REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRITAL de DILI

SECÇÃO CRIMES GRAVES

Case No. 34/2003
Date: 27.4.2005
Original: English

Before:
Judge Antonio Helder Viana do Carmo
Judge Phillip Rapoza
Judge Francesco Florit, presiding and rapporteur

Registrar: Joao Naro

Judgement of:

The Prosecutor
V.
Francisco Perreira

JUDGEMENT

The Office of the Public Prosecutor:
Ms. Shyamala Alagendra

Counsel of the accused
Mr. Hsiao Leung Gooi

INTRODUCTION

The trial of Francisco Perreira - d.o.b. unknown, approximately 25 years of age, place of birth Mape, Zumalai sub-district, Covalima district, farmer, married, place of residence Mape - before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereinafter: the "Special Panel") started on the 6th September 2004 and ended today with the rendering of the decision.

After considering all the evidence presented during the trial and the written and oral statements from the Defense and from the Office of the Public Prosecutor (hereinafter: the "Public Prosecutor"), the Special Panel renders its judgement.

PROCEDURAL BACKGROUND

On 14th November 2003, the Public Prosecutor filed before the District Court of Dili a written indictment (in English version) against Francisco Perreira, charging him with two counts of crimes against humanity. Copies of the statements of several witnesses and copies of the statements of the accused Francisco Perreira himself, were attached to the indictment.

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

Further documentation was filed on the 5th December 2003 (reports of h.r. commissions and al.), on the 25th February 2004 (statement of the accused and statements by two witnesses), on the 25th of March 2004 (autopsy report and forensic anthropology report of the presumed victim) on the 18th of May 2004 (Exhumation and forensic pictures and statements of the accused and of a witness) and on the 17th August 2004 (statements of six witnesses).
In the course of the trial as well, further documentation and motions were filed by the Parties.

After the preliminary hearing, the trial started on the 6th September 2004.

In the course of the trial several witnesses were heard, in Dili and in the village of Zumalai, in the course of a visit of the crime scene by the Court.
At the end of the trial, closing statements were made.

After the closing statements took place, the hearing was postponed for the disposition (2005) and then to the present date for the final written decision.

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

FACTS OF THE CASE

In the indictment, with the formulaic and ritual description of facts which is common to most of the indictments filed before the Special Panels, the Prosecution alleges that, in the context of the events that disrupted the country of Timor in 1999, the presence of organized militia in

the District of Covalima, and in Zumalai specifically, involved a group called Mahidi, to which the accused belonged.

In the accusation, Francisco Perreira is said having taken part in the illegal activities of the Mahidi group which consisted of the persecution of Falintil (Forcas armadas de libertacao nacional de Timor leste) members and supporters and their activities. A variety of illegal acts as threats, unlawful detention, arsons, murders, forcible deportation and other act of persecution are said to have bee committed in this wave of intimidation.

In this general context, a count for murder and one for persecution are placed.

According to the first count the accused is charged with the murder of Alvaro Tilman, a supporter of independence active in the district of Zumalai. The facts allegedly occurred in the course of the illegal detention of the victim, specifically in the course of a pursuit which took place following the victim's attempted escape, on the 18 April 1999.

The second count includes, as facts of persecution, the unlawful detention and various maltreatments imposed on four supporters of independence (Raimundo Magno, Jose' Manek, Mateus Barreto and Luis Sarmento) in the course of the early months of 1999 at a militia compound called Zumalai detention camp. In the same count, as a further act of persecution, the murder of Alvaro Tilman is listed again.

All the facts listed in the indictment and summarized in the counts are said to be part of a wider scenario of widespread and/or systematic attack against the civilian population. This element is the basis for the identification of the accused' acts as crimes against humanity and, as per the Prosecutor's presentation, can be recognized, both in the inherent nature of the illicit conduct (targeting CNRT members and indistinct elements of the population of villages supporting pro-independence) and in the linkages, structure and functioning of the Mahidi and the Indonesian military and other Indonesian institutions.

Francisco Perreira is charged as follows for crimes against humanity:

count 1) by his acts or omissions, Francisco Perreira a.k.a. Siku Gagu is responsible for the murder of Alvaro Tilman on or about 18 April 1999 in Zumalai sub-district, Covalima District (Section 5.1, let. a and Section 14 UNTAET Regulation 2000/15);

count 2) by his acts or omissions, Francisco Perreira a.k.a. Siku Gagu is responsible for persecution by the following acts: the detention and assault of Raimundo Magno, the detention and torture of Jose Manek, the detention and torture of Mateus Barreto, the detention of Luis Sarmento, the murder of Alvaro Tilman; all these acts being committed between April and May 1999 in Zumalai sub-district, Covalima District (Section 5.1, let. h and Section 14 UNTAET Regulation 2000/15).

ON JURISDICTION

The first issue on the agenda is that of the jurisdiction of the Special Panel in relation to the present case, i.e. the power or authority of this Court to hear and adjudicate on the charge against Francisco Perreira.

In general terms, the jurisdiction of the Special Panels for Serious Crimes is founded on Section 1 UR 2000/15; however it is important to understand what role, if any, is played by Section 163.1 of the Constitution which states: "A istância judicial colectiva existente em Timor-Leste, integrada por juizes nacionais e internacionais, com competência para o julgamento dos crimes graves cometidos entre 1 Janeiro e 25 Outubro de 1999 mantém-se em funções pelo tempo estritamente necessário para que sejam concluídos os processos em investigação".

At first reading, the provision (entered into force on the 20th May 2002) appears to set a timeframe which allows the Court to function only until the conclusion of "os processos em investigação", i.e. "the trials under investigation" ("trials" and not "cases" as the current English translation of the Constitution states).

Since the investigation into the alleged actions of Francisco Perreira began one year after the entry into force of the Constitution (via the statement of Matheus Barreto) the question arises, does the court have jurisdiction over the present case.

Understanding the provisions in the first part of Section 163 has proven to be a difficult task, since the text of the subsection is unclear for the imperfection and the lack of technicality of the language used.

The expression "istância judicial colectiva... com competência para o julgamento dos crimes graves cometidos entre 1 Janeiro e 25 Outubro de 1999" is imprecise as the Special Panels have jurisdiction over the listed crimes regardless of time of commission (at least in relation to genocide, war crimes and crimes against humanity. In relation to murder, sexual offences and torture jurisdiction is limited to acts committed between 1st January and 25th October 1999)..

The wording "mantém-se em funções" refers to the operation of the Panels ('the... instance... shall remain operational' in the English translation of the Constitution) appears unfortunate as it is not legal terminology, rather it derive from different disciplines such as management or administration.

The last part of the provision ("os processos em investigação") inappropriately mixes "processos" (i.e. cases which are already before the Court or, in other words, where the indictment has already been filed) with "investigação" (i.e. the activities led by the prosecutor for the collection of information and evidence). In the English translation of the Constitution (which is written in Tetum and in Portuguese and only translated into English) this contradiction does not emerge, since the word used to translate "processos" (cases) is sufficiently wide as to encompass the trial as well as the investigative phase.

Some of these inaccuracies find their origin in the way in which the provision itself has been created in the Constitution.

The Court will come back to this issue. It is worth noticing that Section 163.1 of the Constitution can be interpreted in a number of ways. In one sense, the text can be read as permitting only those trials where the investigation was initiated prior to 20th May 2002 (the date of coming into force of the Constitution itself); an alternative interpretation is that the only function of the provision would be to grant the continuation of the work of the Special

Panels in the context of (and as an institution integrated into) the new Republic of Timor Leste.

Either interpretation is valid, if not definitive. The Parties have strived to furnish their viewpoint, but they didn't add much to the understanding of the provision, since they did not try to go beyond the plain reading of the provision itself.

So, if also we read the whole of Section 163 Cost. following the invitation of the Prosecutor to recall the Latin canon *Nemo aliquam partem recte intelligere potest antequam totum perlegit* we are likely to come to a conclusion which is opposite to the one suggested by the Prosecutor herself: indeed, the second part of the Section states the general rule (regarding the judiciary as a whole: "A organização judiciária existente em Timor Leste no momento da entrada em vigor da Constituição mantém-se em funcionamento até à instalação e início em funções do novo sistema judiciário") while the first part, related to the specific case of the Special Panels, puts a different (shorter ?) term. In other words, while in the second subsection, the existing judicial structure is prorogued until the introduction of a new judicial structure and its coming into functioning, the survival of the Special Panels is conditioned by the first subsection to the coming into being of a different event, namely the completion of the "trials under investigation". Now, there are two terms (end of trial and judicial reform) one of which applies to the whole judicial structure and the other to the special case of the Special Panels (which are a part of the Timorese judiciary). *In toto iure generi per speciem derogatur*: it appears obvious that if there are two time references, the two situations must be treated differently and it can't be stated (as the Prosecutor argues) that "Section 163 (1) and (2) ought to be interpreted as merely confirming that the court that will hear serious crimes cases which are being investigated is the Special Panel ... and they will continue to do so until such time that the new judicial system is established and starts to function" (pgs. 3/4 of the submission of Prosecutor).

Similarly, other literal arguments put forward by the Prosecutor in order to avoid the meaning which apparently emerges from the plain reading of Subsection 163.1 Const. are contradictory in themselves:

- when the Prosecutor underlines that it would be an unnecessary broad interpretation of the Section to limit the activity of the Panel only to cases investigated before 20th May 2002, because it would imply inserting the clause "currently (under investigation), it is easy to rebut that it is exactly the opposite from a logical and literal viewpoint, since the norm uses the provision "conclude the trials" which is unequivocal: it means "to end, to bring to an end something (i.e. the trials) that exists now (at the moment in which the Constitution enters into force) but is not yet finished". Furthermore, if we allow the interpretation that "trials under investigation" does not mean "trials currently under investigation (i.e. on the 20th May 2002)", the Constitutional provision is, simply, emptied of any function, is simply reduced to a provision which is not only not needed but would be a repetition, for the Special Panel, of the general provision contained in the following comma (163.2).

- when the Prosecutor observes that if the Constitution had meant to preserve the jurisdiction of the Special Panels only for the cases (*rectius*, trials) for which the investigation started before 20th May 2002, it would have made specific provisions for the Prosecution office "such as to state that all serious crimes investigation shall

be completed by 20th May 2002 and no new investigations shall commence after that", it is easy to reply that such a limitation can hardly be placed at the level of the investigation, since when a crime is reported and the investigation starts, it may be difficult if not impossible to determine whether the crime falls within one category or another and further act of investigation may be necessary to ascertain facts which could shift the inquiry in one sense or the other.

On the other hand, there would be substantial arguments in support of an interpretation of the provision which allows the Special Panels to keep working on any trial brought to their attention regardless of the moment when the inquiry started: since it's obvious that bringing to a stop a jurisdiction does not mean, automatically, the extinction of the crimes for which the jurisdiction had been created (Section 163.1 Const. does not provide an implicit or creeping amnesty), the devolution of the serious crimes process to an undetermined and nationalized court would be an improper solution, the consequence of which would be, at least until the end of all the pending trials (included those where the accused is believed to be abroad), the coexistence and overlapping of two jurisdictions for the same category of crimes (the Special Panel for the trials related to cases investigated prior to 20th May 2002 and the ordinary Dili district Court for the crimes investigated only after the entry into force of the Constitution). Technically speaking, an awkward solution.

However, criticizing arguments based exclusively on the formal interpretation of the letter of the provision does not provide yet to a solution for the issue at hand.

Naturally the Court bears in mind that if the will that should be expressed by the norm (even at the constitutional level) is not comprehensible in the plain and literal meaning of the words, the judge will have recourse to other interpretative instrument. In the present case, the most direct tool in the hands of the Court becomes the analysis of the way in which the provision was drafted in the course of the works of the Constitutional Assembly and of the comments made by various members of the Constitutional Assembly.

The first expression of what was going to become a complex of three norms spread in two sections (160, 13.1 and 163.2) is to be found in the second (of three) draft of the Constitution presented to the Constitutional Assembly by Fretilin.

No other draft mentions the issue of the Special Panels for Serious Crimes. The way in which the norm is presented and the heading of the Section are conspicuously different form the final result known to us: in the draft, Section 123, headlined "Serious Crimes", states that "Os paineis especiais integrando juizes nacionais e internacionais com competência para julgamento dos crimes contra a humanidade cometidos no ano de 1999 manter-se-á em funções pelo tempo estrictamente necessário para que sejam concluidos os processos pendentes".

Apart from minor variations, the greatest difference from the final wording of the Section lies in the framed time clause for the end of the functioning of the Special Panels: the reference is to the "conclusion of pending trials" and not to the "trials under investigation". While the difference between the two concepts is clear ("pending trials" limits the jurisdiction of the Panels just to the trials filed before the 20th May 2002 and not to those in relation to which the investigation has begun before the same date but the indictment has not yet been filed) it is immediately noticeable that from the variation no major argument can be

drawn in favour of one interpretation or the other, since both include factors which must have happened before the relevant date.

The draft disposition was upheld by the competent commission (the fourth and last of the commissions created to prepare the single parts of the constitution, later to be merged by the whole Constitutional Assembly) with a major addition: as it is possible to read from the verbatim account of the session of 23rd October 2001 of the fourth commission, "O trabalho da Commissão prosseguir para o debate da Disposições Finais e Transitórias do projecto da Constituição do Fretilin (...) Artigo 123 Crimes Graves mereceu a emenda e aditamento seguinte da bancada Fretilin, PPT, após consulta feita ao consultor juridico Dr.Vasco (Almeida, at the time advisor to the Constitutional Assembly):

1. Os factos cometidos entre April de 1974 e o ano de 1999 que possam ser considerados crimes contra humanidade são passives de procedimento criminal juntos dos tribunais nacionais e internacionais competentes.

2. Sem prejuizo do disposto no anterior os paneis especiais integrando juizes nacionais e internacionais com competência para julgamento dos crimes contra a humanidade cemetidos no ano de 1999 manter-se-à em funções pelo tempo estrictamente necessário para que sejam concluidos os processos pendentes".

It is important to notice that the newly structured section includes, in the first sub-section, the provision that, with some modifications, would become the actual Section 160 Const. and that this new part of the provision was not present in any draft or internal document before the session of the fourth commission of 23rd Oct. 2002.

In the following development of the Constitutional process, the section that now occupies us was going to undergo major changes: after the four commissions completed their task, the separate drafts were merged into a unique, coordinated draft which was submitted to the plenary constitutional assembly for discussion and final approval.

It was in this final stage that the section (become meanwhile Section 148) found its definitive design.

Section 148 was then split in two parts: subsection 148.1 became Section 160 of the Constituion. It retained the title 'Serious Crimes' of the draft section (subtracting it for good to the disposition which was the original owner of the title) while subsection 148.2 (sem prejuizo do disposto no anterior os panéis especiais integrando juízes nacionais e internacionais com competencia para julgamento dos crimes contra a humanidade cemetidos no ano de 1999 manter-se-à em funcoes pelo tempo estrictamente necessário para que sejam concluídos os processos pendentes) become the new Section 163.1 to which a new subsection was added (163.2: "a organizacao judiciaria existente em Timor Leste no momento da entrada em vigor da Constituição mantém-se em funcionamento até à instalação e início em funções do novo sistema judiciário").

In other, broader terms, the disposition on the Special Panels gained its current exquisite flavour of transitory norm (enhanced by the newly fashioned title of "Organização judicial provisoria") at the very last.

The illustration of the development of the provision gives some hint but doesn't help to fully appreciate the significance of it. It's only through the reading of the debate which took place in the open plenary sessions of the Constitutional Assembly that we can try to perceive what the common understanding of the Constituent Fathers was about this area of the constitutional framework.

Section 148 (later split and re-numbered, as said, in Sections 160 and 163) was debated in full session on the 29th January 2001 and though the opinions which were expressed in the course of the Assembly's meeting prevailingly focused on the first part of the Section (i.e. on the future possibility to bring the crimes against humanity assumedly committed between 1974 and 1999 before national and international judicial instances), a great amount of light was shed on the issue of what started to be called, since then, the transitional judicial structure.

Members of the Constitutional Assembly opened their speeches with words full of awareness about the delicacy of the issues at stake, in the commonly shared perception that the recent wave of violence had reopened wounds and raised responsibility that had not been forgotten. The less recent past, the facts and the echoes of the battle of 1975 come back and was persistent in the speeches of all participants, as if the time had ripened to come to terms with the ghosts of a previous age. It is easily perceivable from the verbatim transcript of the session, that the debate was intense, dense of constitutional spirit and of sense of institutional commitment.

These are interesting pages, worth reading to understand how the creation of a Constitution compels the members of the Assembly to look with a longer perspective than an ordinary piece of legislation usually requires. At the beginning of an experience such as the establishing of a new country or at the turning point in its history, when a new constitution is going to be established, the absence of a predetermined political agenda and the vagueness of partisan particular interests, induces the Parties represented in the Assembly to operate on the basis of general considerations and pursuing general interests. In this line of thought it is easy to understand that the constitutional phase, in the democratic life of a country, is a time for cooperation rather than contrast and enjoys unique features. When the constitutional spirit blows, the political will of the groups and parties represented in an Constitutional Assembly are oriented to a common aim, i.e. the determination of superior principles above the particular interest of the single group or party in order to permit the cohabitation of everybody. The same language of the speakers, in this context, changes and is fashioned in an embracing manner that, if cannot avoid contrast and sometime bitter exchanges of words, tries to adopt a broader perspective.

Keeping this in mind and looking at the works of the East Timorese Constitutional Assembly, it is possible to understand that the members of the Constitutional Assembly, despite framing a section which would allow an interpretation in favour of an interruption of the functioning of the Special Panels in relation to investigations started after 20th May 2002, in truth never had that possibility in mind and never meant to interfere in such a rudimental and gross manner in the judicial activity of the Panel.

Whatever the original intention of the drafters, the context in which the mentioned provisions arose becomes clear by reading the statements of all the Parties in the political arena.

The scenario that members of the Constitutional Assembly had in mind in relation with the remote and the recent past was to create a democratic system without hiding the misdeed committed against the Timorese people or the conflicts which arose more than twenty-five years before, amongst the same Timorese.

This consciousness was present in many speeches which made the point that brushing the dust under the carpet i.e., simply trying to forget the past would not help to establish a new nation and new relations within the Timorese community and with Indonesia.

This concern is present for example in the interventions of MPs as Eusebio Guterres, Alfredo Da Silva and, mainly, Jacinto Guterres.

The words of the last mentioned representative of the Timorese community can be taken as the backbone of the argument in favour of a general consideration of the violence that cyclically hit the Timorese people, through ages, under the umbrella definition of section 148 draft Constitution (which became 160: Os factos cometidos entre April de 1974 e o ano de 1999 que possam ser considerados crimes contra humanidade são passives de procedimento criminal juntos dos tribunais nacionais e internacionais competentes).

He expressed himself in the Plenary Assembly in this way: "I think that we are facing this problem (*i.e. facing the past violence*) in the concrete phase of our history. This process is our historical process. It's convenient that we resolve this problem properly. If we don't resolve this problem properly, it may result in historical facts that happened in the past, where problems which emerged such as in the 19th century in Manufahi. The problems that emerged in the 19th century in the Manufahi war, was an event with problems. Those issues were badly resolved previously, and they emerged again. Then in the 2nd World War, the problems that were badly resolved appeared again in '69. The problems badly resolved in '69 appeared again in '75. '75 happened during our time, an event that happened in terms of time and tragedy. These tragedies didn't just appear by themselves. Possibly these issues were linked to '69, and possibly linked to '40, '45 and perhaps even before then. But during those times, the justice that was done was not done by us. Possibly during those times, whoever had the powers at that time, in the presence of the administration of the Portuguese, at that time justice was done according to the victor. But in our present time, the thought is different, because of our adherence to democracy and to justice. I think that it's a sincere adhesion for the future, and is an honest adhesion".

The issues arising from the past must be addressed in order to create a sense of unity, a future for the community free from enduring divisions and the risks of claims. At turning points in the life of peoples, as in the life of individuals, when a new legality must be established after a war or an internal conflict has torn apart the society, the decision must be taken whether to incorporate or exclude and ban from civil society those groups or parties or organizations which are held responsible for the collapse of society and for the fall into the turmoil of war; in various fashions, with different means and procedures, those groups of power who brought about the disruption of the Country are purged or tried or somehow compelled to face their errors.

It must be acknowledge that in the case of Timor Leste, in the course of the debate in the Plenary Assembly, a mark of great democratic maturity has been shown by the speakers. As

for individuals, so as well for Nations, it appears that the sufferance for the insults received and the grief of the bereft can result in cynicism or vindictive attitude if the spirit of the community is weak, vulgar or vile; but if it is a noble spirit, it's able to come out of the tunnel with fairness and mercy.

The final alternative fortunately prevailed in Timor and indeed, in the course of the debate in the Assembly what followed from the awareness of the past was the vision, shared by most Parliamentarians, that the course of justice is the only proper procedure to solve the relationship with violence committed in the past. The consciousness emerged that only entrusting to judicial instances the appreciation of the crimes committed between 1975 and 1999 would have spared excesses and would have built trust in the community. The role of justice to re-establish the rule of law and to consolidate a fledging community is outlined in the words of MPs Alfredo Da Silva, Maria Jose Da Costa, Milena Pires, Joao Carrascalao, Aquelini Guterres, just to mention a few.

Justice is the key to solve the issues of the past, and justice is invoked by the Constitutional Assembly.

Does this invocation help us to understand the meaning of Section 163.1 of the Constitution?

The Court is not reluctant to take it as an expression of will that the process of justice must continue: in no passage in the course of the prolonged debate in the Assembly, is the possibility of an amnesty or of a reconciliation without justice put forward; nor did the debate discuss issues such as the removal of jurisdiction from the Special Panels to a different Court, either domestic or international.

Rather the Court is inclined to notice that the newly born section 163 was seen as a technicality, a passage to confirm the legality of the system and to allow it to continue working.

Accepting the will of the Constitutional Assembly, expressed in unequivocal terms, the Court feels itself bound, despite literal uncertainties, to read the provision within Section 163.1 as permitting the Special Panel to have jurisdiction over all investigated cases until the eventual replacement of the Panel within the context of the new judicial structure.

FACTUAL AND LEGAL FINDINGS

After addressing the issue of jurisdiction, the Panel can move to assess the merit of the charges.

Francisco Perreira is charged with two counts of murder and persecution.

The hearing of the witness stretched for some 20 long, sometime extenuating sessions.
The transcript of the hearings is more than 400 pages.
On the main charge of murder, the principal prosecutor's witness (Augustus Pereira) was heard, over two occasions, for several hours (more than 6) and his testimony is recorded in 51 one pages.

Analogous meticulousness was employed by the Court and by the Parties with the other 17 witnesses who were called before the Court.

Witnesses were heard at length and the widest faculty of asking questions was left to the parties; the presiding judge renounced to his prerogatives in assessing the admissibility of the questions asked by the Parties which have been always evaluated by the whole Panel (while Section 33 Transitional Rules of Criminal Procedure -TRCP- states: "The presentation of evidence shall be directed by the ... *Presiding Judge*"; and Section 36.7 TRCP reads: "*The Presiding Judge* shall exercise control over the mode and order of questioning witnesses, so as to make the presentation of evidence effective for the ascertainment of the truth, avoid needless consumption of time ...").

The prosperous acquisition of elements of judgment (witnesses, visit to the crime scene, hearing of witnesses on the scene, documents, forensic and anthropologic reports, pictures) has not produced, as far as the first count is concerned, an unequivocal result: the witness' statement and other documents that the court referred to, give contrdictory accounts of the most relevant part of the events leading to the death of Alvaro Tilman.

The events which eventually led to the death of the victim can broadly be summarized in the following way: the accused, a member of the so called "clandestine" (an organization aimed at providing food and information to guerrillas) was arrested on the 17th April 1999; he subsequently was brought to the Zumalai detention camp (a structure for the detention of clandestine members run by the Mahidi militia of Zumalai). Kept in restriction for one night, in the late morning of the following day, the victim tried to escape detention while allowed by the guards to get out of the room where he was held in order to go to toilet.

While this part of the facts is not contested and is not very relevant, in any case, what followed can only be reconstructed on the basis of few eye-witnesses whose versions are not completely compatible among themselves.

Two witnesses for the prosecution are brothers of the victim himself, Augustus Pereira and Paulino Barros.

The first one alleges to have been called, in the morning of the 18th April, by two armed militia leaders who forced him and his brother Paulino Barros (the other witness for the Prosecution) to join in the chase for the escaping brother. At that time they were in Paulino Barros' house in Zumalai. In Augustus Pereira's version, the two militia leaders (Alvaro Breok and Lino Barreto) forced at gun point him and his brother Paulino to get out of the house and to try and find the third brother under the menace of deadly theat ("They said: if you don't find this young brother, you too will also die in this football field").

They left the house and after calling for their brother without result, the brothers split up. Paulino Barros returned home together with Vasco Da Cruz (the head of the village and owner of the building used as the detention camp). Augustus Pereira followed the horde chasing his brother. In the course of this pursuit, the witness saw "Siku chopping or attacking him (i.e. Alvaro Tilman) and I was 100 meters away". This allegedly occurred in a bushy place close to the building of Zumalai secondary school and to the football field. The Court has had the opportunity to see the spot where the accused allegedly hacked the victim which was approximately seventy meters from the school and forty meters from the main road, in

the middle between the said points. The witness, who in Court confirmed he was 100 meters away, when questioned at the crime scene about his location in relation to the victim and the accused at the very moment when the blow was delivered by the accused, indicated a spot at a distance which was assessed by the Court in 30 meters.

The witness gave a relatively broad description of the circumstances in which Francisco Perreira allegedly attacked his brother in the course of the chase and willingly answered many question directed to him by the parties and by the members of the panel. His account is coherent and represents an event which could very well have taken place in the manner as described by the witness. Many details were provided in relation to the movement of the attack, the location and the position of the victim, even on the kind of vegetation surrounding the place where the attack took place. The witness confirmed his initial statement to the investigators, i.e. that the accused found Alvaro Tilman hiding behind some shrubs and that he delivered a blow with his sword (surik, a straight traditional Timorese sword) while Alvaro Tilman attempted to escape.

The blow inflicted by the accused on the back part of the shoulder produced a deep wound, reaching the bone of the shoulder blade. Alvaro Tilman nonetheless managed to escape heading to the Mola river, a seasonal river lying 200 meters aside the main road, where the final part of the chase took place, with the killing of the victim by gunshot. Indeed, the group of the chasers followed the victim to the river and massed on the riverbank. Due to the fact that the river was at high water mark the escapee was unable to cross and was forced to come to a stop when the water reached his chest. At that point Lino Barreto, who had reached the riverbanks together with many other militia members, discharged his rifle hitting the victim in the head; simultaneously, Francisco Perreira, from the riverbank, jumped into the river and approached the victim.

The only part of the testimony of Augustus Pereira which appears frankly untenable and that casts a doubt on the reliability and on the capacity of the witness to assess not only measures in time and in space but, in the end, the logic of his own words, can be found in the passage where the witness described a one hour period between the infliction of the first blow to the victim delivered by the accused and the shooting of victim by Lino Barreto. The distance between the two incident location is very short, the river being adjacent to the school. According to the witness, the victim is supposed to have run or at least walked continuously (the witness was specifically questioned on this point by Judge Rapoza). The witness asserted that between the said two places the victim Alvaro Tilman moved in continuous motion, without any stop or interruption on the way. It appears frankly incredible and unreasonable that it took one hour to cover the distance of 400 hundreds meters. Once the witness was made aware of the unlikelihood of his account he modified his account maintaining that the victim covered the distance in 40 minutes.

The Court can't understand the tenacity of the witness in upholding his irrational version and does not know exactly what it means.

Paulino Barros testimony confirms that of his brother at least up to the point that the two brothers parted company. In fact, Paulino refers of the arrival to his house of the two militia members and of their actions in forcing the two brothers to search for the victim. Paulino adds that he and Augustus left the house and went in the direction of the football field in Zumalai, in search of Alvaro. He refers that they called out in a loud voice to their brother,

but without result. Paulino went on to say that they were forced to call to their brother until they got to the SMP school building where Paulino decided to go back to his house together with Vasco Da Cruz. He then waited at home until the group of militia brought back the dead body of his brother Alvaro.

The versions presented by the brother contrast markedly with the version of the defense witness, Lourenco Pereira, a Mahidi militia member at the time of the events, recruited by Vasco Da Cruz and assigned to guarding duty at Zumalai detention camp: in his version, he was at the jailhouse when Alvaro Tilman escaped and the chase begun and was at the jailhouse the day before, when Alvaro Tilman was brought into custody, accompanied by the militia members who had arrested him, included the brother of the victim, Paulino Barros, indicated by the witness as a militia member. Lourenco Pereira explained the role of Paulino Barros in the arrest, interrogation and detention of Alvaro Tilman. In relation to the escape and pursuit of the victim, the witness diverges from the testimony of the two brothers of the victim. Lourenco Pereira stated that both Augustus Pareira and Paulino Barros joined the pursuit and both brothers were at the river bank when Alvaro Tilman, followed by a pack of shouting and aggressive militia members, entered the waters of the Mola river. The same witness (Lourenco Pereira) refused to acknowledge the possibility that the accused had the opportunity to hack the victim before he got into the river, i.e. in the proximity of the SMP school, as stated by the witness Augustus Pereira. He refuted that version saying that he was following the chase as well and that the only thing that happened close to the school was the attempt to defend himself by the victim, throwing stones against the pursuers. In relation to the last part of the account, Lourenco Pereira diverges in a substantial manner from the representation made by the two brothers, heard at the beginning of the Prosecutor's case.
This witness testified that the escape bid by the victim came to an end when Alvaro Tilman found himself trapped by the high water of the Mola river, reaching his chest and leaving only his shoulder free. He was trapped because he was in a cul-de-sac and the militia members were already assembled on the river bank, at a distance that the two witnesses heard at the crime scene (Lourenco Pereira and Augustus Pereira) assessed in 20/25 meters from the victim. Paulino Barros, who was present on the river bank beside Lino Barreto, called to the head of the militia (the only one holding a gun) and said: "Shoot him dead because otherwise he is going to run away and we the family will be the victims." At that point, Lino Barreto, who, in the words of the witness had already shot two warning shots on the ground (Question to the witness: "Why did Lino Barreto shot twice into the ground, do you know? Was intentional to shoot the ground or simply was out of the target?" Answer: "That was a warning to arrest him again") raised the rifle and shot the victim in the back. The shot, as undisputedly shown by the pictures attached to the autopsy report, hit Alvaro Tilman right in the centre of the posterior part of the skull. At the same time, Lourenco Pereira went on to explain, the accused jumped into the river and after approaching the victim, hacked him when he had already been hit by the shot discharged by Lino Barreto.
On the anteriority or posteriority of the blow wit respect to the shot, the witness didn't show to have any doubt: the strike with the surik came only after the shot and when the body of the victim had already started falling.

For greater precision, it is worth to refer the same words of the witness:

JPR: Senhor Pereira, you say that Alvaro Tilman was in the river when he was shot, is that correct?
LP: Yes, he had ran away, he ran into the river
JPR: And he was in water that was up to his chest when he was shot, is that correct?

LP: Yes, the water was up to here
JPR: And you say that Siku Gagu hacked him after he was shot, is that correct?
LP: Yes, they shot him first and then Siku Gagu hacked him
JPR: And where was Siku Gagu and where was Mr. Tiliman when he hacked him?
LP: They chased him, follow him to go and catch him inside the water. In the water that is when Siku hacked him
JPR: So, was Tilman still in the water up to his chest when Siku hacked him?
LP: Yes
JPR: So when Siku hacked him, was Siku in the water up to his chest?
LP: Yes, till his chest
JPR: And when Siku hacked Tilman, were they facing each other or was Siku behind?
LP: Siku was behind
JPR: And how much of Tilman's body was showing above the water when he was hacked?
LP: The water was up to here; only his shoulders were out
JPR: So, at the time that Siku hacked Tilman, Tilman was still standing, is that correct?
LP: No, he had already fallen and he was still moving, that is when Siku Gagu hacked him
JPR: What do you mean when you say he was still moving?
LP: Lino had shot him and already got him at the back here
JPR: But you just said that he was still moving when he was hacked, could you describe how he was moving?
LP: He was still walking a bit like this
JPR: So he had been shot, I want to make sure I understand. Is it your testimony that he had been shot but was still walking when was hacked; is that what you are saying or you are saying something else?
LP: No. This is what I would like to say; he was still moving
JPR: Do you mean he was falling or he was walking and falling? I want to know if you can describe a little better what he was doing
LP: No, he was about to fall
JPR: So Siku Gagu was right next to him when he was shot, is that correct?
LP: Yes, close to him

For better illustration, it must be added that the witness showed with a gesture of the shoulders the way in which the body of the victim was, as he said, still moving, by swinging slowly and gently on the spine axis the shoulders and the upper torso, slightly bent forward, as to reproduce the movement of a body brought by waters.

In any case, in Lourenco Pereira's version (and in Augustus Pereira's as well), the deadly blow came from the gunfire of Lino Barreto and not from the surik of Francisco Perreira.

To try and achieve the correct interpretation of the facts it is of paramount importance to understand which of the two versions is correct, the one put forward by Alvaro's brothers, Augustus Pereira and Paulino Barros, or the testimony offered by Lourenco Pereira.

One point must be stated initially: it appears quite evident that blow inflicted by Francisco Perreira to the body of Alvaro Tilman was not the direct cause of death. Whenever it took place (be it close to the football field and the school or in the river, before or after the shot to the head of Alvaro Tilman by Lino Barreto) looking to the pictures attached to the autopsy report and taking into account the versions of the two witnesses (Augustus Pereira and Lourenco Pereira) on the point, it emerges indisputably that the blow with the blade of the surik, though severe enough to leave a mark on the bone of the shoulder blade, did not touch any vital organs and was not consequentially able to produce the death of the victim in and of itself. Following a different perspective, the action by Francisco Perreira may be seen as a work in progress, part of an action which should have continued, or an attempt to kill which was not executed in the proper manner, but what is important to emphasize and underline is that the only action able to produce the end of the life of Alvaro Tilman was the gunshot that

entered the back of the skull and exited in the region of the auditory meatus of the left temporal of the victim.

Quite interestingly, both eye-witnesses to the death of Alvaro Tilman (Augustus Pereira and Lourenco Pereira) blamed Lino Barreto and not the accused, as the direct perpetrator of the death of the victim. For different reasons their opinion coincided in identifying the killer in Lino Barreto. On the one hand Augustus didn't acknowledge the possibility that the accused hit the victim in the river: when asked to clarify the point, he confirmed his version that the only strike delivered by the accused took place close to the school and not in the river; Lourenco, on the other hand, stated that the wound caused by the surik was a small one and was inflicted after the victim had been shot.

Solving the conundrum of which of the versions may be relied upon, requires utilizing elements of judgment which can be found outside the simple statements of Augusto Pereira and Lourenco Pereira. In this respect, the proper weight must be recognized to the declarations of the accused, who before the beginning of the trial told many listeners an account of his participation in the chase and of his role in the death of Alvaro Tilman.

Indeed, Francisco Pereira initially told the story to Faunciano Barreto and Joaquim Barros, respectively the head (secretary) and a member of the CNRT for the area of Zumalai at the end of 1999 and the beginning of 2000; then, in 2003 he spontaneously went before the Commission for Reception, Truth and Reconciliation (CAVR) to give another account of the episode; eventually, after his confession to the CAVR had prompted the inquiry by the Deputy Prosecutor for Serious Crimes, he was questioned by the investigators of the Serious Crimes Unit.

On the possible use of declarations released before or out of the trial by the accused who later, at the trial stage refuses to speak and chooses silence, the Court has already had the opportunity to express itself during the course of the hearing on the 17th September 2004.

That decision agreed by the majority of the Panel, followed by an articulated dissenting opinion of Judge Rapoza, allowed to be used in Court, despite the silence of the accused, only those previous declaration of the accused that had been done out of an investigative process, meaning for such process an activity done or delegated by the Deputy prosecutor for Serious Crimes.

While it doesn't appear necessary now to repeat the principles which were invoked, it is worth noting that it practically meant that the only declarations of which the court could avail were those made by the accused to the CNRT members and to the CAVR officer, with exclusion of those given to the investigators.

The facts referred by the accused to the CAVR were the starting point for the prosecution against the accused. Prior to him giving the statement he was not a suspect, not accused or known by the Serious Crimes Unit. His desire to confess his participation in the pursuit and hacking of Alvaro Tilman resulted in the confession being sent by the Commission to the office of the Deputy Prosecutor and, consequently, in the opening of the investigation which ended with the indictment against the accused.

This adds to the credibility of the deposition and to the sincerity of the accused when he went before the officer of the Commission, Lito Da Costa Amarao.

His narrative does not appear to be constructed with much thought: it's a rambling account of his motivations in joining the activities of the militia, of personal feelings of grief (when it comes to the description of the death of his father for what appear to be futile reasons) and, in the end, of the story of the death of Alvaro Tilman.

Analogously, his narration does not even appear to attempt to shield him from his responsibility: it is obvious that if he had sought to do that, he would naturally have identified Lino Barreto as the perpetrator of the murder or would have tried to distance his behaviour from the death of the victim, saying, for example, that the blow was not deadly or simply suggesting that his intention was not to kill. On the contrary, the focus of his narrative is concentrated on himself and on his role.

What did he say in his declaration?

He said that when Alvaro Tilman began his escape, on the morning of the 18th of April, after having had access to the backyard of the place in which he was being detained, with an excuse (he asked permission to go to toilet), the first person to run after him was Paulino Barros himself (the victim's brother). Let's read the passage:

Francisco Perreira: "He (Alvaro) started running, he run, his older brother ran after him";
CAVR officer: "What is his brother's name?"
FP: "Paulino".
Officer: "The one who run away, what was his name?
FP: "Alvaro, his older brother ran after him, he took off his shirt, gave to be people to (*sic*)... his brother ran also due to fear.

He continued by saying that Alvaro tried to fight back and disperse his pursuers by throwing stones at them and specifically the accused. The story goes on, without mentioning of the attack in the bushes close to the school and to the football field (a detail which comes in the account made by Augustus Pereira).

What happened next, according to the testimony made before the CAVR, is the epilogue of the life of Alvaro Tilman, which is referred in these terms:

Francisco Perreira: "He ran across the road towards this way, he went further, fell in the river, I went like him... This is when his older brother said to kill him 'one person is going to cause us trouble'";
CAVR officer: "Then?"
FP: "His older brother Paulino said: 'Kill him, he.... We would all die .... Everybody". This is why his same older brother was the one that .... With his other younger brother called Agus"....
Officer: "Then?"
FP: "His brother (Augustus) said that everybody knows, his brother (Paulino) said, it was because his older brother (Paulino) that .... his little brother (Alvaro), it was the older brother (Paulino) that ... his little brother, if he hadn't told us to do it perhaps he would not have died ....."
Officer: "So you hacked him?"
FP: "I did hacked, I arrived, his brother told me to, saying dehan dehan tah tah (Tetum for:) said, said, chop, chop so I hacked here in the shoulder once".
Officer: "At the time when you hacked, what catana did you use to hack?";
FP: "Catana samurai";
.....

Officer: "So this... it was his older brother that told you to....?
FP: "Ya. It was his older brother that said to do it."

Quite remarkably, the witness didn't mention, in his account of the episode, Lino Barreto and the action taken by him. The action that should be held as the primary cause of death (for the reasons outlined before), the gunshot which brought about the almost immediate collapse of the body and vast hemorrhaging from the back of the skull, immediately visible and perceived by anybody at the time of the crime, is surprisingly excluded from the account.

It is as if the accused himself wanted to shield the real perpetrator (but then, what need to go and confess to the CAVR, wouldn't it be better to conceal everything forever?) or as if he were victim of a sort of psychological removal (but this psychological act of involuntary self-defense against one's own past which is felt to be too repugnant to be compatible with the self, is supposed to operate in the sense to remove the memory of something done by the same forgetful). The Panel does not have an easy answer for this behaviour, but takes it as an indicator of the candidness of Francisco Perreira when he related his past to the CAVR.
He took his share of blame in the events but omitted to mention the actual killing. Why to confess when nobody compels you if not to discharge your conscience and seek reconciliation with the community?

In the same vein (at least as far as the issue of the presence of Paulino Barros at the crime scene and of the place where Francisco Perreira hit the victim are concerned) are further declarations by the same accused made before or during the trial: about the presence of Paulino, the words used by the accused to answer to Johnny (Da Cunha) in the morning of the 6th October 2004. About the place where he hit the victim, the declaration made to Faunciano Barreto and Joaquim Barros.

Let us examine the details.

On the 6th October 2004 an assistant for the Defence Unit, Mr. Johnny (identified by the members of the Panel as Johnny Da Cunha) went to Suai and then to Zumalai in preparation for the visit by the Panel to the crime scene. His intention was to bring the accused (and a witness) to the crime scene. He visited the accused's house to verify his presence and guarantee that the accused would be present for the following day. In the course of the brief meeting, a third person (Bruno Pinero Dias), the driver with whom Mr. Da Cunha had gone to Zumalai, had the opportunity to hear the exchange of words between the accused and the assistant for the Defence. These words have been referred widely to the SCU investigators (who formalized them in a written statement dated 13.10.2004) and then in Court, when the driver was called to report on the episode at request of the Prosecutor. In Court, the witness was questioned at length on some aspects of the conversation (the mentioning of a machete by Johnny and the words used by the same assistant in approaching the witness) while another detail, inherent the conversations of that day and present in the written statement (dated 13.10.2004) has passed unnoticed. The Court now wants to give the right weigh to this informatio, despite the fact that the process of refreshing of the memory of the witness on this point did not take place. What happened in the course of the testimony of Bruno Pinero Dias is that the process outlined in Section 36.4 TRCP has been implemented in relation to different aspects of the testimony (e.g. the usage of the word 'machete' rather than 'surik' or the exact expressions used by Mr.Da Cunha with the witness) but not in relation to the exchange of words between Mr. Johnny Da Cunha and the accused. The Court is inclined

to extend its research to that area of the statement because, once introduced to the Court, the written statement should be read in its entirety rather that in bits and extracts to avoid the risk of impairing the possibility of a global comprehension of the document. Secondly because in this case the point is not to give the weight of "substantive evidence" (Section 36.4 TRCP) to a declaration despite it not being subject to the cross-examination and in contrast with the declaration made in Court. (which is the function of the mentioned Section), but it is to give value and weight to an element of fact which was totally extraneous to the reasons for which the statement was created and for which the witness was called to Court. Such an approach seems to sanction the behaviour of the Prosecutor who did not make the written statement available before the beginning of the testimony of Bruno Pinero Dias in contravention of his duties as listed in Section 24 TRCP. If the Court had had the possibility to examine the document in advance, it is possible that the mentioned passage could have attracted the interest of the Court at the proper time and could have been an issue of discussion in Court.

Having solved the legal issue of the use of the document, let's read the passage of our actual interest: it's in page two of the statement 13.10.2004, close to the bottom.

Bruno Pinero Dias refers the episode as follows:

"After arriving house, we met Francisco (Perreira) outside his house. ... Then Francisco said: "Ok, now I can go to prison but the brother of Alvaro like Paulino and Luis also go to prison because before Alvaro killed, brother of Alvaro told militia to kill Alvaro". Francisco then said: "Ok, tomorrow I'm ready to meet them"."

While it is not possible to understand the reference to the individual called Luis, it's quite evident that the passage confirms the version of the accused, of the presence of Paulino Barros at the crime scene at the time of the killing and of the words used by him as an invitation to kill his own brother.

It's necessary to remember that the declarations made by Francisco Perreira on the same occasion referred to by Bruno Pinero Dias in Court have already been used by the Court as the base for a decision, when it came to decide whether or not to retain the surik which had been seized in the execution of the warrant of seizure issued on the 7th October 2004 by the majority of the Panel (Judge Rapoza dissenting). In that case, assessing the credibility and reliability of the words of the accused, who, answering the question of Johnny Da Cunha about the surik, replied that the sword had been left in Atambua, West Timor, the Panel considered that, given the circumstances of the declaration, and namely that it was made to an assistant of the Defence Counsel and out the possibility of interferences or of the presence of people who could have influenced the answer, the declaration must be held as trustworthy. For the same reasons the Panel believes that also the words used by the accused to mention the presence of Paulino Barros at the crime scene and the expressions used by the brother of the victim inviting the militia to kill his own brother, are trustworthy. And, in the same line of thought, it should be noticed as a further sign of spontaneity and, so, of credibility, that Perreira mentioned the presence and the words of Paulino Barros to Mr. Johnny Da Cunha without any specific question or reference being made by Mr. Johnny Da Cunha himself.

The same rule of interpretation of facts may find application in relation to the determination of the place where the accused hit the victim. The accused himself confessed to the representatives of the CNRT in Zumalai (Mr. Faunciano Barreto and Joaquim Barros) that he hacked Alvaro Tilman in the river. In the course of the hearing on 1st October 2004 it was

not possible to have a uniform opinion by the two witnesses on whether the accused had said that he hit the victim before or after the gunshot by Lino Barreto: it is plainly evident that the accused and Augustus Pereira contrast on the point. But again, what could have caused the accused to invent his version when he was being interrogated by Faunciano Barreto and Joaquin Barros, three years ahead of the beginning of the inquiry?

In the end, in relation to the various depositions given by the accused, the Court thinks that it must be accepted that for the conditions and the times in which they were made there is an inherent guarantee of genuineness and trustworthiness.

The opinion expressed above reflects the factual finding, confirming the version of the events as set out by the defence witness Lourenco Pereira. Indeed, the words of the accused mirrored those of the witness in a number of important areas: both mentioned the presence of Paulino Barros at the crime scene, the order/invitation/authorization given by him to kill his brother Alvaro and the place where Pereira hacked the victim.

The testimony of Augusto Pereira does not have the same credibility nor is there any external confirmation of the events as stated by him. Further, Augusto Pereira's story appears to be incongruous in relation to some details:

1. It is not clear, for example, why, at the onset of the escape of the victim, Lino Barreto and Alfredo Breok would have gone to Paulino Barros` house instead of leading the pursuit of the victim;

2. Similarly, Paulino Barros's return home after following the group of militia members up to the football field, without continuing in the pursuit of the brother, is a fragile construction which does not have any logical justification; why and who allowed him to go back home, after forcing him to follow the group in the first place? On otherside, if the testimonies of the two brother (Augusto Pereira and Lourenco Barros) are discredited, the representation of the early return home could be interpreted as an attempt to conceal Paulino's role for the infamous invitation to kill his brother.

The Court is inclined to accord full reliability to the line of facts outlined in Lourenco Pereira's and Francisco Perreira's accounts and to give less weigh to other versions.

Having reached this conclusion it is not too difficult to interpret the facts in the proper legal perspective.

From the descriptions made by the witnesses it emerges that the victim was able to evade the jail guards for a short while before he was found by Francisco Perreira. He was discovered in the proximity of the SNP school and from that moment a large number of the pursuers followed him at a short distance until he reached the river.

Augusto Perreira stated that the distance took 40/50 minutes to cover (initially he said one hour); Lourenco as well confirmed that the chasers were shadowing the escape of the victim. Both witnesses confirmed that when Alvaro entered the waters of the Mola river, the entire militia pack of pursuers assembled to assist in the final steps of the flight.

It was at this point that the unfortunate sentence about killing the victim was uttered by Paulino Barros. Immediately after, in the narration of Lourenco Pereira, Lino Barreto, who had previously discharged two shots into the ground as warning shots, raised the gun and shot Alvaro Tilman dead; at the same time, according to the narrations of Lourenco Pereira and of the accused himself, the accused jumped into the Mola river and ran towards the victim in order to inflict a surik strike on him.

The Court admits that the words of Lourenco Pereira can't find a specific corroboration on the point of the exact timing of the shots in relation to the words of Paulino; however, both Augusto Pereira (when interviewed at the crime scene) and Paulino Barros confirmed the version of the plurality of shots (the first says three, the second heard two). What should be underlined is that at least the deadly shot must have followed the invocation by Paulino Barros: otherwise, of course, the invocation itself wouldn't does not make sense.

The last argument paves the way to the final considerations on the chase and on the epilogue of it because it sheds a new light on the entire event: from the words of the accused in the confession made before the CAVR officer (Lito Da Costa) and from the fact that the deadly shot came only after the instruction of Paulino, the majority of the Court draws the conclusion that until the invocation itself, the epilogue of the pursuit had not yet been written and had not yet been decided. In other words, there is no reason to believe that the death of the escapee was the natural or mandatory or inevitable end of the pursuit.

The Prosecutor has strived to prove that there were standing orders given to the militia guarding the Zumalai detention camp in the sense that the prisoners who tried to escape had to be killed (to be more accurate, the first version of this working idea is put out in different terms in the Prosecutor's motion to present further evidence dated 14th October 2004: there the order is referred as "to apprehend and kill those detainees who escaped from their place of detention"). The Prosecutor stated that the death of Alvaro Tilman was the result of a choral action for which Francisco Perreira had to be held responsible if not as direct perpetrator, at least as a co-perpetrator for the joint criminal enterprise in which he took part. The responsibility for the death of the victim was, in this context, to be shared amongst all those who participated to the pursuit, irrespective of their role. This broad perspective to determine the responsibility of the militia members grew through the course of the trial (there is no mention of joint criminal enterprise in the indictment, where the death of the victim is said to be derived directly from the injuries caused by the attack by Francisco Perreira and the shot fired by Lino Barreto).

If also the evidence introduced through the deposition of the witness Xisto Baretto is not unequivocal on the point, the Court has no reluctance in admitting that such orders may have existed and may have been repeated in relation to the militia guarding the Zumalai detention camp. However the point is different: the existence of orders says little of the existence of a joint criminal enterprise and assuming that the pursuit of the victim was based on the shared will to bring about the execution of the order received some time before (and expressed once and only once, as per testimony) appears to be simply a generalization void of logic strength.

At any level, joint criminal enterprise must require a *minimum* of coordination amongst those who participate in the action, in order to assure that the aim of the action is properly pursued. This *minimum* may be represented as a horizontal expression of will, explicit or implied, which binds those taking part in the specific action and is, in the end, the very reason for

gluing their responsibility together. By adhering to a plan or a common (i.e. shared) purpose, the accused would further the criminal activity by lending moral support to someone else's execution. Persisting in the geometrical representation, it is this horizontal will that would bind the co-perpetrator in joint criminal enterprise and not the will expressed by the order from the militia leader to the subordinate. The order is a 'vertical' expression of will in the sense that it implies the presence of a hierarchy, of a leader and of subordinates and is not, by itself, a source of joint criminal responsibility. Now, in our case, there is no reason to believe, or it has not been shown, that at the onset of the pursuit, the will of the pack of pursuers was to kill. It is easier to think, rather, that the first objective of the pursuit, arguably shared by the guards, was to catch the escapee. And indeed, as said before, the first mention of the standing order in the trial spoke of an "order to catch and kill" (witness Joaquin Barros). Once the prisoner had been caught, execution may have followed, but by the hand of whom and in which manner, whether on the spot or in the football field, is undetermined.

In this case what made the situation precipitate and the life of the victim end was apparently the words uttered by Paulino Barros to the militia present at the riverbank to kill his own brother: obviously this was not an order or an authorization in legal terms but it worked as the fact which prompted at least in two people present at the crime scene the arising of a new will, i.e. the determination of killing Alvaro Tilman.

It is assumed that the intention to kill Alvaro was not present in Lino Barreto and in Francisco Perreira before the suggestion.

In relation to Lino Barreto, this appears to be evident from this detail: though he was at the riverbank he did not attempt to shoot the victim.The militia had had time to assemble there, yet he had not shot; he discharged the gun into the ground twice before aiming at the back of Alvaro.

In relation to Francisco Perreira, the same can be said on the basis of his own words (in the various narrations of the facts he always linked the words of Paulino to his action against Paulino's brother, Alvaro) and on the basis of the testimony of Lourenco, who said that the accused only jumped into the river after Paulino's statement.

It has to be underlined that the two wills (in Lino Barreto and in Francisco Perreira) arouse independently, with no relation between each other: the deliberation to kill immediately followed the words of Paulino and the execution of the deliberation followed suit.

Again, no shared intention, no agreement, no accession of the will of one to the action of the other.

The two independent wills prompted two independent actions aimed at the same end, the death of the victim.

As said before, the first one to strike and the only one to cause the death of Alvaro Tilman was the gunshot.

But then, how should the strike with the surik, be evaluated?

The *mens rea* which supports the action is interpreted by the Panel as a determination to kill.

The same accused said in his confession to the CAVR that he meant to carry out the unfortunate order of Paulino Barros.

A *dolus impetus*, more specifically, in which the impulse to act is not sufficiently constrained by cultural or social inhibitors. A quick, almost immediate shift from thought to execution, easily understandable in the given circumstances where the death of the victim was an option, a possibility since the onset of the action (e.g. in case of violent reaction by the fugitive or in case the runaway had gained such an advantage on the pursuers that only the recourse to a gunshot could have stopped his flight: none of the two eventualities happened in reality): the last few words must be carefully interpreted in the sense that the death *might have been* but (in the opinion of the Panel) *was not* foreseen and predetermined at the beginning of the flight.

On the other hand, the *actus reus* features the characteristics of the attempt to bring about the execution of a murderous act: the swing of the sword may not be the appropriate way to use a surik (which more correctly should be used to pierce the victim with the point rather than with the blade) but it may be interpreted as the beginning of a action bound to be repeated but already sufficient in itself to amount to the commencement of the execution of the crime.

On the face of this juridical reconstruction of the facts, the issue of the anteriority or posteriority of the sword strike to the gunshot becomes almost irrelevant: since the strikes stemmed from two independent actions of which the gunshot was the deadly one, if also we admit that the sword swing hit the body of Alvaro Tilman first and the gunshot second, we necessarily have to conclude that the surpassing causality of the gunshot has stopped the action of Francisco Perreira at the level of attempt of murder. If *vice versa*, the action actuated by Francisco Perreira ended *in corpore vili* and was therefore unable to change the chain of causality of the action that had preceded it.

In the end Francisco Perreira's action is to be qualified as an attempted murder.
A second crime, different from the homicide committed by Lino Barreto: two different chain of causality, one object, one crime accomplished and the other attempted.

The crime committed by Francisco Perreira falls within the definition of crime against humanity as well, specifically pursuant to Section 5.1 (a) UNTAET Reg.2000/15: the doubts shown by the defence counsel on the point cannot be shared by the Panel. Mr. Gooi, in his final arguments, observes that the crime (now we could say the two crimes, i.e. both the accomplished murder committed by Lino Barreto and the attempted murder committed by Francesco Perreira) are random and isolated acts, which can't amount to crimes against humanity "because the murder (and the attempted murder, we can now add) in this case was not proven to have been committed on a regular basis, or was part of a systematic occurrence". The argument is correct in fact in the sense that it's true that the death occurred at random and in some term is isolated. Yet this doesn't mean that the crime may be subtracted to a wider scenario which encompasses the detention of supporters of the cause of independence and of members of clandestine. The act must be part of a widespread attack in the sense that it is a foreseeable development of said system of repression, established on wide basis: the target was the general population, by hitting those members of the community who were more active. Further more, it cannot pass unnoticed the obvious

consideration that the establishment and operation of a detention camp in Zumalai was only a part of the activity of the Mahidi milita. In various occasions through the hearings, witnesses assessed the amount of militia members in the area of Zumalai by the hundreds and spoke of the many duties that they were required to carry out. Witnesses often related (specifically in relation to the count of persecution) to the linkages between the militia with the TNI and other administrative or police officers, confirming the climate of impunity which surrounded the activity of the militia. As in other districts (Oecussi and Dili, just to mention the two most relevant) around the middle of the month of April was the time of the onset of the activity of the militias and the moment when the militia focused on the repression of campaigners for independence and clandestine supporters of the armed resistance. The orchestration of this campaign was at a national level, was centralized and was not occasional.

The act of Lino Barreto and Francisco Perreira is embedded in this scheme of repression, representing a by product of the said activity. Murder was not the direct aim of the detention; though, it happened in that as a result of the escape attempt.

Having said that, it is important to add one more point, for further clarification. It's a point that helps us to introduce the issue of the second count, persecution. As said before, the Prosecutor defined the murder of Alvaro Tilman as an act of persecution: the rationale appears to be that the killing of the victim was based on a discriminatory intent, deserving of the further qualification of Section 5.1, let. h and Section 14 UNTAET Regulation 2000/15. The said provision states:
"... crime against humanity means...: (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels".

This provision of course does not say what a persecution is, but a rough definition is offered by the following Section 5.3 that, indeed, details: "(f) Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

In other words, since the essence of a persecutory act is the discrimination that it expresses, it must be assumed that the Prosecutor has believed that such intent was recognizable in the behaviour of (Lino Barreto and) Francisco Perreira at the moment of the crime.

This assumption is not shared by the majority of the Panel which does not thinks discrimination was shown in the context of the murder and attempted murder of Alvaro Tilman.

Apart from persecution, discriminatory intent is not an element of a crime against humanity: if it is true that common experience teaches that the majority of the crimes against humanity are indeed sparked by (and based on some ground of) discriminations since actions of such scale ordinarily find their origin in some political, racial or religious motivation, this does not imply that the legal sources of this kind of criminalization (either at the international or domestic level) require discriminatory elements in the crime. With the exception of the Statute for the ICTR (in which the expression "on national, political, ethnic, racial or

religious grounds" is used to describe the widespread and systematic attack against the civilian population which denotes all crimes against humanity), international and domestic instruments of criminalization of crimes against humanity in general don't require discrimination to be present for whichever crime against humanity.

However, when crimes against humanity are used, like in the present case, as factual elements of persecution, then it appears to be necessary that the single constitutive element, the single crime against humanity is supported by such discriminatory intent. If, as stated, discrimination is a core element of persecution, it must be present in each single episode that is purported to represent a part of the persecution itself; otherwise the single crime against humanity could be punishable in itself but would be extraneous to the planned persecution. The single crime against humanity recalled in the persecution must be prompted by the will to discriminate, i.e. to treat a group or a single member of it, for some reasons, in a detrimental manner in comparison to the general population. In the absence of this element there is no justification to further criminalize a behaviour that is already censured as crime against humanity.

So, in the present case, the first count, already a crime by itself, is "coated" by the Prosecutor with a second layer of illegality because included in the second count as an element of the persecution.

Though, the reasons for the murder and the attempted murder have nothing to do with discrimination.

Alvaro Tilman was detained because he was a member of the clandestine organization supporting the guerrilla against the Indonesian forces and because in April 1999 the campaign of repression of the activity of these groups intensified, in sight of the coming consultation planned for the end of August (i.e. he was detained on discriminatory bases). But he was murdered in the Mola river because of his attempted escape and because the flight ended in the unfortunate way that has been previously illustrated. The same fact that the determination to act arose *ex abruptu*, as a consequence of the words of Paulino, is incompatible with a discriminatory intent.

Let's turn now to consider the other acts of persecution.

As said before, the accused is charged for persecution for:

- the detention and assault of Raimundo Magno
- the detention and torture of Jose Manek
- the detention and torture of Mateus Barreto
- the detention of Luis Sarmento.

In general, on this part of the charges, a conspicuous number of witnesses have been heard; given the irretrievability of the victim Jose Manek, his statement to the investigators, dated 6 October 2003, was admitted as evidence by the Court pursuant to Section 36.3 (c) TRCP; eventually, the visit to Zumalai and specifically to the ruins of the so called Zumalai detention camp (a quadrangular building aside the house of Vasco Da Cruz, the former *chef do suco* and militia leader of Zumalai) helped the Court to understand the conditions of restriction in which the above mentioned victims were allegedly held.

The Court understands that the prosecutorial perspective, when charging Francisco Perreira with persecution for the listed behaviour derives from the assumption that persecution, as stated in the relevant legal provisions, must emerge from behaviour which is in its self already crimes within the jurisdiction of the Special Panels. Indeed, Section 5 of UNTAET Regulation 2000/15 reads: "... crime against humanity means...: (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that universally recognized as impermissible under international law, *in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels*".

In this case we have the inclusion in the indictment, under an umbrella charge, of behaviour which is assumed to be in its self a crime against humanity or torture (as an ordinary crime) but is not considered for its self, rather as a bunch of violations that deserves (only) one comprehensive and global evaluation.

The Court is required to focus on the whole more than on the detail.

First of all, let's see if the alleged behaviour took place.

The general picture which comes from the testimonies confirms the commission, by the accused, of the acts which can be summarized as the detention, the torture and the infliction of severe physical suffering to four individuals.

Raimundo Magno, Mateus Barreto and Luis Sarmento came to Court to give an account of the story of their victimization and if it is true that some discrepancies may be detected between the testimonies in Court and the versions previously given to the investigators, with an added emphasis on the accused, it must nonetheless be accepted that what was said in Court appears as a plausible, if also more colourful version of the same stories.

No great mistake, no great confusion, no basic contradiction can be found in the accounts of the arrests and of the following detentions by the witnesses. The presence and the role of Francesco Perreira in each event has been confirmed as well as his peculiar attitude towards the victims, possibly dictated by his youth (at the time of the facts he had just turned twenty), which can be described as a sort of cynical mercilessness toward the weak, a recurrent behaviour of those who, given a little authority, try to show their pretended nastiness to gain the respect of older and superior members of the group, by discharging their frustrations on the defenseless. They pretend they are tough but they only show their cowardice.

On the detention and assault of Raimundo Magno and detention and the torture of Jose Manek.

The first follower of the clandestine organization was arrested, together with Andre Maya, at the beginning of April '99 by a group of militia members when returning from Aileu where he had attended the funeral of a fellow member.

Raimundo and Andre Maya were brought to a post of the TNI (the Indonesian military forces) where they were severely beaten and then to the detention camp in Zumalai where they were kept in restriction for approximately half a month or less.

On the same day, at the TNI post in the village of Lepo, another member of the clandestine organization, Jose Manek had been brought. Jose Manek was beaten and later led to the detention camp in Zumalai as well.

Details of the modalities of detention as well as details of the beating vary in the different testimonies and with respect to the versions emerging from the written statements released in the course of the investigation. It's possible that in the course of the trial, due to the tension of the hearing and to the presence of the accused, the victims (both Raimundo Magno and Andre Maya are victims of the alleged crimes, if also the second one was not listed as such in the indictment) painted the picture with darker colors and with a degree of dramatization that can't naturally transpire from the transposition of their words in the statements to the investigators in the course of the inquiry. Though, the story is there, a story as many of those heard by the Special Panels in the course of their activity, an ordinary day in the life of a militia patrol in the months leading to the popular consultation of late August 1999.

The participation of the accused in the process of arrest, beating and detention can hardly be challenged by the defense on the basis of the witnesses introduced on request of the defense or on the basis of the contradictions and imprecision of the testimonies.

The defense witness Celestino Dasibere appeared to the Court to be completely confused and unreliable: the transcript of the hearing is a cold medium and can not convey the sense of displacement and incapability to express intelligible concepts that affected the witness. Mr. Dasibere looked as a source of inextricable untrustworthiness and smoky ideas. Apart form the confession of the unreliability of his memory, the witness repeatedly showed to base his recollection of the facts on the quick sands of a fragile memory, ready to affirm one concept and to negate it immediately after. There's a sense of consternation left after hearing such witness: the Court doesn't want to base any factual finding on his words.

For different reasons but with similar outcome, the testimony of Anacleto Letomali was also not compelling. It was clear that the witness had only a partial and temporarily limited knowledge of the facts. He went to the TNI post in Lepo after attending the funeral of a relative of his, when he heard from the mourners that Raimudo Magno and Andre Maya had been arrested and brought to the TNI office in the village. Expressly asked, he confirmed that his visit to the TNI office did not last more than the time needed to meet Raimundo and Andre, untie their hands and bring them into the office. In the witness version the two arrested were outside, under the sun, and were accompanied into the building by Anacleto Letomali and Lourenco Pereira, militia members as well.

The witness confirmed that Raimundo and Andre showed signs of having been beaten and of maltreatment but was not able to confirm the presence of the accused; rather, he said that a lot of militia members were in the proximity of the TNI building but that he didn't notice Francisco Pereira.

The fact that the witness did not see thedefendant during his limited participation in the events does not preclude the presence of Francisco Perreira in Lepo, at the Army office, a few minutes before or after Anacleto Letomali's short visit. Further, to ask a witness after so many years about the presence of a given individual that he had no specific reason to remember (Anacleto was not the victim, he was just a visitor) out of a multitude of unnamed

militia member, places an unrealistic expectation upon him which is obviously going to result in a negative answer.

In other words, given the short spell, the large number of people and the fact that the attention of the witness was naturally focused on the victims (who were his relatives) more than on the possible people to blame, the testimony of Anacleto Letomali is not deemed to be sufficient to contrast the description of the facts emerging from the accounts of the victims themselves.

On the reasons why the victims/witnesses would have come to Court to tell lies to the judges, no hint or suggestion has been expressed by the Defense: the assumed mendacious attitude of Raimundo and Andre toward Francisco Perreira has no foundation. To denounce a plot against some one is not enough to discredit the assumed orchestrators of it if no specific justification is indicated and proven; the denunciation, in such cases, turns to be a backlash for the denunciator. What's more, if an agreement had existed between Raimundo and Andre against Francisco Perreira in order to establish a version to present in Court, we trust the two attempted perverters of the course of justice would have shown a greater ingenuity in arranging an agreed version: on the contrary, as listed by the same Defense Counsel in his written final allegations, in many passages the narrations of the two witnesses diverged. What kind of common will to deceive is this, which creates confusion instead of appearing a reliable lie?

The Court, considering the modest contradictions and minor modifications of the versions, find that the facts narrated by Raimundo Magno and Andre Maia about the beatings they suffered at the time of their arrest and the conditions of the detention which followed are trustworthy and consequently finds that the charge against Francisco Pereira is founded.

Specifically, it must be believed that the beatings were administered by Francisco Perreira as well as by other fellow militia members and army personnel from the moment of the arrest to the moment when the victims were brought to Zumalai detention camp, the greatest deal of them been given at Lepo TNI post. It must be believed that the detention which followed had the harsh features illustrated by the numerous witnesses, Matteus Barreto and Luis Sarmento included. These witnesses confirmed details such as the size of the rooms in which the victims were restricted, the scarcity of food and water, the lack of space due to overcrowding, the lack of light, the random nature of beatings, occasional sleep deprivation, bad sleeping conditions (i.e. directly on the floor and with prisoners sleeping on one another) and so on so forth.

Similar conditions and similar conclusions are to be found in the experiences of other victims listed in the indictments, Jose Manek, Matteus Barreto and Luis Sarmento, whose testimony has been confirmed by Raimundo Magno and Andre Maia.

For Jose Manek, no doubt the perplexities expressed by the Defense Counsel, who didn't have the opportunity to challenge the accuser in the course of a live cross-examination, deserve respect and consideration and indeed have been kept in mind by the Court when it came the moment to take the decision of substituting the direct testimony of the unavailable witness with the admission pursuant to Section 36.3 letter (c) as substantive evidence of the statement he had released in the course of the inquiry, though the homogeneity if not identity of his story with those of Raimundo and Andre to which it is naturally embedded (from

Lepo, the destiny of the three men was glued together) creates a mutual relation of corroboration and dissipate the doubt about the opportunity to use the statement of Jose Manek.

Analogous orientation is expressed by the Court in relation to the remaining charges of persecution, i.e. the detention and torture of Mateus Barreto and the detention of Luis Sarmento.

As far as the last point is concerned, it is necessary to state that the Court understands that the arrest of Luis Sarmento and the detention that immediately followed must be viewed not independently but as a continuous action, the responsibility of which is shared by all those who participated in it. It has been shown that Perreira participated at the moment of the arrest; it is believed that he was present later during the course of the detention, as he was a guard at the detention camp, a point confirmed by various witnesses. As far as Luis Sarmento is concerned, his responsibility begins at the moment of the arrest of the victim. In other words, the Court rejects the contention of the Defence stated in point 192 of his written closing argument: to isolate one action from the other would be to ignore the greater picture. It is inherent to group actions that the single individual sees the group as a shield and a warrant to impunity. Nonetheless the individual contribution, at various levels, strengthens the capacity of the group to strike and furnishes moral if not active support to the action of the other participants.

In relation to the detention and torture of Matteus Barreto the Court is ready to accept that in the course of the hearing the witness partially modified his previous version and he mayhave overly emphasized the role and the participation of Francisco Perreira. Nonetheless, it's clear that the stance taken by the Defense Counsel (namely, failing receipt of a straight confirmation of the previous statements by the witness, testimony should be viewed as void and not usable) is not realistic. Courts never work on that basis and their assessment of the facts is based on experience as well as on personal sensibility and appreciation. It would be an easy job in the Timorese context, to dissect each sentence of each testimony and pretend that it must be read on its own: on the contrary, a realistic evaluation must be done on the face of the whole body of evidence.

In the end the Court is willing to acknowledge the foundation of the accusation against Francisco Perreira based on the facts alleged by the Prosecutor in the indictment in relation to count 2 (save, naturally, the exclusion of the murder from the list of relevant behaviours). It also appears appropriate to underline that the acts attributed to Francisco Perreira (four deprivations of liberty and three severe maltreatments) are but a part of the whole persecutory activity to which the accused participated. The extensive testimonies on the modalities of detention and on the activities of the militia in Zumalai, clearly showed that a relevant number of CNRT or 'clandestine' supporters were arrested or even killed by Mahidi militia from Zumalai in the spring of 1999. The systematic repression of those people in favour of the independence of Timor Leste, in order to isolate guerrilla groups or to prevent political campaigning before the referendum, fully deserves to be called persecution.

The detention of the four independence supporters was a form of deprivation of personal liberty as defined under Section 5 (e) of UNTAET Regulation 2000/15. Specifically, in the alternative outlined in the Section ("crimes against humanity means ...(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international

law), it is thought to fall within the second category (severe deprivation of physical liberty). It is not necessary to examine illegality of the deprivation, maintained by an abusive *de facto* authority without legal or formal title and with unlimited duration. While it's easy, after hearing witnesses describe extreme conditions of restriction, to agree on the sufficient severity of the deprivation of liberty to meet the standard required by the norm, it must not be forgotten that the deprivation of liberty only amounts to a crime against humanity in the case of infringement of a fundamental rule of international law.

As already found in the case of the Prosecutor against Florenco Tacaqui, it's not difficult to state that the legal standard that internationally protects the personal freedom of individuals and whose infringement constitutes an element of the provision of section 5.1 letter (e) UNTAET Regulation 2000/15. While questions can be raised on the applicability of the International Covenant on Civil and Political Rights of 16 Decembers 1966, namely articles 9 and 10 as it has not been ratified by Indonesia and, accordingly, not an enforceable instrument in the Timorese occupied territory, no doubt exists on the contrary, on the applicability and enforceability, at the time, as a source of customary international law, of the provisions of the Universal Declaration of Human Rights, specifically articles 3 and 9, that confirms the primacy and the intangibility of individual liberty.

In relation to maltreatment, the Court holds that the prolonged unjustified beatings, humiliations, threats and abuses amount to torture, having in mind that to such actions fulfill the definition for torture as a crime against humanity, no further requirement is asked than those in the definition of Section 5.2 UNTAET Reg.2000/15 ("Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only, inherent in or incidental to, lawful sanctions") and specifically no request that the violence is administered for extortive or punitive purposes. An element normally understood to be the inherent within the definition of torture.

The only ambiguity arising from the indictment, under this respect, is the definition of the aggression of Raimundo Magno as assault, terminology that is not reflected, in Section 5 of UNTAET Reg.2000/15. The Court finds that the violence against Raimundo should be properly defined as inhuman acts intentionally causing great suffering and serious injury, pursuant to the residual definition introduced by Section 5, letter k, UNTAET Reg.2000/15. Despite the fact that the treatment experienced by Jose Manek and Mateus Barreto on the one hend and Raimundo on the other is materially the same, the decision by the Prosecutor to drop the charge of torture in the case of Raimundo has resulted in the Court applying the catch-all residual definition at the bottom of Section 5.1 and defining the behaviour as inhuman acts.

SENTENCING POLICY

The accused has been found guilty of the crimes described in counts 1 and 2 only subject to a re-qualification of the first count and a small reduction of the second count. All this has already been explained.

According to Sect. 10.1 (a) of UNTAET Reg.2000/15, for the crimes referred to in Sect. 5 of the same regulation, in determining the terms of imprisonment for those crimes, the Panel shall have recourse to the general practice regarding prison sentences in the courts of Timor

Leste and under international tribunals. Moreover, in imposing sentence, the Panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person (Sect. 10.2).

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

In previous cases, the direct execution of a murder by the accused in the course of an attack against a village or a community deserved terms of detention ranging from twelve to fifteen years. Those were cases of attacks in the course of which several casualties were caused and the villages suffered major disruption. A disproportionately superior amount of violence and disrespect for human life and for the rights of the communities which were flagellated was shown by the attackers. Premeditation aggravated the crimes. In the present case, the murder and the attempted murder of Alvaro Tilman were based on an *impetus* which does not cancel the murderous nature of the acts but partially approximate it to the *mens rea* of a manslaughter committed "out of the heat of the passion" (i.e. the chase and the unfortunate words of the brother of the victim). In the end, a crime that deserves a more lenient treatment than those mentioned at the opening of this paragraph. The majority of the Court thinks that an accomplished murder under the above conditions would find a fair retribution with the imposition of a term of nine years in jail.

Attempted crime is regulated in the law of East Timor under Section 53 of the Indonesian Criminal Code, the applicable subsidiary law. The provision, in subsection 1, states: "Attempted to commit a crime is punishable if the intention of the offender has revealed itself by a commencement of the performance and the performance is not completed only because of circumstances independent of his will". The following subsection states that a reduction of one third of the punishment which would be applicable for the accomplished crime shall be granted for the attempt.

Accordingly, the Court is allowed to reduce the term to six years in prison.

Eventually, mitigating circumstances may be recognized:

1. In the first place, it can't pass without notice and proper consideration that the accused confessed to the crime autonomously and that the confession (and the confession alone!) was the factor that brought the crime to the attention of the Deputy prosecutor for serious crimes which otherwise would have passed unnoticed and would have been forgotten.

The motive for the confession may vary but an element of contrition and of repentance is surely present alongside the desire to come to terms with his own past and with the community to whom he and his family belonged. All this deserves consideration in terms of indulgence, for the spontaneity of the confessions and the conditions in which they were made.

It is true that the accused modified at the trial stage his attitude and refused to speak, after making and repeating his confession to several instances out of the trial (from CNRT representative to CAVR officers to the investigators). Though, this altered approach didn't delete the greatest part of the spontaneous contribution that the accused had given to the

clarification of the facts (because, as said before, the Court evaluated that all the confessions made out of the investigation may be -and have been in fact- used by the Court as a source of knowledge of the facts) and, in a way, contributed, if also involuntarily, to the clarification of the facts.

Indeed, if the accused had confessed before the Court at the beginning of the trial and had accordingly plead guilty with the aim of benefiting from a reduced sentence, the Court would have missed the opportunity to hear the evidence of Lourenco Pereira (whose version of the fact only emerged in the middle of the trial). As such, the facts of the case would not have come to light in their entirety and the plea would have been decided upon on the basis of a reconstruction not corresponding to the one that has been eventually found by the Court.

2. Personal and family situation:

- On the one hand, the only element which must be appreciated in favour of the accused is his youth at the time of the events. He was twenty years old and was surrounded by a large number of older militia members. It emerged that the accused, despite his young age, purported to show his nastiness and his determination at the expenses of those at his disposal. However this appears to be more a gesture, a show toward the superiors, to gain their admiration, rather than a true feature of Perreira's character.

- The accused is married and has children. If this is not a sufficient justification for a lenient treatment (at the end of the day, the victim also had a family...) his family condition favours his reintegration in the community once he serves his term in jail.

3. Level of the attempt:

As said before, the contribution of the accused to the death of Tilman is null since the chain of causality prompted by his action did not interfere with or affected the real cause of the death of Alvaro Tilman. His action resulted in a single strike against a non-vital part of the body delivered in a manner which could never have brought about the death of the victim. It would be interesting to analyze the inadequacy of the strike in relation to the kind of weapon (the surik is a straight, traditional weapon with offensive characteristics if used with the point, but much less effective if used as a catana, i.e. with the blade) but this would bring the Court to an area which is beyond the boundaries of the decision. Suffice here to say that the Court believes that the responsibility of the accused should be limited to the level of aggression expressed by the actions of the accused.

In consideration of the mitigating circumstances, the Panel thinks it appropriate to cut the six year term in half and apply a final sentence for attempted murder of three years.

In relation to the crime of persecution, the Panel opines that a further term of one year is appropriate.

The two terms will be served concurrently.

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The time spent in pre-trial detention will be deducted from the sentence imposed.

The accused was arrested on the 17th September 2003 and was released from prison on the 19th November 2003. Accordingly, he served in pre-trial detention two months and three days.

The remaining term to be served in jail by the accused is two years, nine months and twenty-seven days. Since the decision is executed immediately, today 18th March 2005, the term that must be served will expire on 14th January 2008.

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Given the poor economic conditions of the accused and of his family, the Court renounces to issue an order for the cost of the proceedings (Section 53 Reg.2000/30), since it would simply aggravate the Administration with no hope of getting any economic benefit.

Having considered all the evidence and the arguments of the parties, the Special Panel for Serious Crimes issues the following decision with respect to the defendant Francisco Perreira in relation to the charges, as listed in the indictment:

Count 1) The accused is found guilty of crime against humanity in the form of attempted murder of Alvaro Tilman, committed in Zumalai on 18th April 1999, as a part of a widespread and systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 (a) UNTAET Reg.2000/15;

Count 2) The accused is found guilty of crimes against humanity for the persecution in relation to the following acts:

- severe deprivation of physical liberty and inhuman acts causing great suffering or serious injury to the body of Raimundo Magno;

- severe deprivation of physical liberty and torture of Jose Manek:

- severe deprivation of physical liberty and torture of Matheus Barreto;

- severe deprivation of physical liberty of Luis Sarmento;

committed in Zumalai in April and May 1999 as a part of a widespread and systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 letter (h) UNTAET Reg.2000/15. For the remaining part of the charge (persecution in relation to the attempted murder of Alvaro Tilman) the accused is found not guilty.

2.

In punishment of the crime of attempted murder, the Special Panel sentences Francisco Perreira to an imprisonment of three years.

In punishment of the crime of persecution, the Special Panel sentences Francisco Perreira to an imprisonment of one year.

The two terms will be served concurrently.

3.

Pursuant to Sections 42.1 and 42.6 of UR 2000/30, the convicted shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.

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

According to Section 10.3 U.R. 15/2000, section 42.5 UR-30/2000, the time spent in pretrial detention by the accused must be discounted from the term in prison.

The accused was arrested on the 17th September 2003 and was released from prison on the 19th November 2003. Accordingly, he served in pre-trial detention two months and three days.

The remaining term to be served in jail by the accused is two years, nine months and twenty-seven days. Since the decision is executed immediately, today 18th March 2005, the term that must be served will expire on 14th January 2008.

4.

The final written decision will be issued in the term of twenty days, at an hearing that will be scheduled, and will be provided in one copy to the defendant and his legal representative, public prosecutor and to the prison manager.

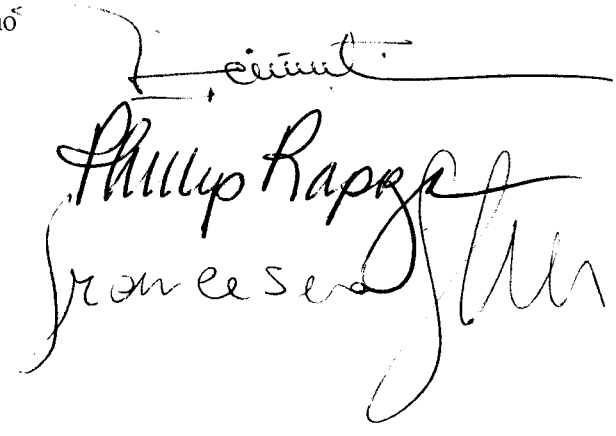
The Defense will have the right to file a notice of appeal within 10 days from the day of the notification of the final written decision and a written appeal statement within the following 30 days (Sect. 40.2 and 40.3 UR-2000/30).

This final written decision was rendered and delivered on the 2005 in the building of the Court of Appeal of Dili by

Judge Antonio Helder Viana do Carmo

Judge Phillip Rapoza
(Subject to the attached statement)

Judge Francesco Florit, presiding



Deputy General Prosecutor for Serious Crimes v. Francisco Pereira
Case No. 34/2003

Separate Opinion of Judge Phillip Rapoza

I have signed the final Judgment in the present case subject to the following:

Jurisdiction

1. I agree with the majority that Section 163.1 of the Constitution of Timor-Leste imposes no impediment to the prosecution of the Defendant. I arrive at that conclusion, however, using a different process of constitutional analysis than the one reflected in the main opinion.

2. The first point to establish is that the purpose of the present exercise is exclusively to determine whether the terms of Section 163.1 in any way preclude the trial of the Defendant before the Special Panels for Serious Crimes. Whether this provision may impact on other cases unrelated to the one before us is of no significance unless the consideration of such matters in some way casts light on how the Court should resolve the issue as to this Defendant.

3. Unlike the majority, I conclude that a plain reading of Section 163 is sufficient to resolve this matter. It is a cardinal rule of statutory and constitutional construction that it is appropriate to go beyond the direct expression of the text only in cases where the meaning of the text is unclear or ambiguous in some aspect material to the issue at hand. Only in such circumstances shall a court turn to extraneous sources such as other legal provisions, legislative history and related writings and sources.

4. Section 163 bears the title "Transitional judicial organization" and appears in Part VII of the Constitution entitled "Final and Transitional Provisions." Paragraph 1 relates to the duration of the Special Panels and its appellate counterpart.[1] Paragraph 2 relates to the continued operation of the existing national judicial system until a new system is established.

5. Read as a whole, Section 163 does nothing more than indicate the duration of the various judicial structures still in place at the time the new Constitution entered into force. The time provided to the Specials Panels under Section 163.1 is that which is "deemed strictly necessary to conclude the cases under investigation [os processos em investigação]."[2]

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[1] Section 163.1 refers to "The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes..."

[2] I do not agree with the majority that the use of the term "cases" is a mistranslation of the Portuguese term "processos," which appears in the original version of the Constitution. See Judgement at p. 3. Accordingly, I decline to adopt the majority's proposed translation of this portion of Section 163.1 as "the

6. Section 163 has no effect on the subject matter jurisdiction of the Special Panels for Serious Crimes, which was established by UNTAET regulations that are still in effect. Thus, the Special Panels were created 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.[3]

7. Accordingly, Section 163.1 is not jurisdictional in nature, meaning that it does not define the cases that are within the competency of the Special Panels. Rather it merely establishes a timeframe beyond which the Special Panels are not intended to function, as can be seen from its heading ("Transitional judicial organization") and its placement within the Constitution ("Final and Transitional Provisions").

8. Even if this Court were to apply the strictest possible limitation on the operational timeframe of the Special Panels, there would be no reason for the trial of the Defendant not to go forward. Thus, even if the Court were to adopt the view that it could remain operational only so long as is necessary to deal with cases under investigation on 20 May 2002, the effective date of the Constitution, the Defendant would still have his day in court.

9. Assuming, without deciding, the accuracy of the majority's conclusion that the investigation into the Defendant's case began one year after the Constitution went into effect, that fact has no bearing on whether it was proper for the Special Panels to remain in operation at the time of the Defendant's trial.

10. On 18 March 2005, the date that the verdict was announced in the Defendant's case, other panels of this Court were still conducting proceedings in separate cases that were clearly under investigation prior to 20 May 2002. One such case involved the murder of UNAMET staff members in Atsabe on 30 August 1999,

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trials under investigation." First, the suggested translation is counterintuitive in that "trials" are obviously not subject to "investigation," as only "cases" are subject to investigation. Second, in the Portuguese criminal justice system (after which the Timorese system is substantially modeled), the term "processo" is used to describe an investigation opened by the Public Prosecutor (Ministério Público). The term "processo" can also apply to the resulting charges later brought as a case before the court where a trial ("julgamento") is conducted. The majority appears to have approached this understanding when it later states that the term "processos" refers to "cases which are already before the Court" and acknowledges that the term "is sufficiently wide as to encompass the trial as well as the investigative stage."

[3] 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. 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.

the day of the popular consultation. See Deputy General Prosecutor for Serious Crimes v. Domingos de Deus, Case No. 2A/2004 (Decided on 12 April 2005). In Domingos de Deus, although the indictment was not filed until 2004, the investigation into the case began in 1999 and extensive witness interviews were conducted in 2000 and 2001.[4] Another case, which is still on trial as of the date of this dissent, is that of Deputy General Prosecutor for Serious Crimes v. Sisto Barros and Cesar Mendonca, Case No. 01/2004. In the Barros case the investigation began in 2001, well before the effective date of Section 163.1.[5] Other cases were also still pending before the Special Panels on 18 March 2005 in which the investigations had begun prior to 20 May 2002.

11. The significance of these cases is that each one was still pending during the Defendant's trial. In other words, during the entire course of the Defendant's trial, it was necessary for the Special Panels to "remain operational ... to conclude the cases under investigation" because these cases, which were under investigation prior to 20 May 2002, were still active and were on trial or otherwise awaiting disposition.

12. The fact that the Defendant's case resulted from an investigation that allegedly commenced after 20 May 2002 is thus irrelevant. The Special Panels had to "remain operational" for cases other than his, thus justifying the continued existence of the Court.

13. To the extent that the Defendant's case may have been investigated after 20 May 2002, that fact also has no bearing on the competence of the Special Panels to conduct his trial. As previously noted, this is because Section 163.1 is not jurisdictional in nature. The law pertinent to the jurisdiction of the Special Panels, which remains in effect, clearly gives the Special Panels competency over the offenses with which the Defendant was charged without respect to the date upon which the investigation of the case commenced.[6]

14. In light of the foregoing, I agree with the final position taken by the majority that the Special Panels continue to have jurisdiction "over all investigated cases" until the Court ceases to operate, although I reach that conclusion by means other than those put forward in the main opinion.[7]

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[4] See Case File (Vol. I at pp. 120-196; Vol. II at pp. 197-356) in the companion case of Deputy General Prosecutor for Serious Crimes v. Mohamad Roni, et al, Case No. 02.2004, from which the Domingos de Deus case was severed.

[5] See Case File (Vol. I at pp.139-175).

[6] See Paragraph 6, supra.

[7] See Judgement at p. 9.

Criminal Responsibility of Francisco Pereira

Direct Perpetrator

15. The exact cause of death of Alvaro Tilman cannot be established on the evidence before the Court. Although the gunshot to Tilman's head by Lino Barreto would likely have been fatal, it is not clear whether the gunshot preceded or followed the Defendant's hacking of the victim. This is significant because it also cannot be established on this record whether the Defendant's own blow was the fatal one.

16. There was credible evidence that the Defendant struck Tilman with the blade of his sword with such intensity as to leave a mark on the bone of the victim's shoulder blade. Although no vital organ is present at that part of the human anatomy, it is unresolved whether the hacking by the Defendant could have fatally severed the victim's carotid artery, a major source of blood to the head.

17. The majority asserts that the cause of the victim's death was the gunshot wound to the head. Accordingly, they conclude that the Defendant was not the direct perpetrator of Tilman's murder, as the shot was fired by Lino Barreto. Having said that, the majority still acknowledges the possibility of the Defendant having criminal responsibility for the victim's death under the theory of joint criminal enterprise. See Judgement at p. 19.

Joint Enterprise

18. The majority states that a "joint criminal enterprise must require a minimum of coordination amongst those who participate in the action, in order to assure that the aim of the action is properly pursued." Id. "By adhering to a plan or a common (i.e. shared) purpose, the accused would further the criminal activity by lending moral support to someone else's execution." Ibid. at p. 20.

19. In the present matter, the majority concludes that the necessary elements of a joint criminal enterprise are not present and thus the Defendant's individual criminal responsibility, if any, must be based on other grounds.

20. Essentially, the majority concludes that whatever common purpose existed was among those chasing Alvaro Tilman after his escape, it did not include the intent to kill him. "[T]here is no reason to believe, nor has it been shown, that at the onset of the pursuit, the will of the pack of pursuers was to kill." Id. The "first objective" was to catch the escapee.

21. The majority then states that the idea of killing Tilman arose later and was independent of the original purpose of the group, which in their view was merely to apprehend the victim. The main opinion treats the words of Paulino Barros, in which he encouraged Lino Barreto to shoot Tilman, as the source of the idea to

kill the victim. "It is assumed that the intention to kill Alvaro was not present in Lino Barreto and in Francisco Pereira before the suggestion." Id. The majority goes on to conclude that in the end there was no evidence of a shared intention between Barreto and Pereira, stating that "[t]wo independent wills prompted two independent actions aimed at the same end, the death of the victim." Id. So viewed, there was no common purpose linking the two assailants and the criminal responsibility of each must be evaluated separately.

22. I respectfully disagree with the majority concerning the manner in which the law of joint enterprise applies to the present case. Under Section 14.3(d) of UNTAET Regulation 2000/15, a person is criminally responsible for a serious crime if he "contributes to the commission...of such a crime by a group of persons acting with a common purpose." Pursuant to Section 14.3(d)(i) and (ii) the contribution of the person must be intentional and "shall either (i) be made with the aim of furthering the criminal activity or criminal purpose of the group...or (ii) be made in the knowledge of the intention of the group to commit the crime."

23. For a person to be criminally responsible under these provisions, the following must be established:

    (a) The person shall in some way contribute to the commission of a crime;
        (i) by a group of persons acting with a common purpose, and

    (b) The contribution of the person to the commission of the crime shall be
        (i) intentional and
        (ii) made with the aim of furthering the criminal activity or purpose of the group, or
        (iii) made in the knowledge of the intention of the group to commit the crime.

24. In order to assign criminal responsibility under Section 14.3(d) it must first be determined whether the Defendant contributed to the commission of a crime committed by a group of persons acting with a common purpose. The majority concludes that while it was proved that the group chasing Tilman intended to catch him, there is no evidence that it had any intent to kill him. Again, I respectfully disagree.

25. The existence of a common purpose may be established by either direct or indirect evidence of an agreement among the members of the group. Moreover, the agreement may be explicit or implicit as determined by the circumstances of the case. In the present matter, I conclude that the circumstantial evidence establishes, beyond a reasonable doubt, that there was an implicit agreement or understanding among the pursuers of Alvaro Tilman that his escape was to be prevented, using deadly force if necessary.

26. In support of this conclusion, I note the following:

(a) The credible evidence before the Court establishes that the Defendant was one of several militia guards whose job was to ensure that the independence supporters held prisoner at the Zumalai detention camp did not escape. The issue of securing prisoners was a significant one, to the point that specific orders were given on at least one occasion as to what steps should be taken in the event of an escape. Indeed, the majority states that it "has no reluctance in admitting that such orders may have existed and may have been repeated in relation to the militia guarding the Zumalai detention camp." See Judgement at p. 19. The orders given were to apprehend and kill those detainees who escaped from the camp. There was credible evidence presented to the Court that the Defendant was present when those orders were given. Moreover, one witness stated that these orders were repeated every day, although not with specific reference to any particular prisoner.

(b) The effort to capture Tilman following his escape was immediate and overwhelming. There was credible evidence that over 100 armed militia members participated in the chase. The defendant carried a surik, which is a type of sword with a blade. Lino Barreto carried a rifle. Other persons carried various weapons of similar types.

(c) There was evidence before the Court that the Defendant hacked Tilman with his sword in the bush near the school. (The panel took a view of the crime scene and observed that the school is approximately half way between the detention camp and the point at the river where the victim died.) In this version, the Defendant came close to Tilman who had no weapon and tried to throw rocks at his pursuer. The Defendant then reached out with his sword and hacked the shoulder of the victim causing a serious wound in the shoulder area.

(d) There was also evidence that Tilman continued on to the Mola River where he entered the water in an effort to escape those who were chasing him. The uncontroverted evidence is that the Defendant hacked him with his sword while chasing him in the river.

(e) Whether the Defendant hacked the victim both near the school and in the river is not certain. For purposes of this separate opinion I adopt, without accepting, the version found credible by the majority, to wit: that the Defendant attacked the victim with his sword only in the river where he wounded him severely in the shoulder.

27. These facts amount to circumstantial evidence that establishes, beyond a reasonable doubt, that there was an implicit agreement or understanding among the pursuers of Alvaro Tilman that his escape was to be prevented, using deadly force if necessary. The orders that had previously been given, the overwhelming

force sent in pursuit of one escapee, and the fact that the pursuers were armed with weapons capable of achieving a fatal purpose all support this view. Moreover, at the river, both the Defendant and Lino Barreto used deadly force on the victim, regardless of who struck the fatal blow or shot. It is evident on these facts that those pursuing Tilman intended to prevent his escape using all available means, even if it required killing him.

28. The majority notes that Paulino Barros, who was at the riverbank with Barreto, told him to shoot and kill Tilman. The majority offers this statement as proof that there was no previous intent on the part of Barreto to perform that act. Indeed, the main opinion goes so far as to suggest that these same words prompted the Defendant to form, for the first time, the intention to kill Tilman. I do not adopt this view.

29. As previously noted, there is sufficient credible evidence before the Court to establish that there was a common purpose motivating the pursuers of Tilman. The statement of Barros constituted nothing more than words of encouragement in service of the enterprise in which he urged his confederate on in their joint venture. The statement of Barros that Tilman should be killed as he fled into the river did not amount to a new idea suddenly raised in the midst of the chase. Rather, his words were an expression of the common understanding of the length to which the pursuers would go to stop Tilman.

30. Viewing the evidence in this manner, I conclude that the requirements of Section 14.3(d) have been satisfied. The group of militia members who set out in pursuit of Tilman was actuated by a common purpose, which was to prevent his escape, using all available means, including deadly force. The Defendant was a member of that group who contributed to the commission the murder of Alvaro Tilman as a crime against humanity. In doing so he acted intentionally and with the aim of furthering the criminal activity and purpose of the group.

31. This conclusion is consistent with previous decisions of the Special Panels in which criminal responsibility has been imposed pursuant to Section 14.3(d). Thus, in Prosecutor v. Jose Cardoso[8] the Court asserted that the defendant had taken part in a joint criminal enterprise. The Court concluded that from his actions it could infer that the defendant "had the intention to further the common purpose of the KMMP militia to target supporters of independence."[9] Similarly, in the case of Prosecutor v. Joseph Leki[10] the Special Panels held the defendant responsible under Section 14.3(d). The Court stated: "Since he joined the militia, the accused obviously knew about the purposes of the group. To participate in those operations, regardless he was carrying a gun or not, was his contribution to the

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[8] Case No. 04/2001 (Decided 5 April 2003. Ntukamazina, Presiding).

[9] See Cardoso, Judgement at pars. 371-372.

[10] Case No. 05/2000 (Decided 11 June 2001. Costa, Presiding).

killings of the first three victims. The evidence he was 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 in the commission of the three deaths." Consistent with Leki, the Court wrote in Prosecutor v. Mateus Tilman[11] that it had "no doubts that the accused gave his contribution" to the attempted murder of the victim "in the knowledge of the intention of the group to commit the crime."[12] The panel concluded that the defendant was criminally responsible for attempted murder even though he was not the direct perpetrator of the crime. According to the Court, "Just holding a petrol [can] and machete during a siege maneuver against unarmed civilians, he played an undoubting role to the commission of the attempted murders."[13] See also Prosecutor v. Anastacio Martins and Domingos Goncalves[14] which stated as follows: "The material or objective element or *actus reus* will be a cooperative behavior...which by adhesion to the action of the group, gives a contribution to the achievement of the common aim...The fact that the two accused did something specific in the course of the action...distinguishes their contribution in comparison with the simple presence of the other militia members which were on the spot but have not been prosecuted for their merely passive role...On these premises the multiplicity of murders and other crimes...is merged in an unity were (sic) the identity of the single crime is lost and the participants bear the burden of the whole. In the end, it was a single, yet multifaceted, action and those who gave a contribution to it are responsible not for the single element that they directly committed but for its entirety."[15]

Conclusion

32. Based on the foregoing and consistent with my previous Separate Statement attached to the Disposition of the Decision filed in the above matter on 18 March 2005, I have signed the Judgement in the present case subject to the following:

33. I agree with the majority of the panel that a verdict of guilty of Crimes Against Humanity should be entered against the Defendant with respect to Count One of the indictment.

34. I do not agree with the majority that the Crime Against Humanity in Count One should be for attempted murder. I conclude that the qualification of the crime in

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[11] Case No. 08/2000 (Decided 24 August 2001. Pereira, Presiding).

[12] See Tilman, Judgement at par. 50 citing Section 14.3(d)(ii).

[13] Ibid at par. 47.

[14] Case No. 11/2001 (Decided 13 November 2003. Florit, Presiding).

[15] See Martins, Judgement at p. 14.

Count One should be for Crimes Against Humanity in the form of the murder of Alvaro Tilman.

35. I agree with the majority of the panel that a verdict of Crimes Against Humanity should be entered against the Defendant with respect to Count Two of the indictment. I further agree that the qualification of the crime in Count Two should be for Crimes Against Humanity in the form of Persecution for the acts stated in the indictment.

36. I do not agree with the majority concerning the Persecution charge as relates to Alvaro Tilman and I would also add the murder of Alvaro Tilman as one of the acts in relation to which the Defendant is guilty of Persecution.

37. With respect to the sentencing of the Defendant, I conclude that a more severe sentence would be appropriate in the circumstances of this case, considering my view that the Defendant is criminally responsible for the murder of Alvaro Tilman.

38. The foregoing Separate Opinion is submitted with sincere respect for the majority of the panel and the Judgement that it has entered.

Judge Phillip Rapoza
Special Panels for Serious Crimes

Date: 27 April 2005

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