation, the new legal framework introduced by the United Nations and based upon international law, filled the vacuum with its own legality that even from a purely positivistic viewpoint had the power to frame the principle of 'nullum crimen sine lege' in the way thought more proper and in a way that could not be complained of as abusive. As a result, since 25 October 1999, the law of East Timor allowed the retroactive reference to

international customary law. This was the situation up until the 20 May 2002, the date of East Timor's Independence.

On Independence, the Constituent Assembly of East Timor- acting as a sovereign political power- established its Constitution and the principles contained therein as the highest form of law in East Timor. Section 31 contains the concept of 'nullum crimen sine lege'. If Section 31 is read as excluding international customary law as a source of retroactive criminalisation, the effect would be to re-qualify as simple and ordinary crimes acts that were crimes against humanity during the period 25 October 1999 until 19 May 2002. Indeed, this interpretation is prevented by the presence of Section 160 of the Constitution. Section 160 contains clear provision for the prosecution of "crimes against humanity of [sic] genocide or war" that occurred in East Timor during the period of Indonesian occupation within national or international courts. This wording can not stand alone and can only be understood as a clarification and an interpretation of other Constitutional provisions (included, as it is, in the Final and Transitional Provisions), such as, in the present case, Section 31. As an effect of this systematic interpretation, imposed if not else, by the need of not vanishing the presence of Section 160 in the Constitution, Section 31 must be read as not interfering with the previous criminalization of atrocities of 1999 as crimes against humanity, where the case may occur.

The above illustrated interpretations differ from those outlined by the Court of Appeal on the same issue. Nonetheless, this Panel does not think to be bound by the precedents of the Court of Appeal, which can not be held as binding on the inferior court. Indeed, the provision of section 2.3 UNTAET Reg.2000/11, in itself ambiguous – affirming the binding nature of precedent decisions while confirming the independence of the single judge- is now incompatible with the principle of subordination of Courts only to law and to the Constitution itself (Section 119 of the Constitution). Obviously, the two concepts (subordination only to law –Sec.119 Cost.- and rule of *stare decisis* -Sec.2.3 UNTAET Reg.2000/11) cannot stand together and in case of conflict between a statute brought in before the Constitution and the Constitution itself, the statue will be abrogated and the second norm will prevail, according to general principles which find confirmation in Section 165 of the Constitution.
In the end, the mentioned Section 2.3 of UNTAET Reg.2000/11 is inapplicable because implicitly abrogated for inconsistency with Section 119 of the Constitution.

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Upon the premise outlined above, the individual criminal responsibility of the two accused for the crimes of count 1 of indictment (Anastacio Martins) and for count 1 and 2 (for Domingos Goncalves), can be affirmed. For the murder of Celestino Correia (count 3 against Anastacio Martins) the Court finds that there is a lack of jurisdiction.

In the first place, with regards to the qualification of the crimes of count 1 of the indictment (Anastacio Martins) and count 1 and 2 (for Domingos Goncalves), the Court finds that the characterisation of the acts as crimes against humanity (Sec.5 UNTAET Reg. 15/2000) is appropriate on the facts of the case, since many concurring elements indicate that the murders (committed by Anastacio Martins in Metagou and Domingo Goncalves in Buku Mera) and the forcible transfer of population (by Domingo Goncalves) were part of a

widespread or systematic attack against a civilian population, executed with the knowledge of the attack.

These elements can be found, in the opinion of the Court, not only in the execution of each criminal act (the three murders in Metagou by Anastacio Martins; the three murders in Buku Mera followed by forcible deportation by Domingo Goncalves) but also in the activity and circumstances that preceded the execution itself.

In the aftermath of the popular consultation of August 1999, a meeting was held on the 2nd of September in the main square of Bazartete. Directions were given ("Buku Mera and Laurema are the strongholds of Falentil") and orders were pronounced as if fatal verdicts ("we have to go there and assault the Falentil and if not there –the Falentil- we kill people"). The execution of these orders followed: few days after the meeting, several villages of the district of Bazartete were raided which resulted in executions, destruction and deportation.

Anastacio Martins and Domingo Goncalves attended the meeting where militia leaders planned killings and raids in the area. It is worth noticing that the order was generic, in that it did not refer to any specific victim. The choice of the victims was made on the spot, for gratuitous reasons. Both in the case of the killings in Metagou (count 1 against Martins) and in the case of those in Buku Mera (count 1 against Goncalves) the selection of the victims was made at random, from amongst the villagers present at that moment: the victims were culled for having pictures of Xanana Gusmao or on the basis of the assumption that they fed independence fighters. These were obviously mere pretexts but they were sufficient to make a target out of a man. This random choice, this sort of Russian roulette in which the final destiny of men is decided on no heavier evidence of their 'sins' than being found in possession of a picture of a political leader or a sentence on feeding Falentil (Jorge Goncalves: "My father was still shaking hands with one of the Indonesian TNI. The TNI said to my father: 'old man you will not die in this time'; ... in this time Vito and Domingo Goncalves informed the TNI that my father fed Falentil so no need to shake hands with him. And then they pushed against my father and the TNI shot my father from the back...") depicts a disrespect and indifference of human life which contributes to the finding that such acts formed part of a wider scheme or of an attack.

Indeed, the target was the people, the villagers, who had chosen to support independence. They were punished through the execution of representatives, taken from among them at random. In these conditions, the modality of execution of the plan is an expression of the will or of the intention of the participants, who are conscious, before beginning the action, of participating in a mission whose outcome could and probably will be deadly. What may be doubtful, at the onset of the action, is the measure, the size of the massacre that in the villages that are going to be visited will occur. However there is no uncertainty with respect to the destructive and murderous purpose of the raid itself. It was clear, because it was predicated and planned, that those expeditions were aimed to punish the Falentil supporters, burning houses and killing people, and, by adhering or participating to those expeditions, the accused accepted the commission of the murders and the destruction of the houses and the deportation of people.

In other words, all the crimes committed in the course of one of those attacks against a village lose their individuality and become a part of a general but unique act of aggression integrally covered by the ill-intention of the participants. The individual member of the

militia group, in those circumstances, is not relevant in himself, but as a part of the whole, a *monade*, a cog in a machinery which finds in its own way of acting the reason of its force. What is appalling is the total absence of possibility of reaction from the victims, largely overwhelmed by the number of the aggressors, exposed to the raids with no other recorse than to flee, sometimes compelled to wait, conscious that this could be their very last day, in the illusion of preserving their house or their cattle or their animals by their presence. It was often a poor illusion: at the end, many were to loose house and animals and life. The Defense Counsel, with a zeal that would deserve a better cause, asked several times: "if you knew they were coming, why didn't you escape?", only to receive from the witness the most natural answer (pg.6/7, hearing 18.9.03): "I called him (the victim) – he didn't want" – and he waited to be killed. These being passive victims, the acceptance, in a way, to place one's own destiny in the hands of a merciless aggressor, is revealing: those villagers, like animals brought to the slaughterhouse, could smell that their fate was close to the end but most of them refused or were unable to react, as in a ritual of tiredness which makes any possible reaction only a postponement of the ineluctable.

Like the prisoner Pablo Ibbieta in Jean Paul Sartre's *Le mure,* at the crossroad of his life, they couldn't see a hope for their life, beyond that day. And, consequently, they renounced to the fight or the flight, and they surrendered. The deprivation of hope, of the light in one's life, is the dehumanization that makes, of the victim, a thing.

The raids were expected. They were spread all over the district, the population of the district was under the iron fist of the militia that gripped the area for days, bringing people, as if humanity was at its disposal, from one part of the country to the other. The deportation of people and the concentration of them in Liquica, from where they were then forwarded to Atambua, illustrates that there was an original plan of punishment and dispersion which embraced all the criminal activity of the militia in the days following the popular consultation of the end of August 1999.

In these conditions the contribution of the individual to the action of the group consolidates and strengthen the capacity of the group to strike. For this very reason the two accused must bear the responsibility not only for the crimes which they were actually seen, by witnesses, to commit, but also for the other murders (and for the deportation, for Domingos Goncalves) which were committed, respectively, in the course of the attack against the village of Metagou and against the village of Buku Mera. According to the general principles on shared criminal responsibility, that find explicit provision in section 14.3 of UNTAET Regulation 2000/15

"In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

....(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or

(ii) be made in the knowledge of the intention of the group to commit the crime

the *actus reus* and the *mens rea* take a specific, distinct feature.

The material or objective element, or *actus reus*, will be a cooperative behavior, of any significance and not merely passive, which, by adhesion to the action of the group, gives a contribution to the achievement of the common aim: in the specific cases, the presence and the participation, by the accused, in the execution at least of a part of the general plan of raid and murders, strengthened the determination of the group, giving moral support to the will and determination of the other participants to the action. The fact that the two accused did something specific in the course of the action -by stabbing or chopping some of the victims or, in the case of Anastacio Martins, giving orders- distinguishes their contribution in comparison with the simple presence of other militia members which were on the spot but have not been prosecuted for their merely passive role (e.g. Jose Gomez, Armendo da Concecau, Anselmo Da Silva). On these premises, the multiplicity of murders and other crimes (deportation, in this case) is merged in a unity were the identity of the single crime is lost and the participants bear the burden of the whole. In the end, it was a single, yet multifaceted, action and those who gave a contribution to it are responsible not for the single element that they directly committed but for its' entirety.

On the mental element of the action, or *mens rea*, it is sufficient it to say that the intention to participate can hardly be placed in doubt, given the kind of action committed by the accused. Similarly, "the knowledge of the intention of the group to commit a crime" (14.3 of UNTAET Regulation 2000/15) is undisputable, if also it takes the shade of a *dolus indeterminatus* (which is still an epiphany of *dolus directus*) where the intention includes the option of a limited but not determined number of possibilities. Like the will of the suicide bomber or of the terrorist who puts a bomb in a crowded place in order to reach a number of victims which cannot be predetermined and which can range from none to many, the intention of the militia member, at the onset of the action, covered an open range of options. Of course, this does not presume an unlimited acceptance of an unlimited number of killings nor (unlike the terrorist or the suicide bomber in the examples given before) was it the purpose of each militia member to reach the highest possible number of deaths; nonetheless the intention was clear and the adhesion to the plans so clearly outlined in the meeting of 2nd September implies the determination or acceptance of the inevitable results.

Addressing the issue of the knowledge of the attack, it is noticeable that, when the militia leaders planned the attacks after the referendum, they were meant as retaliation against the population of those villages that had granted support and shelter to independence supporters and campaigners. They were acts of revenge that could be mandated in generic terms, and, for this, conceived as a part of a systematic attack, leaving the same choice of the target and the execution of the mandate to other militia leaders or subordinates. The attacks on villages were planned without choice of individual target because, at that time, after the consultation, the intention was not so much to weaken the resistance of campaigners by killing the heads of pro-independence organizations or retaliating against the families of the fighters, but to punish the populations of the villages that had shown support to independence.

The same way in which the task was executed tells us something about the qualification of the crimes and the knowledge that the killings were not isolated, being inserted in a wider context. The modalities of the attack to the villages, with the incumbent presence of overwhelming militia forces, on one hand, illustrate the number of pro-autonomy fighters involved in the operation, incompatible with a surgical or occasional action. On the other

hand, the execution of the order to burn houses, steal livestock, arrest and execute those arrested and deport the survivors, are clearly incompatible with the idea of an isolated crime.

The knowledge by the two accused of the width of the attack is an inherent consequence their long affiliation to the militia group Besih Mera Putih and their participation in the meeting on the 2nd of September.

For the abovementioned reasons, the accused are criminally responsible for the crime of murders and deportation as crime against humanity, in violation of Section 5.1, letters a) and d) of UNTAET Reg. 2000/15. More precisely, the description of the murders as crimes against humanity is not exhaustive. A further qualification is needed: those murders fall in Section 338 of the Indonesian Penal Code (IPC) because are killings without premeditation. This Panel, in a recent case (the trial n.9/2002, *Prosecutor vs Carlos Soares a.k.a. Carman*), had the opportunity to scrutinize the issue and to state, in the interlocutory decision of 14/8/2003, that, despite the erroneous English translation of Sections 338 and 340 of the IPC, both the Sections just mentioned include acts which could be described as murder. Specifically, Section 340 describes murder with premeditation while Section 338 includes (voluntary manslaughter and) intentional murder without premeditation. There's no reason to come again to this issue since this Panel makes express reference to the interlocutory decision mentioned above.

On count 3 of the indictment, the Court thinks that the murder of Celestino Coreia falls beyond the jurisdiction of the Special Panels since it doesn't attain the qualification of crime against humanity. In other words, while the Court has no doubt that the murder took place in Atambua and that the coauthor of it was Anastacio Martins (as previously stated, the testimony of the son of the accused, present during all the course of the punitive action, is too clear and too detailed to be refuted or questioned, while the admission of guilt by the accused himself corroborates and supports the charge), the Court can not accept the qualification of the murder as a part of a systematic or widespread attack, as assumed by the Prosecutor.

The reason and the motive of the crime are clearly stated by the son and the wife of the victim, present at the crime scene when the murder took place: they refer that the killing of the elderly Celestino Correia came as an act of revenge by a group of militia men for the wound inflicted by Correia on another militia member (and son of one of the avengers) in the course of a row. It was a reaction which followed half an hour after the preliminary action. It was a brutal revenge, which took place in the context of a refugee camp, under the control of the militia group, in the immediate aftermath of the deportation (the victim and his family had been in Atambua for a week). However it was not at all an element of a wider plan, much less a bit of a widespread or systematic attack. The situation followed while the deportation was surely still in place and constituted the scenario of the murder, but it had, in truth, nothing to do with the reason of the crime. In other words, taken for granted that the attack was still ongoing (the Court accepts the notion of including the detention or the limitation of freedom of the displaced people in the concept of attack, as a part -the very last part- of it, for the reason that the displaced people were not free to leave the camps and go back to East Timor), at most it could be taken as a surrounding circumstance, but never an element of a supposed crime against humanity, since the murder was triggered and found its justification in the revenge. How could it form a crime against humanity if there's no relation (apart from the contextuality) between the crime and the attack, if the murder doesn't find its

root nor its occasion in the execution of the plan of attack or in the need to bring it to further consequences? The single murder must form part of a widespread or systematic attack to be qualified as crime against humanity: be it specifically planned as such or be it born spontaneously in the course of the attack, it must find in it a justification, a relation and not only an unrelated happening.

Missing the nexus between the attack and the crime, the crime is a simple murder (according to Section 8 of UNTAET Reg.2000/15 and Section 338 of the IPC), which could fall within the jurisdiction of the Special Panels (if the murder is committed between 1/1/99 and 25/10/99) only if the crime were committed in the territory of East Timor. In fact, pursuant to Section 2 of UNTAET Regulation 2000/15 the universal jurisdiction of the Special Panel (i.e., jurisdiction irrespective of territorial location of the crime or citizenship of victim or author) doesn't extend to murder and to sexual offences, being limited to the crimes of genocide, war crimes, crimes against humanity and torture.

Since the crime was committed in Atambua, West Timor, the Special Panels have no territorial jurisdiction and hereby decline their jurisdiction on the case of murder listed under count 3 against Anastacio Martins.

SENTENCING POLICY

The determination of the term of imprisonment is radically different for the two accused, according to the different procedural strategy chosen by the two.

According to Sec. 10.1 (a) of UNTAET Reg.2000/15, for the crimes referred to in Sect. 5 of the same regulation, in determining the terms of imprisonment for those crimes, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under the international tribunals. Moreover, in imposing the sentences, the Panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person (Sect. 10.2).

The relevant discretion left to the judge in imposing the sentences (ranging from the minimum to 25 years of imprisonment) is tempered by the need to follow the general practice of the courts in East Timor and under the international tribunals.

For Anastacio Martins, the Public Prosecutor and the Defense suggested in the joint statement that the accused be given a penalty ranging from 8 to 12 years.

An examination of previous decisions issued by the Special Panels in analogous cases shows a clear trend, established from the very beginning of the activity of the Court.

When the accused pleads guilty, the Court has shown a markedly lenient approach: in the few cases for murder treated in this way (the Joao Fernandez case, the Augusto dos Santos case, the Marcourious de Deus case and the Quelo Mauno case) the Panel has taken in consideration the opportunity to show a welcoming approach to those who, demonstrating regret, chose a procedural option which spares time and resources of the Court.

In the majority of modern legal systems the guilty plea, in different shapes and with different features, gives the accused who faces a charge that cannot be challenged or that he or she does not want to challenge, the possibility to shortcut the trial and to accept a penalty immediately imposed by the judge. The inherent consequence for the advantages in terms of timesaving and procedural simplification is a relevant reduction of the penalty imposed if the accused is found guilty. Sometimes the Law or the Statute establishes the reduction rate, depriving the judge of discretion on the issue, but most of times the Law is silent and the judge or the Court are left free to asses the penalty in relation to the case and its circumstances; in the last eventuality, the judge will bear in mind the function and benefit of the application of the plea of guilt and will grant a discretionary reduction of the term that would be imposed if the accused were found guilty at the end of the trial.

In the use of a discretion of this sort, this Court has usually considered that, in the given circumstances, to represent an advantage for the accused, the reduction of the term which would be otherwise imposed at the end of the full trial must be a material one, cutting around half of the term. A less drastic approach proved to be useless: after the first decision of the Special Panel, in the Joao Fernandes case, where the Court took a less lenient decision, more than one year elapsed before a second guilty plea was submitted.

In the end, as far as this issue is concerned, the Court is inclined to consider the plea of the accused as the most important and only relevant of the mitigating elements.

Further elements in mitigation, illustrated by the Defense Lawyer, do not emerge as independent, conclusive reasons for consideration since they don't appear to be more than generic allegations usually introduced in the trials before the Special Panels: the poor condition of the family of the accused, the illiteracy of them, their low rank in the militia, the presence of sons and of casualties in the same family of the accused are all elements mixed in a request of mercy that has in its vagueness the reason for its weakness.

There is no need to prove all the circumstances alleged by the Defense Counsel about the hardship of the life of Anastacio Martins, circumstances that are reasonable and believable. The Panel has no difficulty to believe that what has been stated by Ms. Dimitrijevic in her plead for mitigation, was true. However, those circumstances are not enough to constitute an autonomous reason for a further reduction of the penalty.

The argument used by the Defence Counsel can easily be rebutted, noting for example, that illiteracy is common in East Timor, so that it does not mean much in itself nor it puts the illiterate in a condition of weakness, and in second place that the humble background has not prevented the accused from an abusive and coercive exercise of power in the circumstances of the execution of the crime. The low rank in the militia is, as well, not a conclusive argument, in first place because, with regard to Anastacio Martins, it is not completely true (from the witnesses' statements emerges, on the contrary, the position of power or leadership of Anastacio Martins, who, in the course of the raid to the village to Metagou, gave orders to other militia members (who appeared to be subordinates) to dig graves and prepare a fence; the accused, at the end of the raid, threatened the villagers; these functions appear to be incompatible with a purely executorial role) and in second place because, if also it were true, it is balanced by the fury and tenacity shown in the execution of the crimes, which demonstrated that those crimes, those modalities were not only conditioned by executorial zealousness. In other words, the accused gave a personal contribution to the criminal activity

and stating that the accused was forced, by his low rank, to execute the crimes is not a correct picture of the facts.

In the end, the three murders attributed to Anastacio Martins were brutal acts, executed with the highest disrespect of human life. It is impossible to forget that one of the victims in Metagou was buried while still alive or that another was killed after being beaten for almost one hour.

In the absence of a plea of guilt, the execution of a single murder like this would deserve a penalty of sixteen years, in keeping with the practices illustrated above. The multiplicity of the criminal acts, though merged in a unique action, imposes the application of Section 65 Indonesian Penal Code, on the conjunction of punishable acts. The imposition of further, analogous, penalties for the further murders would be limited by the legal ceiling of one third above the most severe punishment. The Court considers it appropriate to further diminish the total punishment to the conviction of twenty-three years imprisonment.

The reduction for the procedural shortcut elicited by the defendant who pled guilty, brings the penalty to eleven years and six months of imprisonment.

For Domingos Goncalves, who didn't plead guilty, the Defense Counsel invoked, as mitigating circumstances, the conditions of life of the accused, the hardship he and his family went through, his poor current condition and his low rank in the militia. While the misfortune faced by him and by his family during 1999 can not be accorded weight, for the reason that there's no logical connection between a misfortune suffered and a misdeed inflicted, never the less proper relevance must be accorded to the rank of Domingos Goncalves in the militia and to current difficulties faced by his family. The first aspect is in this case material, since it is positively demonstrated that the accused, unlike Anastacio Martins, had a role that, if it was not merely ancillary, was not surely of any relevance in the chain of command of the militia group (the witness Mateus Dos Santos on Domingos Goncalves: "He is like from the people so he just received orders from Jacinto and Laurindo"); the second aspect (the dire straits and the conditions of the members of his family and of the accused himself) induces the Panel to have mercy upon the accused. The accused has lost a leg, cut by his own wife; his wife is mad; his children are young and his mother is very old; the accused is unemployed. All those are sufficient grounds for a relevant mitigation. However, such mitigation can not attain the degree of one half granted by the Special Panel in case of recourse to the procedural mechanism provided by section 29 A of UNTAET Reg. 2000/30.

As in the case of the co-accused, the execution of a single murder like those attributed to Domingos Goncalves would deserve a penalty of sixteen years, in keeping with the practices illustrated above. The multiplicity of the criminal acts, though merged in a unique action, imposes the application of Section 65 Indonesian Penal Code, on the conjunction of punishable acts. The imposition of further, analogous, penalties for the further murders would be limited by the legal ceiling of one third above the most severe punishment. The Court considers it appropriate to further diminish the total punishment to a conviction for twenty-three years imprisonment. A term of one year is then imposed for the last crime attributed to the accused, the deportation of population from Buku Mera. In the end, the total of twenty-four years conviction is reached.

On this base, the application of the mitigating circumstances illustrated above brings the final penalty to fifteen years.

The order of payment of the costs of the procedure and the order pursuant to Section 10.3 UNTAET Reg. 15/2000, section 42.5 UNTAET Reg.30/2000 and Section 33 of Indonesian Penal Code (deduction of pre-trial detention) are detailed in the final part of the present decision, by law.

Having considered all the evidence, and the arguments of the parties, the Special Panel for Serious Crimes issues the following decision:

1.

With respect to the defendant Anastacio Martins, in relation to the charges, as listed in the indictment, the Court establishes as follows:

Count 1) The accused is found guilty of Crimes against humanity for the murders of Jacinto Dos Santos, Francisco Da Silva and Pedro Alves, committed on 4th September 1999, in Metagou Village, Sub District of Bazartete, District of Liquica, as a part of a widespread or systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 letter (a) UNTAET Reg.2000/15 and Section 338 Indonesian Penal Code;

Count 2) The Court acknowledges the withdrawal by the Prosecutor of the charge of the murders of Guilhermo Alves, Clementino Goncalves, Paulo Goncalves, on the 7th September 1999, in Buku Mera Village, Sub District of Bazartete, District of Liquica, qualified as crime against humanity;

Count 3) For the killing of Celestino Coreia, committed on the 14th September 1999 in Atambua, West Timor, subject to re-qualification of the fact as murder (Sec.338 Indonesian Penal Code) and not crime against humanity (Section 5.1 letter a UNTAET Reg.2000/15) the Court declines to exercise its jurisdiction, ex Section 1 and 2 of UNTAET Reg.2000/15;

Count 4) The Court acknowledges the withdrawal by the Prosecutor of the charge of deportation or forcible transfer of population committed between 5th and 11th September 1999 from East Timor to West Timor, qualified as crime against humanity;

2.

In punishment of those crimes, the Special Panel sentences Anastacio Martins to an imprisonment of eleven years and six months, considering all the murders conjuncted, applying Section 10 UNTAET Reg.2000/15 and Section 65 of the Indonesian Penal Code.

3.

With respect to the defendant Domingos Goncalves, in relation to the charges, as listed in the indictment, the Court establishes as follows:

Count 1) The accused is found guilty of Crimes against humanity for the murders of Guilhermo Alves, , Clementino Goncalves, Paulo Goncalves, committed on the 7th September 1999, in Buku Mera Village, Sub District of Bazartete, District of Liquica, as a part of a widespread or systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 letter a UNTAET Reg.2000/15 and Section 338 Indonesia Penal Code;

Count 2) The accused is found guilty of the charge of forcible transfer of population committed on the 7th September 1999 from Buku Mera, in East Timor, to West Timor, as a part of a widespread or systematic attack against the civilian population, qualified as crime against humanity pursuant Section 5.1 (d) of UNTAET Reg.2000/15; for the remaining part of the charge (deportation or forcible transfer of population from Metagou and Legumea to West Timor, from 5th to 6th of September and from 8th to 11th of September) the accused is found not guilty;

4.

In punishment of those crimes, the Special Panel sentences Domingos Goncalves to an imprisonment of fifteen years, considering all the crimes conjuncted, applying Section 10 of UNTAET Reg. 2000/15 and Section 65 of Indonesian Penal Code.

5.

The Court orders the defendants to pay the costs of the criminal procedure.

6.

According to Section 10.3 of U.R. 15/2000, Section 42.5 of U.R. 30/2000 and Article 33 of Indonesian Penal Code, the Special Panel deducts the time spent in detention by Anastacio Martins and Domingos Goncalves due to orders by East Timorese Courts. The accused Anastacio Martins was arrested and detained since 2 May 2000 to the date of the decision (13 November 2003). Therefore he was under detention for 3 years, 5 months and 28 days. The accused Domingos Goncalves was arrested on 26 January 2000. He was released on 28 February 2001. He was re-arrested on 10 May 2001 and re-released on 15 April 2003. Therefore he was under detention for 3 years and 10 days.

Accordingly, previous detention shall be deducted from the sentence today imposed, together with such additional time he may serve pending the determination of any final appeal.

The Court takes this opportunity to note that according to the 'Prison Inmates Calculation Form' of Anastacio Martins held at Gleno Prison, he entered into pre-trial detention on 11 August 2000. However, according to the case file of the Court, Anastacio Martins was arrested and detained from 2 May 2000. The Court hereby orders that the 'Prison Inmates Calculation Form' be amended to reflect that fact that the period of pre-trial detention of Anastacio Martins began on 2 May 2000.

7.

Pursuant to Sections 42.1 and 42.5 of UR-2000/30, the two convicted shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.

The sentence shall be executed immediately, provided this disposition as a warrant of arrest.

The final written decision will be issued in the term of twenty days and will be provided in one copy to the defendants and their legal representatives, public prosecutor and to the prison manager.

The Defense Council have the right to file a notice of appeal within 10 from the day of the notification to them of the final written decision and a written appeal statement within the following 30 days (Sect. 40.2 and 40.3 UR-2000/30).

This Decision was rendered and delivered on the 13 November 2003 in the building of the Court of Appeal of Dili by

Judge Dora Martins De Morais

Judge Antonio Helder Viana do Carmo

Judge Francesco Florit, presiding and rapporteur
(Done in English and Bahasa Indonesia, the English text being authoritative)