TYPOGRAPHICALLY CORRECTED VERSION

THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE

DILI DISTRICT COURT

THE SPECIAL PANELS FOR SERIOUS CRIMES

Before:
Judge Phillip Rapoza, Presiding and Rapporteur
Judge Siegfried Blunk
Judge Deolindo dos Santos

CASE NO. 01/2004

DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

V.

SISTO BARROS aka XISTO BARROS
AND CESAR MENDONCA

FINAL JUDGMENT

For the Deputy General Prosecutor:
Mr. B. P. Bhandari

For the Defendant:
Mr. Leung Gooi
Ms. Wanda Brito

I. INTRODUCTION

1. The defendants in the present case are identified as follows:

Name:	**Sisto Barros aka Xisto Barros**
a. Date of birth:	10 May 1975
b. Location of birth:	Lookeu Village, Suai
d. Current residence:	Lookeu Village, Suai
c. Status:	Married. Three children.
d. Occupation:	Farmer

Name:	**Cesar Mendonca**
a. Date of birth:	19 April 1971
b. Location of birth:	Debos Village, Suai
c. Current residence:	Lookeu Village, Suai
d. Status:	Married. No children.
e. Occupation:	Farmer. Part-time mechanic's assistant.

II. THE SPECIAL PANELS FOR SERIOUS CRIMES

2. The Special Panels for Serious Crimes were established within the Dili District Court to exercise that Court's exclusive jurisdiction over serious crimes occurring in 1999, including genocide, war crimes, crimes against humanity, murder sexual offenses and torture.[1] Moreover, the existence of

[1] See "II. Serious Criminal Offences," Sections 4 through 9 of UNTAET Regulation No. 2000/15. See also Section 9 ("Exclusive Jurisdiction for Serious Crimes") of UNTAET Regulation No. 2000/11 as amended; Section 1 ("Panels with Jurisdiction over Serious Criminal Offences") of UNTAET Regulation No. 2000/15. We note that Section 2.3 (c) of Law No. 10/2003 of Timor-Leste provides that the "regulations and other legal instruments from UNTAET, as long as these are not repealed" shall continue to serve as part of the applicable law.

mixed panels of national and international judges to hear serious crimes cases is recognized in Section 163.1 of the Constitution of Timor-Leste.

III. PROCEDURAL BACKGROUND AS REQUIRED BY TRCP SEC. 39.3(b)

3. On 25 October 2001, the accused Sisto Barros was questioned about certain serious crimes committed in 1999 by UN Police Officer Husni Abutahun (CP 2679) assisted by local Officer Americo Nascimento. The interview occurred at the Suai Police Station. Thereafter Barros signed an interview form that purported to contain a transcript of the questions he was asked and the answers that he gave. Following the interview, Barros was taken into custody as a suspect and eventually was sent to Becora Prison in Dili.

4. On 14 November 2001, UN Police Officer David P. Morris (CP 2101) interviewed Barros while he was in custody at Becora Prison. Thereafter Barros signed a "Suspect Statement Form" that purported to contain a transcript of the questions he was asked and the answers that he gave. Attached to the form is a "Letter of Authorisation" signed by his lawyer at the time authorizing "Serious Crimes Investigators or CIVPOL to undertake an interview of my client, Xisto Barros in my absence."

5. On 26 November 2001, Barros appeared before the Investigating Judge of the Dili District Court for the purpose of a thirty day review of his detention pursuant to the provisions of Section 20.9 of UNTAET Regulation 2001/25, as amended by Reg. 2001/25 (hereinafter "Transitional Rules of Criminal Procedure" or "TRCP"). The judge released Barros from custody pursuant to several substitute restrictive measures, including that he remain in East Timor at his then current address, that he report to CIVPOL in the event that he wishes to leave

Lookeu village and that he not interfere with the witnesses against him. See TRCP Sec. 21 "Substitute Restrictive Measures." Prior to his release, Barros was in custody for thirty-three (33) days.

6. On 31 October 2002, the accused Cesar Mendonca was questioned about certain serious crimes committed in 1999 by UN Police Officers Isagani Ico (CP 3496) and Rodrigo de Dios (CP 3498). The interview occurred at the Serious Crimes Investigation Unit office in Suai. Thereafter Mendonca signed a form entitled "Interview of Suspect – Not Arrested." The form purported to contain a transcript of the questions he was asked and the answers that he gave. Mendonca remained at liberty following the interview.

7. On 8 March 2004, the Investigating Judge of the Dili District Court issued arrest warrants for both defendants who were taken into custody on 9 March 2004 in Suai.

8. On 12 March 2004 the two defendants were brought before the Investigating Judge of the Dili District Court who released them on substitute restrictive measures pursuant to TRCP Sec. 21. Prior to their release, each defendant was in custody for four (4) days.

9. On 15 March 2004, Deputy Prosecutor General for Serious Crimes filed an indictment with the Special Panels for Serious Crimes pursuant to TRCP Sec. 24.1 charging Sisto Barros aka "Xisto Barros" and Cesar Mendonca with two counts of Crimes Against Humanity in the form of murder, one count of Crimes Against Humanity in the form of attempted murder and one count of Crimes Against Humanity in the form of

persecution. A third defendant, Josep Nahak, was also charged in the same indictment, but the Court later severed his case.[2]

10. On 16 and 17 March 2004, a judge of the Special Panels held a hearing on the Prosecutor's request for the pretrial detention of Barros and Mendonca. On 17 March, the Court denied the Prosecutor's request and ordered their continued release on substitute restrictive measures, including the requirements that they report on a weekly basis to the police station nearest to their respective residences; that they remain in East Timor and surrender all passports or other travel documents; that they have no contact with any victim or witness in the case; and that they appear at Court for all judicial proceedings relative to the indictment.

11. On 18 May 2004, a judge of the Special Panels conducted a Preliminary Hearing pursuant to TRCP Sec. 29 that was attended by both defendants, who were represented by new court-appointed counsel.

12. Also on 18 May 2004, the defendants filed a joint motion challenging the indictment on several technical grounds. The Prosecutor, in turn, filed a written response in opposition. The motion, entitled "Joint Defense Motion on Defects in the Form of the Indictment and to Strike Counts 3, 4 and 5" was denied orally by the panel prior to trial. The Court advised the parties that the specific reasons for its decision would be contained in its final written decision following trial. See, infra, "IV. LEGAL RULINGS PRIOR TO TRIAL, A. Form of the indictment."

13. On 7 March 2005, the defendant Sisto Barros filed a "Motion to Exclude Accused Statement from Being Admitted into Evidence" to which the

[2] The charges against the defendant Nahak were severed on 20 September 2004. Nahak was later found to be not mentally competent to stand trial. See Findings and Order on Defendant Nahak's Competence to Stand Trial dated 1 March 2005 in Prosecutor v. Josep Nahak, Case No. 1A/2004.

Prosecutor filed a written response. The panel denied the motion orally prior to trial and advised counsel that it would recite the reasons for its decision in its final written decision. See, infra, "IV. LEGAL RULINGS PRIOR TO TRIAL, B. Admissibility of statements of the defendant."

14. The trial of the two defendants before the Special Panels for Serious Crimes began on 7 March 2005 and concluded on 29 April 2005.

15. The Special Panels rendered its verdict and sentence on 29 April 2005 on which date it entered a Disposition Relating to the Conviction and Sentencing of the Defendants Barros and Mendonca at a public session attended by both defendants and their attorneys. After finding the defendants guilty as charged, the Court imposed a total punishment of nine (9) years imprisonment as to each defendant, with the sentence to begin immediately.

16. On 12 May 2005, the Court entered the present Final Judgment at a public session attended by the defendants and their attorneys.

17. Each defendant was represented by a court-appointed attorney at every stage of the proceedings.

18. Interpreters in English, Tetum and Bunak assisted at every public session of the Court as was required.

IV. LEGAL RULINGS PRIOR TO TRIAL

A. Form of the indictment

19. On 18 May 2004, the defendants filed a joint motion challenging the indictment on several technical grounds. The Prosecutor, in turn, filed a written response in opposition. The motion, entitled "Joint Defense

Motion on Defects in the Form of the Indictment and to Strike Counts 3, 4 and 5" was denied orally by the panel prior to trial. The Court advised the parties that the specific reasons for its decision would be contained in its final written decision following trial.

20. In support of their request for relief, the defendants assert that the indictment (1) fails to allege that the conduct of the defendants occurred in the context of a widespread or systematic attack on a civilian population with knowledge of the attack and (2) is framed in language that is imprecise, vague or insufficient.

21. **The indictment sufficiently alleges that the conduct of the Defendants occurred in the context of a widespread or systematic attack on a civilian population with knowledge of the attack.**

Each of the counts contained in the indictment charges a crime against humanity. It is clear that to constitute a crime against humanity, a criminal act must be "committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack." Section 5.1 of UNTAET Regulation 2000/15. Moreover, the criminal act must be one enumerated in Section 5.1 (a) through (k).

The Defendants assert that the contextual requirement of a "widespread or systematic attack" is inadequately pled in the present indictment. Although acknowledging that each count recites the language in question, the Defendants find fault in the failure of the Prosecutor to specifically allege the facts underlying the claim of a "widespread or systematic attack" in Section IV of the indictment, "Statement of Facts."

The Defendants' claim is without foundation. The first words of the indictment, following the identification of the Defendants, are as follows:

"A widespread of systematic attack was directed against the civilian population in East Timor in 1999." The portion of the indictment containing those words is titled "Section III. Introductory Statement of Facts." This portion of the indictment describes in great detail the nature of the conflict in East Timor and the facts underlying the claim of a widespread or systematic attack directed against the civilian population. In doing so, the indictment describes the respective roles of the Indonesian military, the police and the local militias in the attack on the civilian population. Specific reference is made to the Laksaur militia operating in Covalima and the defendants are identified as members of that group.

Section IV, in turn, specifies the alleged criminal acts of the defendants that purportedly arose in the course of that widespread or systematic attack, with knowledge of the attack. They begin with a description of how the Commander of the Covalima Laksaur and the Danki of that group ordered the members of the militia, including the defendants, to arrest and deport villagers from Lookeu and to kill those who were pro-independence.

The fact that the contextual element of the offense of crime against humanity is described in a preliminary section entitled "Introductory Statement of Facts" that is separate from the section styled "Statement of Facts" is without significance. It remains that the indictment sets out in detail the facts upon which both the contextual and specific elements of the charges against the defendants are based. To suggest that the presence of the contextual allegations in a separate section somehow puts them outside of consideration is to exalt form over substance.

The indictment adequately pleads the contextual element of crimes against humanity and sets out in sufficient detail the underlying facts in Section III. Moreover, the indictment sufficiently links the alleged conduct of the

defendants to that widespread of systematic attack on the civilian population in Section IV.

Whether or not the existence of widespread or systematic attack has been demonstrated is always a matter of proof for the Prosecutor and the defense has the opportunity to contest the issue during the trial. But in the circumstances of the present case, it will not suffice for the defendants to say that the issue has not been pled.

22. The language of the indictment is legally sufficient and is not imprecise, vague or insufficient.

(a) The dates of the offenses

The defendants complain that the indictment is defective in that it fails to specify a date certain for each offense but uses temporal qualifiers such as "on or about 4 October" and "between April and September 1999".

The term "on or about" to describe the date of a particular event is widely used in legal drafting, especially in the context of formal criminal charges. Its purpose is to avoid any issues that could arise from a variance between the proof at trial and a specific date contained in an indictment. The date of a crime does constitute an element of the offense itself and, to that extent, is irrelevant. Nonetheless, it is significant in that it serves to provide the defendant notice of the facts underlying the charges against him. Similarly, the date of the offense limits the Prosecutor to proof of a particular event and prevents him from establishing the defendant's guilt on some other set of circumstances.

Neither the notice given to the defendant nor the restriction imposed on the Prosecutor is measurably diminished by the locution "on or about" when used with respect to a date contained in an indictment. Indeed, the

term has been routinely used in the indictments brought before the Special Panels and it has been accepted as a form of routine pleading in this Court.

Similarly, the use of a phrase such as "between April and September 1999" is unexceptionable. As employed in the present indictment, the term describes an ongoing situation, being the period of time that the defendants actively participated in militia activities in Covalima district. Nonetheless, the individual offenses with which the defendants are charged are described with sufficient specificity, including the date of each offense.

(b) The particularity with which the indictment specifies the conduct of each accused.

The defendants assert that the indictment fails to state with sufficient particularity the nature of the conduct that each is charged with in Counts 2 through 4. Even a cursory review of the indictment will indicate that this contention is without merit. The acts described in the "Statement of Facts," to which each count makes reference, are specified in sufficient detail to put each defendant on notice of the charges against him and the facts upon which they are based. The Prosecutor is not bound to insert in the indictment every fact that he reasonably anticipates to prove at trial. Nonetheless, he must plead with sufficient specificity all the facts necessary to establish the elements of the offenses charged. The present indictment satisfies that requirement.

(c) The sufficiency of the allegations concerning the charge of "Persecution"

Similarly, the allegations concerning the charge of "Persecution" are sufficient in the present indictment. Persecution is essentially a complex crime arising out of the conjunction of a criminal act within the jurisdiction of the Special Panels and a discriminatory intent. See Section

5.1(h) of UNTAET Regulation 2000/15. As defined in Section 5.2 of the same regulation "Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

Count 4 of the indictment correctly cites the applicable law, specifies five separate criminal acts alleged to constitute persecution and references fourteen paragraphs in the factual portion of the indictment supporting the allegation. Accordingly, for purposes of pleading, the Prosecutor's indictment is more than adequate.

(d) The appropriateness of the charge of "Attempted Murder"

An indictment must allege that the purpose of a defendant's action was the commission of a crime within the jurisdiction of the Special Panels. Nonetheless, it need not allege that the accused was successful in the commission of the offense. Individual criminal responsibility and liability for punishment attach equally to "attempts to commit such a crime" so long as an accused takes "action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions." Section 14.3(f) of UNTAET Regulation 2000/15. This is equally true if the attempt was to commit a crime against humanity in the form of murder. Contrary to the assertion of the defendants, there is no specific intent required in the case of an attempted murder other than the intent to commit murder itself, as the lack of success in the execution of the crime is "independent of the person's intentions." See Section 14.3(f).

Although Count 3 of the indictment refers to "Crime Against Humanity: Attempted Murder," it is arguable that a better phrasing of the charge is possible, although not necessarily required as a matter of law. In the case

of Prosecutor v. Rudolfo Alves Correia,[3] the defendant was charged with a crime against humanity in the form of murder. The panel concluded that there was insufficient evidence of a completed murder, but there was sufficient evidence of its attempted commission. Accordingly, the panel qualified the crime for which the defendant bore individual criminal responsibility as "an attempt to commit a crime against humanity in the form of murder."

Regardless, the phrasing of the indictment in its present form is sufficient in that it properly alleges a crime within the jurisdiction of the Special Panels and does so in a manner that provides adequate notice to the defendants of the charges against them.

(e) The claim that the charges of "Murder" and "Persecution" are duplicative.

It is clear that under UNTAET Regulation 2000/15, "Persecution" and "Murder" are separate offenses as a matter of law, even when they are both charged as a crime against humanity. This is because Persecution has the additional element of discriminatory intent not found in Murder. Although each crime against humanity must have been committed as part of a widespread or systematic attack directed against a civilian population, that attack need not target any particular group.

The key element in Persecution is that the underlying criminal acts are directed against an "identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...or other grounds that are universally recognized as impermissible under international law." Section 5.1(h) of UNTAET Regulation 2000/15. Similarly, in the Blaskic case,[4] the ICTY trial chamber found the defendant guilty of Persecution on the

[3] Case No. 27/2003. Decided on 25 April 2005.

[4] ICTY Blaskic (03-03-2000)

basis of acts including murder and causing serious bodily injury, destruction of property, inhumane treatment and forcible transfer of persons. Nonetheless, in order to establish that such acts amounted to Persecution, it was necessary to prove that they were committed with discriminatory intent. The same is required under UNTAET Regulation 2000/15.[5]

(f) The failure of the indictment to specify a theory of individual criminal responsibility under Section 14.3 of UNTAET Regulation 2000/15 as to each offense.

The defendants claim that the indictment is defective because it fails to identify the particular subsection of Sec. 14.3 of UNTAET Reg. 2000/15 that describes their individual criminal responsibility. They assert that the prosecution must specify exactly what mode of responsibility is being charged under Section 14.

The Special Panel previously considered this claim in the case of Deputy General Prosecutor v. Abilio Mendes Correia (Case No. 19/2001). In that case a single justice of the court denied the defendant's request to dismiss the indictment against him based on similar grounds. The court stated:

> In citing Section 14 generally, the indictment is not 'insufficient' as that term is legally understood. An 'insufficient' indictment would be one that fails to indicate whether a person's criminal responsibility is individual (TRCP Sec. 14) or as a commander or superior (TRCP Sec. 16). In the present case, the defendant is informed in each count that he is alleged to be individually responsible as described in Sec. 14 of UNTAET Reg. 2000/15. That is the crucial allegation that must be made. Although the Prosecutor could have chosen to further specify the basis for the defendant's individual criminal responsibility with

[5] Although it is not relevant to this issue, we note that UNTAET regulations track the provisions of the ICC Statute in requiring that the discriminatory intent be "in connection with any act referred to in this paragraph of any crime within the jurisdiction of the panels." Section 5.1(h) of UNTAET Regulation 2000/15. This additional requirement does not apply either before the ICTY or the ICTR.

> reference to a particular subsection of the regulation, it is not required that he do so.
>
> The subsections of TRCP Sec. 14.3 are not elements of an offence that must be specifically articulated. Rather, they merely describe the forms of conduct that are incorporated within the concept of individual criminal responsibility set out in TRCP Sec. 14. An indictment is not defective should it fail to specify a particular subsection of TRCP Sec. 14, and individual criminal responsibility can be demonstrated by evidence satisfying any of the subsections in TRCP Sec. 14.3. Consequently, proof that a person conducted himself as described in any one of the subsections in TRCP Sec. 14.3 will be sufficient to establish individual criminal responsibility on the count involved.[6]

The Special Panels also ruled on the issue in the case of Deputy General Prosecutor v. Anton Lelan Sufa, et al. (Case No. 4/2003). In that case the defendants moved the Court to reject the indictment on the ground that it failed to provide them adequate notice of the charges. The Court, in denying that request, concluded that it was not necessary for the indictment to specify upon which category of individual responsibility the prosecution intended to rely: "[T]he panel in its present composition and its majority does not regard this as compulsory, rather as a voluntary requirement." The decision went on to state that "it will often be difficult to ascertain at the investigational stage the precise category of individual responsibility to be taken into account, and will often only be possible to clarify this during the taking of evidence before the Court."

Another panel of this Court in the case of Prosecutor v. Rudolfo Alves Correia[7] recently ruled that a defendant is "not prejudiced in any way by the form of the indictment because it contained a description of each

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[6] Deputy Prosecutor General for Serious Crimes v. Abilio Mendes Correia, (Case No. 19/2001), "Decision on Defendant's Second Challenge to the Indictment" (2 March 2004).

[7] Correia, supra at n. 3. See par. 12.

category of conduct by which a defendant could be considered individually responsible for an offence." Moreover, the indictment provided a thorough description of the facts underlying the defendant's criminal responsibility. "As those facts were disclosed in the indictment and referred to in Count One, it was not considered significant that the indictment set out the entirety of Section 14.3 of UNTAET Regulation 2000/15 with respect to the Defendant's individual criminal responsibility. On the other hand, the Court did consider significant the fact that the recitation contained Section 14.3(b) under which the defendant was later convicted.[8]

In the present case, the facts giving rise to the charges against the defendants are contained in the indictment at Section III, "Statement of Facts." Those facts are related in sufficient detail to allow the Defendants to identify the basis for the criminal charges against them. Section IV of the indictment asserts the defendants' criminal responsibility to have been individual, as opposed to command, responsibility and the relevant provisions of Sec. 14.3 of UNTAET Reg. 2000/15 are set out. Moreover, the indictment specifically contains and recites the provisions of Section 14.3(d)(i) under which the panel has found each defendant guilty on each count.

In light of the foregoing, the indictment in its present form is sufficient and provides the Defendants with adequate factual and legal notice of the charges against them.

B. Admissibility of statements of the defendant

23. On 7 March 2004, the defendant Barros filed a "Motion to Exclude Accused Statement from Being Admitted into Evidence" to which the Prosecutor filed a written response. The panel denied the motion orally

[8] Id.

prior to trial and advised counsel that it would recite the reasons for its decision in its final written decision.

24. A defendant's prior statement to an investigator may be considered as evidence at trial if the defendant gave the statement after knowingly and voluntarily waiving his right to remain silent.

25. We start by considering the law applicable to the present motion. We note at the outset that at oral argument counsel for defendant Barros asserted that the legal norms used in other international tribunals are not applicable before the Special Panels. We disagree. Section 9.1 of the Constitution of East Timor states "[t]he legal system of East Timor shall adopt the general or customary principles of international law." Similarly, it relates in Section 9.2 that any "[r]ules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor" following their formal approval and publication. Accordingly, the general and customary principles of international law have official status in East Timor and are thus binding on this Court.[9]

26. This is significant because most international criminal tribunals have adopted the practice of permitting the use at trial of statements made by a defendant outside the proceedings. Thus, with respect to the use of out-of-court confessions by a defendant, the practice "has been to admit them as evidence against the accused unless the latter can show that they should be excluded due to their involuntary nature." Richard May, International Criminal Evidence (Transnational Publishers, Inc. 2002) at 292.

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[9] We note also that UNTAET Regulation 2000/15 is largely based on the ICC Statute and it would be counterintuitive to assert that this Court should not be guided by international norms in the domain of criminal law.

27. Indeed, this has been the practice going back to both the Nuremburg and the Tokyo trials at which transcripts or pretrial affidavits in which defendants admitted wrongdoing were admitted in evidence. See ibid. at 289-292.

28. Nor are we persuaded by the argument raised by the defendant that the application of "civil law principles" inescapably leads to the disqualification of statements by the defendant. We need go no further than to consider the practice in the civil law system of Germany. Under German law, when a defendant has admitted his guilt to a police investigator the police office is allowed to testify at trial concerning the comments of the accused. The German Supreme Court (BGH) has repeatedly emphasized that if such testimony were not permitted, an importance circumstance bearing on the alleged crime would be ignored. See, e.g. BGH St. 3,149; 22, 170.[10]

29. Aside from the application of general norms of international criminal practice, the Special Panels are governed by the Transitional Rules of Criminal Procedure, which contain a blend of civil law and common law elements. Turning first to the rules for specific guidance, TRCP Section 34.1 states that "[t]he Court may admit and consider any evidence that it deems is relevant and has probative value with regard to issues in dispute" (emphasis added).

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[10] We note that the defendant also cites in support of his position "Portuguese Criminal Procedure and the general penal law procedure of other democratic civil law countries." The reference to "democratic civil law countries" is likely out of consideration for the fact that prior to the revolution in 1974, the general practice in Portugal (then, as now, a civil law country) was apparently to permit the use at trial of out-of-court statements by defendants. Shortly after the revolution Decree Law 605/75 and, later, Decree Law 377/77 substantially tightened the process for the use of such statements, no doubt in response to perceived abuses by the police establishment of the prior regime. The Portuguese experience thus derives from the peculiar historical context in which the issue was most recently considered. In light of the German practice cited in the text, it can hardly be said that the current Portuguese model is the only one possible in "democratic civil law countries."

30. This provision is sufficiently broad to permit the use of a prior statement of a defendant at trial. See, e.g., "Decision on the motion of the Prosecution to admit into evidence the suspect's statement made on 21 August 2002" in the case of Prosecutor v. Damiao da Costa Nunes.[11] In that case another panel of this court decided "[t]o admit the suspect's statement made on 21 August 2002 into evidence according to Section 34.1 of the Rules of Evidence (Regulation 2000/30)."

31. TRCP Section 34.2 sets out several restrictions on what may be considered as evidence: "The Court may exclude any evidence if its probative value [1] is substantially outweighed by its prejudicial effect, or [2] is unnecessarily cumulative with other evidence. [3] No evidence shall be admitted if obtained by methods that cast substantial doubt on its reliability or [4] if its admission is antithetical to, and would seriously damage the integrity of the proceedings, including, without limitation, evidence obtained through torture, coercion or threats to moral or physical integrity."

32. These restrictions thus do not apply to a prior statement of a defendant except in circumstances where the Court determines that the rights of the defendant were not respected, to the point that either (1) there is substantial doubt as to the reliability of the statement or (2) its admission would seriously damage the integrity of the proceedings.

33. In determining whether a statement is "reliable" or would "seriously damage the integrity of the proceedings" within the meaning of TRCP Section 34.2, the Court must consider the provisions of TRCP Section 6, which describes the rights of a defendant upon arrest (TRCP Section 6.2) and the rights of a defendant "at every stage of the proceedings" (TRCP Section 6.3).

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[11] Case No. 01/2003. Motion decided on 26 November 2003. Case decided on 10 December 2003.

34. These rights, which must be respected, include the following: (1) "the right to remain silent and not to admit guilt, and that silence will not be interpreted as an admission;" (TRCP Section 6.2[a]) and (2) "the right not to be compelled to testify against himself or herself or to admit guilt, and that if he or she chooses not to speak in the proceeding, such silence will not be held against him or her in the determination of innocence or guilt." (TRCP Section 6.3[h]). These rights are re-emphasized in TRCP Section 30.4, where it states that the Court "shall remind the accused of his or her right to remain silent."

35. Accordingly, the Court must determine whether an investigator who took a statement from a defendant respected his right to remain silent. To do this, the Court must decide whether a defendant made the statement after voluntarily waiving his right to remain silent, understanding the nature of that right. If the defendant's rights were respected in this way, then the statement can be considered "reliable" and not a danger to the integrity of the proceedings under TRCP Section 34.2. In those circumstances, the statement may be considered as evidence.

36. The admissibility of a defendant's prior statement is further supported by TRCP Section 6.2(a), which states that when a person is arrested, he is entitled to know that he has "the right to remain silent and not to admit guilt, and that silence will not be interpreted as an admission." An admission is a statement by a person that can be considered as evidence against him at trial. See Barron's Law Dictionary (New York, 1984) at p. 12: "Admissions. [I]n criminal law, the voluntary acknowledgement that certain facts do exist or are true . . . admissions are insufficient to be considered a confession of guilt, although they are generally admissible against a defendant."

37. The purpose of Section 6.2(a) is to ensure that a person, once arrested, is informed that if he chooses to remain silent, his silence will not be used as evidence against him at trial. Moreover, it implies that if he were to make an admission (which his silence is not), then his admission could be considered as evidence at trial. By ensuring that silence is not treated as an admission, Section 6.2(a) strongly supports the view that an admission, if actually made, could be used as evidence at trial.

38. A defendant's prior statement to an investigator that is otherwise admissible may be considered as evidence at trial even if the defendant elects to remain silent during the proceedings against him.

39. The defendant states that the use of his prior statements contravenes his "inviolable right of defense," which includes the right to remain silent. We do not agree that a defendant's right to remain silent at trial is in some way impinged upon if his previous statements are used during the proceedings against him. We do not agree that as a result of the introduction in evidence of a previous statement a defendant is more likely to be forced to waive his right to remain silent at trial in order to explain his prior statements.[11]

40. It is clear that if a defendant were to choose voluntarily to speak to an investigator on a previous occasion, that fact would not amount, per se, to a waiver of his right to remain silent at trial and he may still assert that right despite his previous statement. Nonetheless, a defendant who elects to maintain his silence at trial is not insulated from the consequences of his previous voluntary statement. Accordingly, even though his right to assert his silence at trial must be respected, his previous voluntary

[11] We note that in the present case, the Panel ultimately decided not to consider the pre-trial statements of the defendant Barros, but he nonetheless decided to give a statement at trial. Accordingly his trial statement could not have been motivated by the need to explain improperly admitted prior statements since none were admitted in evidence in his case. To the extent that Mendonca spoke at trial, he merely reaffirmed his pretrial statement, which was largely exculpatory.

statement to an investigator may still be used as evidence. The defendant's right to maintain his silence at trial is not so broad as to require the exclusion from evidence of a previous statement knowingly and voluntarily given to an investigator.

41. The right to silence is important because it protects a person's right not to be forced to incriminate himself. Thus, the right prevents the state from compelling a person to make a statement or to testify against his will. Accordingly, a person has the right to remain silent not only when confronted by the police, but also at trial. See TRCP Section 6.2(a) and (h).

42. In those cases where a police officer fails to respect a defendant's right to silence, the remedy is to prevent the police from deriving any benefit from the resulting statement. Consequently, any statement made in violation of a defendant's right to remain silent may not be used either for investigative purposes or at trial. In this way a defendant's right to silence, although not respected at the outset, is vindicated in the end.

43. Nonetheless, although a defendant has the right to remain silent, he may also waive that right and speak voluntarily to the police. When a person understands that he has the right to maintain his silence but freely chooses to speak, the element of compulsion is removed.

44. The position taken by the defendant does not distinguish between prior statements that are compelled and those that are voluntary. So considered, any prior statement of a defendant, even those that are voluntary, must be excluded at trial if he later chooses to remain silent during those proceedings. This application of the right to silence is overbroad. While the defendant undoubtedly has the right to assert his silence at trial despite

his previous statement, it does not follow that his previous voluntary statement should be discarded from consideration at trial.

45. As previously noted, the purpose of the right to silence is to protect a person from being compelled to make a statement against his will. That objective is not advanced if a voluntary statement is excluded at trial. This is so because at the time that such a statement was made, the defendant waived his right to remain silent and spoke without being forced to do so. The fact that the same defendant may subsequently decide to assert his silence must be respected, but there is no compulsion involved in the use of his previous voluntary statement as evidence at trial.

46. The principle that a defendant should not be compelled to speak is not bolstered by the exclusion of his previous voluntary statement from evidence, even when he elects to remain silent at trial. As the prior statement has already been made, there is no element of compulsion in its later use. The defendant may prefer not to be confronted with his own words, but should that happen at trial, it remains that he is not being compelled to do anything at that moment.

47. To apply the right to silence retroactively to a statement that was voluntary at the time it was made does not promote the policy against compulsion. The right to silence should not be interpreted to include the right to avoid the consequences of one's own voluntary statement, especially where the purpose of the right to silence is not advanced in the process.

48. The defendant essentially suggests that in no circumstances should an accused be the source of evidence against himself when he has asserted the right to silence at trial. We disagree and state that there is no "right" not to be the source of evidence against oneself that is any broader than the right to remain silent.

49. A defendant may legitimately find himself confronted at trial with various forms of evidence of which he is the source or which he cooperated in producing. These could include statements made by the defendant in a public place that were overheard by passersby or statements of the defendant to a friend who later agrees to testify against him. Similarly, a defendant could voluntarily provide to investigators items such as private documents or he could provide objects to the police during a consensual search of his home. In each of these instances, the defendant would be the "source" of the evidence against him. Nonetheless, no legal right of the defendant would be violated if such evidence were to be admitted at his trial, even if he chose to remain silent at that stage.

50. The provisions of TRCP Section 33.4 do not require that a defendant's prior statement to an investigator that is otherwise admissible must be excluded from evidence at trial.

51. TRCP Section 33.4 provides as follows: "A statement or confession made by the accused before an Investigating Judge may be admitted as evidence, if the Court finds that any admission of guilt contained in such a statement was made in compliance with the provisions of Section 29A."

52. We do not agree with the assertion of the defendant that the language of TRCP Section 33.4 serves to exclude from evidence at trial previous statements by a defendant to an investigator. Nor do we read the provision as suggesting that no other statements of the accused may be admitted in evidence other than those made before an Investigating Judge. Our reasoning is as follows:

    a. First, the provision in question appears in TRCP Section 33 ("Presentation of Evidence"), which regulates the order of proof

at trial and the manner in which it will be presented. The following section, TRCP Section 34 ("Rules of Evidence") actually sets out the rules by which evidence may be admitted or excluded, along with the rationale supporting such actions. The appearance of the provision in TRCP Section 33 thus suggests that it relates to the manner or order of proof at trial and should not be taken as reflecting an exception to the rules of evidence that follow.

b. Second, the wording of TRCP Section 33.4 goes no further than to permit the introduction at trial of evidence from an earlier court proceeding. The terms of the provision do not address, much less exclude, other types of evidence, including statements by a defendant. The section serves a specific and limited purpose and does not purport, directly or by implication, to determine the admissibility of evidence outside its scope.

c. Third, statements made before an Investigating Judge are given special attention throughout the rules because they are made in the courtroom, although not at trial. Consequently, such statements are unique as they may have evidentiary value, even though they did not arise during the course of the trial

Such statements are singled out at several points in the rules for specific treatment: (1) TRCP Section 20.5 states that when a suspect makes an admission of guilt before an Investigating Judge, the judge "shall proceed as provided in Section 29A"; (2) TRCP Section 29A states that "[w]hen the accused makes an admission of guilt in any proceedings before the Investigating Judge," the said judge shall determine whether the admission is knowingly and voluntarily made; and (3) TRCP Section 33.4

provides, apparently in cases where the Investigating Judges did not proceed under Section 29A, that the admission of an accused "may be admitted as evidence" where the case goes to trial.

Accordingly, TRCP Section 33.4 does nothing more than describe how statements by the defendant before the Investigating Judge may be treated at trial where they have not already resulted in proceedings on an admission of guilt under TRCP Section 29A.

53. Unlike the defendant, we not read TRCP Section 33.4 as imposing a rule as strict as that found in Portuguese criminal procedure, in which any prior statement to the police by a defendant is explicitly excluded from use at trial unless the rules specifically provide otherwise. Although such a strict rule of exclusion is contained in the Portuguese Codigo de Processo Penal (CPP), there is no similar provision in the Transitional Rules of Criminal Procedure.

54. CPP Artigo 357 specifically provides that the use at trial of "statements previously made by the defendant is only permitted" (emphasis added) in the enumerated circumstances, including (a) certain instances in which the request is made by the defendant, and (b) those in which the statement was made before a judge and where its use is necessary to clarify factual issues at trial and no other mode of clarification is available. Similarly, CPP Artigo 356 states that agents of the police may not testify to the contents of a statement that is not otherwise admissible in evidence. It is clear that the Transitional Rules do not specify such restrictions.[12]

[12] It is interesting to note that while Artigo 356.7 prohibits a police officer from testifying at trial about statements he or she receives from a defendant, the Draft Code of Criminal Procedure of Timor-Leste apparently contains no such provision.

55. TRCP Section 33.4 is limited to providing for the admission in evidence at trial of prior statements of a defendant before an Investigating Judge. It does not refer in any manner to the exclusion of any other type of statement by a defendant. In this respect it is very different from CPP Artigos 356 and 357, both of which explicitly and unmistakably provide for the exclusion of all statements by the defendant other than those permitted by the rules. It would be inappropriate to conclude that TRCP Section 33.4 has the same strict exclusionary effect as CPP Artigos 356 and 357 even though it does not contain comparable language providing for such an exclusion.

Decision and later rulings

56. Accordingly, we denied the defendant's motion to exclude his statements for the reasons stated above. We further stated that the Prosecutor would be allowed to offer the statements in evidence, but only if he could first establish that the defendant had waived his right to silence knowingly, intelligently and voluntarily.[13] Moreover, we ruled that it was necessary to demonstrate that the defendant's rights were otherwise respected when the statements were made.

57. The Court later conducted a hearing during the trial to determine whether the defendant Barros had in fact waived his right to silence knowingly, intelligently and voluntarily. Based on the evidence presented it was apparent that there had been significant problems with the translation of the defendant's rights to the point that the panel concluded that the Prosecutor could not prove that the defendant's waiver of his silence comported with the standards set out above.

[13] A waiver must be (a) knowing in the sense that the defendant understood his rights, (b) intelligent in the sense that he had sufficient appreciation for those rights to choose whether or not to exercise them and (c) voluntary in the sense that his waiver must be an exercise of his own free will and not the result of coercion or duress.

58. Moreover, as to the 14 November statement, the defendant was incarcerated on that date and represented by an attorney who signed a form allowing either the Serious Crimes Unit investigators or CIVPOL officers to interview his client. The right to silence belongs to the client and not to his lawyer and such a waiver by counsel should be given no effect by the Court. Essentially, the defendant was abandoned by his own lawyer and in those circumstances any resulting statement is inadmissible.

59. Consequently, the Court did not allow either statement by the defendant Barros to be introduced in evidence, either in written form or through the testimony of investigators who participated in the interviews.

60. As to defendant Mendonca's oral motion that we exclude his prior statement, that request was denied, but the panel later decided not to consider the contents of the statement in its deliberations as it was essentially repetitive of other more direct evidence before the Court, including the defendant's own unsworn statement to the panel.

V. FINDINGS OF FACT BY THE COURT

A. Facts proved as required by TRCP Sec. 39.3(c)

61. Considering all the credible evidence presented at trial and the reasonable inferences that can be drawn therefrom, the Special Panel concludes that the following facts have been proved beyond a reasonable doubt:[14]

[14] We pause to note that both defendants gave extensive unsworn statements at trial in which they essentially confirmed the occurrence of the events hereinafter described. Their versions, however, are substantially self-serving and generally place culpability on parties other than themselves. The panel has nonetheless given due consideration to their statements and weighed them along with the sworn testimony of other percipient witness.

Background concerning the situation in East Timor in 1999

62. For centuries, East Timor was a colony of Portugal. On 28 November 1975, independence supporters in the capital city of Dili proclaimed the establishment of the Democratic Republic of Timor Leste. Shortly thereafter, on 7 December 1975, the armed forces of the Republic of Indonesia invaded East Timor. Eventually East Timor was declared the 27th province of Indonesia.

63. Between 1975 and 1999 the supporters of East Timorese independence pursued their efforts through a variety of political and military means. During that period, various groups maintained a continuous guerilla presence in the countryside with widespread support from the population.

64. On 27 January 1999, the President of Indonesia announced that there would be a referendum in which the people of East Timor could vote whether to remain part of Indonesia as an autonomous province.

65. On 5 May 1999, the governments of Indonesia and Portugal along with the United Nations agreed that a popular consultation or referendum should be held in East Timor to determine whether the people wished to remain part of Indonesia as an autonomous region.

66. In the period leading up to the vote there was a widespread and systematic campaign by Indonesian military and police authorities, along with Timorese militia whom they supported, to use force and violence to suppress independence supporters and to promote autonomy. One such militia formation was the Laksaur Militia, which operated in the Covalima district.

67. The popular consultation on the autonomy issue was held under UN auspices on 30 August 1999. Voting was heavy throughout the country.

68. On 4 September 1999, the United Nations announced that 78.5% of those participating in the referendum had indicated their support for independence by rejecting the autonomy option.

69. Immediately thereafter, militia supporters of autonomy, assisted by the Indonesian military and police, launched a renewed wave of widespread and systematic violence against the civilian population. In addition to committing acts of murder, rape and torture against supporters of independence, pro-Indonesian forces forcibly deported or relocated a large part of the local population to West Timor. The entire campaign was part of a coordinated attempt to disrupt the peaceful resolution of East Timor's status and to prevent the implementation of the results of the popular consultation.

70. The Laksaur militia group was one of the pro-autonomy formations that participated in the widespread and systematic campaign of violence directed against the civilian population. It conducted a number of military-style operations to promote the cause of autonomy against those who were perceived to be independence supporters.

Background of the Defendants

71. Between 1994 and 1998 the defendants had both participated in a clandestine network of independence supporters that provided money, food and other supplies to armed pro-independence guerillas who were opposing the Indonesian occupation.

72. By 1999 the situation had become more tense and many people supporting independence left their villages and fled to the mountains and other remote areas to avoid the violence perpetrated by both the militia and the Indonesian military. During this period, those who remained behind in the villages made efforts to provide needed supplies to their friends and family who were in hiding.

73. In April 1999, the defendants Barros and Mendonca both joined the Laksaur Militia. They did so to avoid suspicion in light of their previous clandestine activities.[15]

74. Prior to the popular consultation in August 1999, the defendants were stationed by the Laksaur militia in the border community of Fatululik and during the balloting they both voted there. At a point, their commander at the time, Pedro Teles, advised them that "independence had won" and autonomy was defeated.

75. On 5 September 1999, the day after the announcement that autonomy had been overwhelmingly defeated, a large number of militia surrounded the compound of the Roman Catholic church in Suai where hundreds of independence supporters had sought refuge. Many of the militia carried guns. Both Barros and Mendonca were among the militia members who were present, although neither carried a gun. According to Manuel Gusmão, who escaped from the compound with Anito Gusmão and

[15] In their statements to the Court, the defendants portray themselves as reluctant members of the militia. Nonetheless, at a time when many of their clandestine colleagues fled (such as Luis Amaral) or remained in place but true to their convictions (such as Vincente Quintão and Francisco do Espirito Santo), the defendants chose the course of least resistance and changed sides. Although they suggested that they continued to provide material support to the clandestines after they joined the Laksaur militia, Mendonca eventually admitted that there was a lot of "intelligence" around and they "couldn't move." In sum, according to Mendonca, "We didn't help any more." Whatever may have been the defendants' internal reservations, if any, concerning their militia activities, such feelings do not constitute a defense to the crimes charged, nor do they amount to a mitigating circumstance unless acted upon. In the present case, the defendants in fact intentionally contributed to the commission of serious crimes by the Laksaur militia, which was a group acting with a common purpose. See, infra at VII. Legal and Factual Grounds as Required by TRCP Sec. 39.3(d).

Fredrico Barros, the militias "were coming to kill us." After he had fled from the area, he could hear gunshots coming from the vicinity of the church.

76. Starting in September 1999, the defendants and their militia comrades moved the population of Fatululik to West Timor and the defendants went there as well.

77. After spending some time in West Timor, the defendants returned to East Timor as members of a 40-man Laksaur militia unit. Half of the militia members carried guns and the other half carried either weapons such as swords or supplies such as food. Both defendants carried SKS rifles, a gun used by the Indonesian military.

78. Although neither defendant had formal military training, they both received instruction concerning the use of their respective firearms. On the way to East Timor, Mendonca asked his commander, Joaquim do Carmo, how to use his rifle. Carmo showed the defendants how to use their guns and when they arrived at Lookeu, Carmo shot a dog to test his gun and to demonstrate how it should be used.

79. Prior to the departure of the Laksaur militia group for East Timor, their commander Joaquim do Carmo attended a meeting with Olivio Moruk at the militia headquarters. Olivio was the overall leader of the Laksaur militia group of which the defendants were a part. After the meeting Carmo told his men that they were going to East Timor to find independence supporters who had run away. As the defendant Mendonca told the Court, he knew that they were to look for such people but he did not know specifically who they were going to arrest or take prisoner.

The Killing of Fredrico Barros

80. On 4 October 1999, Fredrico Barros, Anito Gusmão and Manuel Gusmão were hiding in the vicinity of the health clinic in Ogues, a community north of Suai. All three men were independence supporters who had escaped from the church compound in Suai on 5 September. See, supra at par. 75. They had gathered behind the clinic because they believe that INTERFET soldiers would soon be arriving there, thus ensuring their safety.

81. No INTERFET soldiers ever arrived and instead a group of Laksaur militia appeared and started stealing items from the clinic. They discovered the presence of the three independence supporters who promptly ran away. The militia shot at them, but no one was injured. The three men ran to Fatubele where they remained for several hours.

82. At approximately 4:00PM, Fredrico, Anito and Manuel left Fatubele and continued on their way. At a point they came to a clearing, which they began to cross. Suddenly, gunfire broke out from the edge of the forest that they had been approaching. At least ten militia members were in a formation that curved along the treeline. From that position they fired on the three men.

83. The defendants Barros and Mendonca were in the formation, with Barros standing toward the middle. Both carried SKS rifles and Barros was seen firing his gun in the direction of the three men. After the firing began, all three tried to flee, each running in a different direction.

84. Fredrico was hit by a bullet and fell to the ground. Anito fled some distance and hid in the bush, permitting him to watch the events that followed.

85. The group of militia approached Fredrico's body and began to hack him with a machete or some other form of bladed weapon. The defendant Barros removed the victim's hat from his head while other militia members went through his possessions and a backpack that he had been carrying. At the end the Laksaur members continued on, stepping over the Fredrico's body as they proceeded on their way.

86. Anito remained in hiding until nighttime to avoid detection by the militia. He then ran to Fatulor, where the three men had a pre-arranged meeting spot.

87. After Fredrico failed to appear in Fatulor, Anito and Manuel suspected that he had died and they went looking for him. Eventually they returned to the scene of the shooting where they found Fredrico's dead body lying on the ground. He had machete wounds to the head, face, arms and legs and both his ears had been cut off. Anito also found an SKS cartridge near the body. Dogs had begun eating the back of Fredrico's neck. Anito and Manuel wanted to bury the body but were afraid that the militia might still be in the vicinity and so they left.

88. On 6 October, Anito and Manuel returned to the scene with a local village chief and several other people to collect Fredrico's remains. Wild animals had ravaged his body and all that remained was his right arm, left arm and one leg. They gathered what remnants they could and buried them in Fatulor.

The Events in Looketo Forest

89. Following the murder of Fredrico Barros, the defendants and their fellow militia members continued walking and eventually went part way up a

mountain where they stayed for the night. The next morning, 5 October, the group woke early and proceeded through Looketo Forest.

90. That same morning, another group of Timorese was also present in Looketo Forest, but for a different purpose. This group consisted of independence supporters who had fled to the remote area to hide from the Indonesian military and the militia. They were all civilians and included men, women and children who were encamped near a small river and a natural spring where they could obtain drinking water.

91. Shortly before daybreak the members of this group gathered to say their morning prayers. After they were done, they went about their normal tasks such as gathering water and eating breakfast.

92. Suddenly, a large group of militia appeared at the encampment and starting shooting their guns at the independence supporters, who were unarmed and defenseless. The shooting continued for as long as one half hour, with one survivor describing the gunshots as being "like water coming out of a hose."

93. Some of the militia were wearing shirts or pants from Indonesian army uniforms, but all of them wore red and white headbands representing the colors of the Indonesian flag. The defendant Barros was one of the militia seen to be wearing green clothing attributed to the Indonesian military.

94. When the shooting began, people began to scream and run from the advancing militia. During the initial volley of gunfire numerous people were hit. Armando Soares Pereira was struck in the knee while his teenage son Fenencio was hit by a bullet that went through his arm and then shattered his kneecap. Armando tried to drag Fenencio to safety, but the boy was bleeding profusely and was so severely wounded that he lost

control of his bodily functions. As his father tried to save him, the boy urinated and defecated in his pants before finally passing out. Armando thought his son had died and he left him where he lay and then tried to crawl behind a large rock for safety.[16]

95. During the surprise attack Barros was seen at the front of the militia attackers and he was among the first people observed at the scene. Mendonca stayed close to Barros and both carried SKS rifles.

96. While these events were happening, Armando saw the defendant Barros shoot his rifle in the direction of people in the encampment. Other witnesses, in turn, also saw Barros shoot in the direction of Armando and his sons. Similarly, Barros was seen shooting in the direction of Lorenzo Gusmão whose dead body was later found at the scene.[17] Indeed, Barros was seen to shoot in several directions, as indicated by one credible witness who observed him shooting "up and down," referring to shots fired in different directions. After he finished shooting, Barros was heard to shout to the effect, "One day we will kill you all!"

97. The defendant Mendonca admitted at trial that he had also shot his rifle, although he claimed he did so solely as a warning shot.[18]

98. After the shooting died down, members of the militia walked around the encampment and tried to locate survivors. An unidentified militia member shouted out, to the effect: "You can hide in the rocks or in tree holes but

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[16] Fenencio did not die. He was later taken higher into the mountains by survivors and was treated with traditional medicine. At a point he was transported by the UN to Australia where he was hospitalized and underwent approximately three months of recuperation.

[17] Gusmão's body had been hacked so severely with a bladed weapon that one witness described it as "minced." The condition of the body was such that after the militia departed, Armando covered it with a dress belonging to his wife.

[18] The defendant asserted that he shot his gun because he had heard a militia member speak disrespectfully to one of the captive women who ultimately was forced onto a truck and relocated to West Timor.

we are still going to get you!" At a point, Carmo tried to convince Nazario Guterres to come out from his hiding spot and Guterres asked him not to shoot. The body of Guterres was later found shot in the upper torso as well as stabbed on the left side of the chest and his right hip. Prior to the attack, Guterres had been eating breakfast with his family.

99. One of the militia members, Joseph Nahak, swung his sword in the direction of Edmundo, the four-year-old son of Armando and hacked him in the buttocks, leaving a permanent scar. At a point Nahak and other militia members went through the camp scavenging for people's possessions. They forced people to put their possessions in one place and they took the whole lot. As a result, Armando lost a number of prized objects, some of them made out of gold that had come from his family's "uma lulik," a structure in which families store items of significant personal and spiritual value. As the marauders went through the camp, random gunfire could be heard throughout the general area.

100. One militia member beat Maria de Fatima with his gun, while another stole a chain from around her neck. Maria, who was the sister of Armando, was later forced to go to West Timor with her captors.

101. Barros and Mendonca also walked through the camp. At a point they came upon the badly injured body of Fenencio but continued walking. Later they encountered Domingas de Resurreição, the sister of Barros's father. She was present with her daughter and other family members. She was very scared of the militia and thought that she and her family would be killed. Standing near the dead body of Gusmão, Barros grabbed the hand of Anita Moniz, the daughter of Domingas. He held her with one hand while grasping his gun in the other. The immediate thought of Domingas was "If she dies we all die."

102. Although she was afraid of Barros, he did not harm Domingas or her family and she began to take consolation in the fact that her captor was a relative and not a stranger. As a result, she cooperated with Barros in order to ensure her safety and that of her children.[19]

103. At a point Armando heard the militia shouting that they were taking everyone and were about to leave. When Armando later emerged from hiding, all the survivors had been taken away.

104. The survivors of the attack were marched to the roadway, with the militia members guarding them along the way, with one group of militia preceding them and another group following them.

105. Eventually the survivors were placed on a large yellow truck and transported to West Timor. They numbered approximately eleven. They remained quiet during the journey and kept looking to the floor of the vehicle out of fear of their captors. Also on the truck were armed militia members, including the two defendants.

106. Once the truck arrived in West Timor, the survivors were taken to the house of the village chief and commander of the Laksaur militia, Olivio Moruk. His house was located within a fenced compound that also included the militia headquarters.

107. While Olivio held them, the captives were not harmed or mistreated, but they were constantly watched. For example, they were

[19] The position of the defendant Barros that his aunt and her family went willingly to West Timor is not credible. As Domingas de Resurreição testified, "They caught us. They arrested us." Similarly, Maria de Fatima stated, "We were scared. When people take you, you just go with them." In these circumstances, the fact that the victims did not resist further was clearly due to their desire to avoid any additional harm from the men who had just attacked their families, killing and wounding many of them. The chance appearance of a relative among their attackers was fortuitous and provided some hope that they might avoid the same fate.

escorted to the toilet as well as to the shower for the entirety of their captivity. In addition, they were required to cook for the members of the militia. As stated by Maria de Fatima, "Whatever they told us to do we would do it. We were afraid. We were scared."

108. Domingas and her family were confined to the compound for approximately thirty days and not allowed to leave. At the end of that time they were permitted to return to East Timor.

The Arrest of Vicente Alves Quintão and Francisco do Espirito Santo

109. Shortly after the two defendants jointed the Laksaur militia, they participated in the arrest of two of their former clandestine colleagues, Vincente Alves Quintão and Francisco do Espirito Santo. Vincente was their immediate superior in the clandestine organization and a recognized independence supporter. Francisco was Vincente's brother-in-law. Their houses were in close proximity to each other.

110. At approximately 9:00 PM on a date in early April 1999, a large group of Laksaur militia members converged on the home of Vincente to arrest him.

111. Vincente heard a knock on the front door of his house. He opened the door and saw the defendant Mendonca. The defendant was wearing some Indonesian army clothing and had a red and white bandana around his neck, symbolizing the flag of Indonesia. There was a large crowd of militia members beyond Mendonca, including the defendant Barros. Barros was dressed in clothes similar to Mendonca's and both carried a samurai sword. Other militia members also had swords, while some had guns and others had both.

112. Mendonca put his arm around Vincente and walked him to the crowd of militia where Barros grabbed his hands and tied them behind his back with a strip of palm leaf. Barros asked the prisoner where Francisco was and Vincente indicated that he was at his house nearby.

113. A group of militia, including both defendants, then went to Francisco's house while others held Vincente in the roadway.

114. When the group arrived at Francisco's house someone knocked on his door and called to him. He came outside to find a large number of militia members present, including both defendants.[20] The defendant Barros grabbed Francisco's hands as well and tied him up. The militia took him to the roadway where he and Vincente were then forced to walk to Lookeu village and then on to Laksaur headquarters.

115. On the way to Lookeu both Vincente and Francisco were beaten severely. Vincente had blood coming from his forehead and both had extremely swollen faces from the beating. Long after the ordeal Vincente had dizzy spells from the attack. The road was dark but Vincente could see that Barros hit him repeatedly. Francisco, on the other hand, could not identify his assailants.

116. When the two captives arrived at Lookeu, Barros took his samurai and raised it to swing at them. Another militia member, Atai Silvestre, grabbed Barros's arm and stopped him from hacking the prisoners. He told Barros that they were not supposed to kill their captives but to take them to militia headquarters.

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[20] At some point during the events surrounding the arrest of Francisco, Mendonca said to the effect "I am arresting you, but you are not going to die. If you die, I will die." Indeed, Mendonca's gesture in placing his arm around Vincente at the time of his arrest was of a similar character. Whether Mendonca was sincere in his reassurances or merely encouraging his former colleague to "come quietly" has not been established. Whatever may have been Mendonca's intention, it was not sufficient to prevent Francisco's arrest or to save him and Vincente from the serious, prolonged beating that they received following their arrest.

117. At Lookeu, Vincente and Francisco were also beaten by unidentified militia members who kicked them with boots and beat them with sticks. The beatings continued all the way from Lookeu to the militia headquarters. Eventually, when they arrived at the headquarters, the commander, one Mateus, gave them medicine to care for their wounds and to reduce the swelling on their faces.

118. Vincente and Francisco were held in a cell that contained approximately six prisoners, all of whom were in favor of independence. Vincente and Francisco were eventually freed, although they were first required to sign a statement supporting autonomy.

B. Facts not proved as required by TRCP Sec. 39.3(c)

119. Considering all the credible evidence presented at trial and the reasonable inferences to be drawn therefrom, the Special Panel concludes that the following facts have not been proved beyond a reasonable doubt:

120. That either defendant was the direct perpetrator of the murders or attempted murders alleged in the indictment.

VI. APPLICABLE LAW

121. As established in UNTAET Regulation No.1999/1, UNTAET Regulation No. 2000/11, as amended by UNTAET Regulation No. 2001/25), and UNTAET Regulation No. 2000/15, the Special Panels for Serious Crimes shall apply the following:

(a) The laws of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1;

(b) Any subsequent UNTAET regulations and directives;

(c) The laws applied in East Timor prior to 25 October 1999 (until replaced by UNTAET Regulations or subsequent legislation) insofar as they do not conflict with internationally recognized human rights standards, the fulfillment of the mandate given to UNTAET under the United Nations Security Council Resolution 1272 (1999), or UNTAET regulations or directives. Law 10/2003 of the National Parliament clarified that the law applicable in East Timor prior to 25 October 1999 was Indonesian law, a fact previously held by the Special Panels in the case of Prosecutor v. João Sarmento and Domingos Mendonca (Decided 24 July 2003);

(d) Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict.

(e) Subsequent laws of democratically established institutions of Timor-Leste. To the extent that such laws apply in a particular case and represent a change from previous law, the law more favorable to the Defendant shall apply, as stated in Section 3.2 of UNTAET Regulation No. 2000/15.

VII. LEGAL AND FACTUAL GROUNDS AS REQUIRED BY TRCP SEC. 39.3(d)

A. Individual criminal responsibility

122. Section 14 of UNTAET Regulation No. 2000/15 sets out the parameters of individual criminal responsibility. In relevant part it states:

14.3 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 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 ...:

(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.

123. Pursuant to Section 14.3(d)(i) of UNTAET Regulation No. 2000/15, a person can be individually responsible for a crime even if he did not personally commit the offense, provided that he "in any way contributes to the commission . . . of such a crime by a group of persons acting with a common purpose." Additionally, the defendant's contribution must be "intentional" and "made with the aim of furthering the criminal activity or purpose of the group." This applies whether the crime in fact occurs or is merely attempted. The liability described in this section is often referred to as joint enterprise or common enterprise liability.

124. In considering the application of Section 14.3(d)(i) we must first determine whether there existed a group of persons acting with a common purpose; second, whether the defendant contributed to the commission of a crime by such a group with the aim of furthering its criminal activity or purpose; and third, whether the defendant's contribution to the commission of a crime by the group was intentional.

B. A group of persons acting with a common purpose

125. The Laksaur militia generally constituted a group acting with a common purpose. Its overall purpose was to ensure that East Timor remained a part of Indonesia and that the supporters of independence were defeated by all available means, including the use of deadly force and violence.

126. The Laksaur militia was comprised of smaller operating units that performed specific operations at the local or district level. These small units often conducted themselves as groups within the meaning of Section 14.3(d).

127. More specifically, in April 1999, the militia members who converged on the houses of Vicente and Francisco constituted a group acting with a common purpose, which was to suppress the independence movement by taking aggressive actions, including the arrest of clandestine leaders. On that particular evening, the specific purpose was to arrest both Vicente and Francisco and to turn them over to Laksaur commander Mateus. Both defendants were present and directly participated in the steps taken to arrest, transport and detain the two victims.

128. In October 1999, both defendants were part of a 40-man militia formation sent to East Timor for the purpose of locating and arresting independence supporters. Although the results of the popular consultation had already been announced, incursions such as the one in which the defendants participated were intended to prevent the implementation of the election results, which strongly favored independence.

129. The group that set off was heavily armed in that approximately 20 of the men had rifles while most of the remainder had swords. The defendants were among those who had guns. It was clear from the outset that deadly force was an option for the achievement of the group's purpose relative to independence supporters.

130. Once inside East Timor, the militia band of which the defendants were a part participated in at least three operations, all of which were motivated by the same common purpose, which was to defeat the independence movement by all available means, including deadly force and violence if necessary. Thus, the shooting of Fredrico Barros, the attack on the unarmed civilians in Lookito Forest and the deportation of the survivors to West Timor, all amounted to combined operations by a group of which both defendants were a part. Moreover, it was a group motivated by a common purpose that in each case involved a criminal activity or goal.

131. As a previous panel has commented, "Since [the defendant] joined the militia, the accused obviously knew the purposes of the group."[21]

C. Contributes to the commission of a crime

132. The findings of fact by this Court methodically document the active contribution of the two defendants to the commission of crimes by a group or groups acting with a common purpose.

133. The Special Panels previously addressed this issue in the case of Prosecutor v. Joseph Leki.[22] In Leki the panel stated that "To participate

[21] Prosecutor v. Joseph Leki, Case No. 05/2000. Decided 11 June 2001.

[22] Id.

in those operations, regardless [of whether the defendant] was carrying a gun or not, was his contribution to the killings of the first three victims. The evidence that he was a carrying a gun...enhances his performance to the results. Just holding a gun during a siege maneuver against unarmed civilians, he played an undoubting role to the commission of the three deaths."[23]

134. Similarly, in Prosecutor v. Jose Cardoso[24] the panel concluded that direct participation in the crime was not required in order to impose individual criminal responsibility on a defendant so long as the defendant had assisted in a criminal act or participated in the common enterprise. More recently, the panel in Prosecutor v. Domingos de Deus[25] determined that the defendant bore criminal responsibility under Section 14.3(d) when, as part of a militia group, he "contributed to their criminal intent by his threatening posture of carrying a gun" and later "uttering scolds and verbal threats, thereby intimidating the unarmed people...and strengthening the criminal resolve of the other members of the group."[26]

135. In the present case, each defendant made a significant contribution to the commission of the crimes of the Laksaur militia group. Each went far beyond the threshold established in Leki, which concluded that merely holding a gun during a siege maneuver against civilians was sufficient to impose criminal responsibility for three resulting deaths.

136. In the case of the arrest of Vincente and Francisco, Mendonca was the person who went to their homes and told them they were under arrest. Barros was the individual who tied them up. Barros also beat Vincente as

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[23] Ibid. at p. 8.

[24] Case No. 04/2001. Decided 5 April 2003.

[25] Case No. 2A/2004. Decided 8 April 2005.

[26] Ibid. at p. 13.

they walked on the road. Once in Lookeu village, Barros was going to hack at the prisoners until he was stopped by Atai Silvestre.

137. Relative to the shooting of Fredrico Barros, both defendants were armed with SKS rifles. Each one was in the militia formation that shot at Fredrico and his compansions from the edge of the clearing. The defendant Barros was seen shooting his gun while standing toward the middle of the line of militia men.

138. Finally, the two defendants both participated in the militia ambush of independence supporters in Looketo Forest. Without restating all the details contained in the factual section above, it is sufficient to state that the appearance and conduct of Barros and Mendonca were consistent with that of the other militia members during the operation. Each carried a gun and fired it, either placing innocent civilians at risk or putting them in a state of great fear. Their actions contributed to the general operation and concluded with their assisting in the apprehension and transportation of survivors to their place of captivity in West Timor.

139. It is clear that the defendants were not mere innocent bystanders with respect to the events recited in the indictment. Rather, they participated to a significant extent in the actions of the militia group. Moreover, their actions were in furtherance of the criminal activity or purpose of the group.

D. Intent

140. A defendant's contribution to the commission of a crime must be intentional in the sense that he must mean to advance the commission of the crime or to increase the likelihood of it being committed. This is to distinguish the defendant from a person who advanced the commission of

a crime without intending to do so or having reason to know that his actions would have that effect.

141. In the Domingos de Deus case, the panel concluded that the defendant's actions "intimidated unarmed people" and "strengthened the criminal resolve of other members of the group." The Court concluded that "[t]here can be no doubt that the accused had the required intent."[28]

142. Similarly, in Leki the Court found the defendant criminally responsible for an attack even though he had not shot his gun. In the words of the panel "The accused had deliberate intent to provide sufficient means to accomplish the purposes of the militia group. The killings of [the three victims] was not a casual fact; they were carried out as a part of a longer planning to terminate any opponent to the establishment."[29]

143. In the present case the evidence demonstrates that the defendants intended to advance the criminal activity and the criminal purpose of the various Laksaur formations in which they participated. In each of the factual scenarios described above, they made a meaningful contribution to the commission of crimes by members of the group and did so knowing both the crimes that would be perpetrated as well others that were likely to be committed.

F. Substantive offenses

144. Section 5.1 of UNTAET Regulation No. 2000/15 sets out a number of criminal offenses that can be qualified as crimes against humanity if they are "committed as part of a widespread or systematic attack and

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[28] Id.

[29] Leki, supra at n. 21 at p. 8.

directed against any civilian population, with knowledge of the attack." Accordingly, when an offense such as murder is committed within this context it amounts to murder as a crime against humanity. See Section 5.1 (a) of UNTAET Regulation No. 2000/15. In the present case the defendants are charged with crimes against humanity in the form of murder, attempted murder and persecution.

Murder and Attempted Murder

145. In Public Prosecutor v. Joni Marques[29] the Court addressed the definition of murder as a crime against humanity. In addition to the *chapeau* requirements of crimes against humanity, the Court ruled that the additional elements of the crime require proof that (a) the victim is dead; (b) the perpetrator's act was a substantial cause of the victim's death; and (c) the perpetrator intended to cause the death of the victim or reasonably knew that his act was likely to result in the victim's death. [30] The Court also stated, inter alia, that under international law murder, as a crime against humanity, does not require premeditation.[31]

146. As a serious criminal offense contained in Section 5.1 of UNTAET Regulation No. 2000/15, murder as a crime against humanity can be either committed as provided in Section 14.3 (a) through (d) of the same regulation or attempted as provided in Section 14.3(f). Accordingly, when a person attempts to commit a murder as a crime against humanity and (1) commences the execution of the crime by taking a substantial step toward its accomplishment, and (2) the crime does not occur because of

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[29] Case No. 09/2000 (Decided 11 December 2001. "Los Palos Case")

[30] See Joni Marques at pars 645-648.

[31] Ibid. at par. 649. This view is consistent with the position taken both by the ICTY and the ICTR as set out in Deputy Prosecutor General for Serious Crimes v. Francisco Pedro, Case No. 01/2001 (Decided 14 April 2005) at par. 14.

circumstances independent of that person's intentions, that person nonetheless incurs criminal responsibility under Section 14.3(f) for his attempt to commit the crime.

147. Considering the previous discussion of individual criminal responsibility in the context of a common criminal enterprise pursuant to Section 14.3(d)(i), we conclude that each defendant bears such responsibility with respect to the murder of Fredrico Barros (Count One) and Nazario Guterres and Lorenso Gusmao (Count Two).

148. Similarly, we conclude that as to those victims named in Count Three (Armando Soares Pereira and his sons Fenencio and Edmundo) who were wounded but not killed during the attack in Looketo Forest, the defendants bear individual criminal responsibility as well, with the crime qualified as an attempt to commit murder as a crime against humanity.

Persecution

149. Finally, we also conclude that each defendant bears individual criminal responsibility pursuant to Section 14.3(d)(i) for crimes against humanity in the form of persecution.

150. In Prosecutor v. Alarico Mesquita[33] the Court addressed the definition of Persecution as a crime against humanity. In addition to the *chapeau* requirements of crimes against humanity and the requirement of a discriminatory intent, the Court ruled that Persecution is required "to be committed in connection with another crime within the jurisdiction of the Panels."[34] In Mesquita the "other crime" alleged in the indictment was "abduction" although abduction is not a crime over which the Special

[33] Case No. 28/2003 (Decided 6 December 2004)

[34] Ibid. at par. 89.

Panels have jurisdiction. The Court concluded that in the circumstances of the case before it, the facts underlying the alleged "abduction" constituted a "severe deprivation of physical liberty" which is an act specified in Section 5.1(e) of UNTAET Regulation 2000/15 and thus within the jurisdiction of the Special Panels.

151. In the present case Count Four cites five separate acts relating to the persecution with which the defendants are charged. All but the first involve acts referred to in Section 5.1 or other crimes within the jurisdiction of the Special Panels as required by Section 5.1(h). The first refers to the arrest and beating of Vincente and Francisco, although "arrest and beating" do not fall per se within the scope of Section 5.1(h).

152. As in Mesquita, we look to the facts as proved at trial to determined whether the arrest and beating of Vincente and Francisco qualify for consideration under Section 5.1(h) under some other heading. We conclude that they do. Not only were Vincente and Francisco arrested and later imprisoned, but also they were severely beaten to the point that even the militia commander relented and gave them medication for their injuries. Thereafter they were kept in a cell with other independence supporters until their release.

153. In the circumstances, we consider the treatment of the victims to have amounted to "imprisonment or other severe deprivation of physical liberty," which is conduct specified in Section 5.1(e)[34] Moreover, considering the severity of the beating involved, it can also be said that Section 5.1(k) applies, which includes "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

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[34] The same could be said about the treatment of Domingas and her family members, as her "arrest"and "illegal detention" as specified in the indictment also do not fall within Section 5.1(h), although her forcible deportation does. See Section 5.1(d).

154. Accordingly, all the acts listed in Count Four fall within the parameters of Section 5.1(h) either as charged or as qualified above.

VIII. VERDICT AS REQUIRED BY TRCP SEC. 39.3(e)

155. Having considered all the credible evidence presented at trial and the reasonable inferences that can be drawn therefrom, the Panel finds the defendants guilty beyond a reasonable doubt, as follows.

156. The defendant **Sisto Barros** is:

A. Guilty of a Crime Against Humanity in the form of Murder pursuant to Section 5.1 (a) of UNTAET Regulation 2000/15 for the death of Fredrico Barros, for which he is individually responsible pursuant to Section 14.3(d)(i) of UNTAET Regulation 2000/15.

B. Guilty of a Crime Against Humanity in the form of Murder pursuant to Section 5.1 (a) of UNTAET Regulation 2000/15 for the deaths of Nazario Gutteres and Lorenso Gusmao, for which he is individually responsible pursuant to Section 14.3(d)(i) of UNTAET Regulation 2000/15.

C. Guilty of an attempt to commit a Crime Against Humanity in the form of Murder according to Section 5.1 (a) of UNTAET Regulation 2000/15 against Armando, Fenencio and Edmundo Soares Pereira, for which he is individually responsible pursuant to Section 14.3(d)(i) of UNTAET Regulation 2000/15.

D. Guilty of a Crime Against Humanity in the form of Persecution according to Section 5.1 (h) of UNTAET Regulation 2000/15 committed in the form of the acts listed in Count 4, subsections (i) through (v) of the indictment for which he is individually responsible pursuant to Section 14.3(d)(i) of UNTAET Regulation 2000/15.

157. The defendant **Cesar Mendonca** is:

A. Guilty of a Crime Against Humanity in the form of Murder pursuant to Section 5.1 (a) of UNTAET Regulation 2000/15 for

the death of Fredrico Barros, for which he is individually responsible pursuant to Section 14.3(d)(i) of UNTAET Regulation 2000/15.

B. Guilty of a Crime Against Humanity in the form of Murder pursuant to Section 5.1 (a) of UNTAET Regulation 2000/15 for the deaths of Nazario Gutteres and Lorenso Gusmao, for which he is individually responsible pursuant to Section 14.3(d)(i) of UNTAET Regulation 2000/15.

C. Guilty of an attempt to commit a Crime Against Humanity in the form of Murder according to Section 5.1 (a) of UNTAET Regulation 2000/15 against Armando, Fenencio and Edmundo Soares Pereira, for which he is individually responsible pursuant to Section 14.3(d)(i) of UNTAET Regulation 2000/15.

D. Guilty of a Crime Against Humanity in the form of Persecution according to Section 5.1 (h) of UNTAET Regulation 2000/15 committed in the form of the acts listed in Count 4, subsections (i) through (v) of the indictment for which he is individually responsible pursuant to Section 14.3(d)(i) of UNTAET Regulation 2000/15.

IX. SENTENCING AS REQUIRED BY TRCP SEC. 39.3(f)

A. Mitigating circumstances

158. The defendant Barros sent word to his family in East Timor that Domingas and her relatives were safe and located in West Timor. Armando Soares Pereira confirmed this in his testimony before the Court.

159. The defendant Mendonca told the wife of Francisco do Espirito Santo of his arrest. She gave Mendonca clothing to take to her husband, which Francisco testified he received.

160. The defendants returned from East Timor in October 2001 and allegedly has been living peacefully in their community since then.

B. Aggravating circumstances

161. The defendants participated in militia activities over an extended period of time between April and October 1999 and were involved in a number of criminal episodes.

162. The defendants were generally armed during their militia forays, most often with guns. Those whom they sought to intercept were unarmed civilians with no means to resist them.

163. The criminal actions of the defendants against their victims were completely unprovoked.

C. Sentencing policy

164. According to Sec. 10.1 (a) of UNTAET Regulation No. 2000/15, in determining the terms of imprisonment for crimes charged under Sec. 5 of that regulation, the Court shall be guided by the sentencing practices of the courts of East Timor and and also of international tribunals. Moreover, Sec. 10.2 of the same regulation provides that the Court shall take into account "such factors as the gravity of the offence and the individual circumstances of the convicted person."

165. The penalty imposed on a defendant found guilty by the Special Panel serves several purposes.

First, the penalty is a form of just retribution against the defendant, on whom an appropriate punishment must be imposed for his crime.

Second, the penalty is to serve as a form of deterrence to dissuade others who may be tempted in the future to perpetrate such a crime by showing

them that serious violations of law and human rights shall not be tolerated and shall be punished appropriately.

Third, the prosecution and punishment of the perpetrators of serious crimes committed in East Timor in 1999 promotes national reconciliation and the restoration of peace by bringing closure to such cases, discouraging private retribution and confirming the importance of the rule of law.

166. The Court considered all the pertinent mitigating and aggravating circumstances as well as the above sentencing policy. It concludes that the sentence that it has imposed is proportionate both to the offence committed by the Defendant and the purposes served by sentencing in such a matter.

D. Sentence

167. Considering that both accused have been convicted of committing several acts, the Court must apply Article 64[35] and Article 65[36] of the Indonesian Penal Code (IPC), leading to the following result:

(a) The murder of Fredrico Barros stated in Count 1 is a separate act within the meaning of Article 65.1 (IPC) as it was committed on a different date and in a different place than the other offenses for which the defendants stand convicted.

(b) The murders of Nazario Gutteres and Lorenso Gusmao stated in Count 2 as well as the attempted murders Armando Soares Pereira, Fenencio Soares Pereira and Edmuno Soares Pereira stated in

[35] Article 64.1 (IPC) essentially states that when a defendant is alleged to have engaged in multiple criminal acts, if they are so related as to be considered one continuous act, then only a single punishment can be applied to all the acts combined. The sentence shall not exceed the most severe punishment that could be imposed for any one of the criminal acts involved.

[36] Article 65.1 (IPC) states, in substance, that only "one punishment" shall be imposed even in cases where a defendant is convicted on different indictments with respect to separate criminal acts. According to Article 65.2 (IPC), the maximum penalty that can be imposed shall be not be more than one-third of the most severe punishment that could be imposed for any one of the charges involved.

Count 3 all occurred during the same event at the same time and place and therefore constitute one continuous act within the meaning of Article 64.1 (IPC). This continuous act, in turn, is separate from the acts described in A (above) and C (below) within the meaning of Article 65.1 (IPC).

(c) The acts of persecution stated in Count 4 are based on the same discriminatory intent, which was executed in different stages, and therefore, constitute one continuous act within the meaning of Article 64.1 (IPC). This continuous act, in turn, is separate from the acts described above (A, B) within the meaning of Article 65.1 (IPC).

168. Accordingly, the Court **SENTENCED** the defendants as follows:

(a) In the case of **Sisto Barros**:

i. On Count 1, 7 years of imprisonment
ii. On Counts 2 and 3, 7 years of imprisonment
iii. On Count 4, 6 years of imprisonment
iv. Pursuant to Article 65.2 (IPC), out of these single punishments the Court constitutes a total punishment of 9 years of imprisonment.

(b)In the case of **Cesar Mendonca**:

v. On Count 1, 7 years of imprisonment
vi. On Counts 2 and 3, 7 years of imprisonment
vii. On Count 4, 6 years of imprisonment
viii. Pursuant to Article 65.2 (IPC), out of these single punishments the Court constitutes a total punishment of 9 years of imprisonment.

E. Credit for time served

169. Pursuant to Section 10.3 of UNTAET Regulation 2000/15 and TRCP Section 42.5, each defendant is entitled to have deducted from his sentence the period of time he was held in detention following his arrest.

Sisto Barros

(a) The defendant Sisto Barros was first arrested on 25 October 2001 and held in custody until 26 November 2001, on which date he was released by the Investigating Judge of the Dili District Court subject to substitute restrictive measures. The total period of his confinement was thirty-three (33) days, which shall be deducted from his prison term.

(b) The defendant Sisto Barros was also arrested on 9 March 2004 and detained until 12 March 2004, on which date the Investigating Judge released him once again subject to substitute restrictive measures. The total period of his confinement on this occasion was four (4) days, which shall be deducted from his prison term.

(c) Accordingly, the defendant Sisto Barros is entitled to have a total of thirty-seven (37) days deducted from his prison term.

Cesar Mendonca

(a) The defendant Cesar Mendonca was arrested on 9 March 2004 and detained until 12 March 2004, on which date the Investigating Judge released him subject to substitute restrictive measures. The total period of his confinement on this occasion was four (4) days, which shall be deducted from his prison term.

F. Costs of proceedings

170. Each defendant shall bear the costs of the criminal proceedings against him as regulated by law. In the circumstances, where the proceedings against the Defendants have been conducted jointly, each Defendant shall bear one half of the total costs of the proceedings.

G. Execution and enforcement of sentence

171. Pursuant to TRCP Sections 42.1 and 42.6 each defendant shall be immediately imprisoned and shall spend the duration of his sentence in Timor-Leste.

172. The sentence of each defendant shall be executed immediately.

173. Each defendant has the right to petition for his conditional release from incarceration pursuant to TRCP Sec. 43 after he has completed two-thirds of the term of his imprisonment.

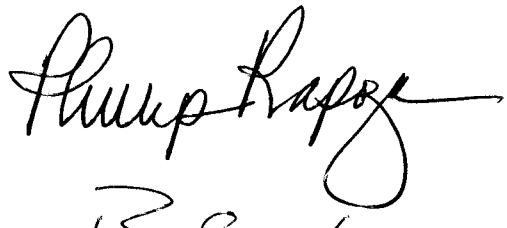
174. This Final Judgment is provided in one copy in English to each defendant and his legal representative, the Public Prosecutor and to the prison manager. A Tetum translation of this decision shall be provided to each defendant not later than 16 May 2005.

H. Final decision and appeal

175. Each defendant has the right to file a notice of appeal within ten (10) days from the date of this final written decision and a written statement of appeal within the following thirty (30) days pursuant to TRCP Sections 40.2 and 40.3.

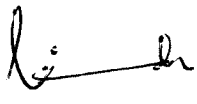
This Final Judgment was issued on 12 May 2005 by the Special Panels for Serious Crimes sitting at the Court of Appeals building in Caicoli, Dili, by:

Judge Phillip Rapoza,
Presiding and Rapporteur



Judge Siegfried Blunk

Judge Deolindo dos Santos



(The original of the above Final Judgment was rendered in English, which shall be the authoritative version.)