REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRITAL de DILI

SECÇÃO CRIMES GRAVES

Case No. 04a/2001
Date: 05 /12/2002
Original: English

Before:
Judge Sylver Ntukamazina, Presiding
Judge Benfeito Mosso Ramos
Judge Maria Natercia Gusmao Perreira

Registrar: Joao Naro

Judgement of: 05 December 2002

THE PROSECUTOR

V.

Joao Franca da Silva Alias Jhoni Franca

JUDGEMENT

The Office of the Public Prosecutor:
Mr. Essa Faal
Mrs Shamla Alagendra

Counsel of the accused
Mr. Siphosami Malunga

INTRODUCTION

1 The trial of Joao Franca da Silva Alias Jhoni Franca (aged 27, single, born on the 26th July 1975 in Lolotoe, District of Bobonaro, East Timor) before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereafter: the "Special Panel"), responsible for the handling of serious criminal offences, commenced on the 4th March 2002, was suspended many times including a suspension of 5 months for unvaibility of judges, and concluded today, the 6th December 2002 with the rendering of the decision.

2 After considering the plea of guilty made by the accused, all the evidence presented during the trial, and the written and oral statements from the office of the Prosecutor General (hereafter: the "Public Prosecutor") and also the defendant and the defense for the defendant, the Special Panel.

HEREBY RENDERS ITS JUDGEMENT.

A. THE SPECIAL PANEL

3 The Special Panels were established, within the District Court in Dili, pursuant to Section (hereafter "Sect.") 10 of UNTAET Regulation (hereafter "U.R.") no. 2000/11 as amended by U.R 2001/25, in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of U. R. 2000/15.

B. PROCEDURAL BACKGROUND

4 On 6 February 2001, the Public Prosecutor filed before the Dili District Court a written indictment (in English version) against the accused 2nd Lt. Bambang Indra, Joao Franca Da Silva aka Jhoni Franca, Jose Cardoso Mouzinho, Fransisco Noronha and Sabino Gouveia Lete. The accused Jhoni Franca was charged in five counts with Unlawful deprivation of physical liberty as crime against humanity (count 1) or in alternative unlawful deprivation of physical liberty (count 2), torture as crime against humanity (count 3) or in alternative

serious maltreatment (Count 4), Persecution for political reasons as crime against humanity (Count 16).

5 Attached to the indictment were copies of the following documents: the statements of the witnesses Orlando Leao Ati, Domingos Augusto, Cyrus Banque, Norberto Belo, Joao Belo, Hermino Belo, Amelia Belo, Aurea Cardoso, Jose Cardoso Ferreira aka Mouzhinho, Mariana da Cunha, Tomas Da Costa, Olivia Juvita Dos Reis, Agrefina Dos Santos, Anibal Ferrreira, Mario Gonsalves, Rosa De Jesus, Jose Gouveia Leite, Fernanda De Deus Martins, Adao Manuel, Jose Moniz, Isabel Da Costa Maia, Angela Tereza Monis, Lius Monis, Jose Monis, Eugenio Noronha, Jose Perreira, Judith de Deis Sarmento, Anapaula Soares Ximenes. The list of the victims that forms an integral part of the indictment was attached as annex A and contained Victim A, Victim B, Victim C, Amelia Belo, Mariana Da Cunha Herminio Da Graca, Jose Leite, Aurea Cardoso and her two children, Rosa De Jesus, Bendito Da Costa, Adau Manuel, Mario Gnsalves, Carlito Freita, Mariana Da Costa, Antonio Franca, Augusto Noronha, Villagers of Guda, Gudatas, Raimea, Sibi and other villages in Lolotoe. The full names of victim A, B and C were contained in Annex B filed together with the indictment, which precise that the list of victims shall not be disclosed, that the victim has to be referred to only by the pseudonyms given to them. All annexes were an integral part of the indictment.

6 The Court clerk provided notification of the receipt of the indictment to the accused and to the legal representative of Joao Franca Da Silva alia Jhoni Franca, as well as to the co-accused persons Sabino Gouveia Leite and Jose Cardoso Ferreira aka Mouzinho, and their legal representatives, on 8 February 2001, pursuant to Sect. 26.1 and 26.2 U.R. 2000/30.

7 Joao Franca da Silva Alias Jhoni Franca was arrested and detained on 5 February 2001. His arrest was then confirmed and ordered by the Investigating Judge.

8 On 16 February 2001 the Prosecution submitted an application for protective measures for victims of sexual offenses pursuant to Section 28.2 (b) of Regulation 2000/30 on the Transitional rules of Criminal Procedure with an affidavit in support of protective measures for victims of sexual offenses.

9 On 3 April 2001, the Public Prosecutor made a request for issue of arrest warrant of the accused persons Fransisco Noronha and Bambang Indra believed to be residing in Indonesia.

10 On 5 April 2001, the Public Prosecutor transmitted to the Court the following original documents pertaining to detention of Jhoni Franca Da Silva and Sabino Gouveia Leite: Warrant of arrest for Jhoni Franca dated 5 February 2001, detention orders for Jhoni Franca Da Silva dated 6 February and 5 March 2001, warrant of arrest of Sabino Gouveia Leite dated 1st December 2000, detention Order of sabino Gouveia Leite dated 6 December 2000, detention order for Sabino Gouveia Leite dated 5 January 2001 and detention order for Sabino Gouveia Leite dated 5 February 2001. She submitted also the witnesses statements of Anibal Pereira (27/9/00), Mario Gonsalves (4/8/00), Rosa de Jesus (4/8/00), Jose Gouveia Lete (18/8/00), Fernanda de Deus Martins (2/10/00), Adau Manuel (4/8/00), Isabel da Costa Maya (7 /9/00), Angela Teresa Monis (6/7/00), Luisa Monis (27/09/00), Jose Moniz (18/8/00), Eugenio Noronha (3/8/00), Jose Pereira (26/9/00), Judith Dos Reis (5/6/00), and Anapaula Soares Ximenes.

11 At the same date, the original following witnesses statements were produced before the Special Panel: Witnesses statements of Orlando Leao Ati (25/9/00), Domingos Augusto (28/11/00), Cyrus Banque (14/9/00), Norberto Belo (29/9/00), Joao Belo (03/8/00), Herminio Belo (3/8/00), Amelia Belo (4/8/00), Aurea Cardoso (18/8/00), Jose Cardoso (27/7/00), Mariana Da Cunha (8/9/00), Tomas Da Costa (26/9/2000), Olivia Juvita Dos Reis (26/9/00) and Agrefina Dos Santos (17/8/00).

12 The preliminary hearing commenced on the 6th April 2001 and finished on the 5th July 2001.

13 On 6 April 2001, the Special Panel decided to extend time for the defense to prepare the case, the severance of the charges against Bambang Indra and Fransisco Noronha from the other charges in the indictment, to issue a warrant of arrest requested for Bambang Indra and Fransisco Noronha and delivered a decision for protective measures of the three women who were allegedly victims of rape, which will be referred to as " Victim A, Victim B and Victim C". The Court also extended the detention of the accused Joao Franca da Silva alias Jhoni Franca and Sabino Gouveia Leite for the duration of the trial. The preliminary hearing was postponed to 27 April 2001.

14 On 27 April 2001, during the preliminary hearing, the prosecution responded orally and submitted also written response to the preliminary motion filled by the defense. The Court took the case to decide in chamber on the motion raised by the defense. The Court found that the charge in the indictment couldn't be deemed accurate pursuant to Section 24 U.R 2000/30. The Public Prosecutor was granted leave to amend the indictment on the 28th May 2001, and was given until the 1st June 2001 to submit the amended indictment. The Defense was asked to file the response to the amended indictment before the 7th June 2001. The preliminary hearing was postponed to 7 June 2001 for the Public Prosecutor to file the amended indictment.

15 On 25 May 2001, the Public Prosecutor filed in English the amended indictment against the accused Joao Franca da Silva aka Joao Franca Da Silva aka Jhoni Franca, Jose Cardoso Ferreira aka Mouzhino and Sabino Gouveai Leite. The Bahasa version of the amended indictment was submitted on 4 June 2001.

16 In the amended indictment, Jhoni Franca is charged of 8 counts of: (Count 14) Crimes against humanity: Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law of Bendito Da Costa, Amelia Belo, Adao Manuel, Mario Goncalves, Jose Gouveia Leite, and Aurea Cardoso and her two children in Lolotoe sub-district, Bobonaro district, between May and July 1999, as part of a widespread or systematic attack against a civilian population with knowledge of the attack, a crime stipulated under Section 5.1(e) UNTAET Regulation 2000/15; (Count 15) Crimes against humanity: Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Herminio Da Graca in Lolotoe sub-district, Bobonaro district, between May and July 1999, as part of a widespread or systematic attack against a civilian population with knowledge of the attack, a crime stipulated under Section 5.1(e) UNTAET Regulation 2000/15; (Count 16) Crimes against humanity: Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Mariana Da Cunha in Lolotoe sub-district, Bobonaro district, sometime in May 1999 , as part of a widespread or systematic attack against a civilian population with knowledge of the attack a crime stipulated under Section 5.1(e) UNTAET Regulation 2000/15; (Count 17) Crimes against humanity: Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Victim A, Victim B and Victim C in Lolotoe sub-district, Bobonaro district, sometime between May and July

1999 , as part of a widespread or systematic attack against a civilian population with knowledge of the, crime stipulated under Section 5.1(e) UNTAET Regulation 2000/15; (Count 18) Torture, as crimes against humanity, of Bendito Da Costa, Adao Manuel, Mario Goncalves and Jose Gouveia Leite, between May and July in Lolotoe sub-district, Bobonaro district, as part of a widespread or systematic attack against a civilian population with knowledge of the attack, a crime stipulated under Section 5.1(f) UNTAET Regulation 2000/15; (Count 19) Crimes against humanity: other inhumane acts of similar character intentionally causing great suffering or serious injury to body or mental or physical health of Mario Goncalves in Lolotoe Sub-district, Bobonaro district, sometime in May 1999, as part of a widespread or systematic attack against a civilian population with knowledge of the attack, a crime stipulated under Section 5 (k) of UNTAET Regulation 2000/15; (Count 20) Crimes against humanity: other inhumane acts of similar character intentionally causing great suffering or serious injury to body or mental or physical health of the civilians detained at various places in Lolotoe sub-district, between May 1999 and July 1999, in Lolotoe Sub-district, Bobonaro district, as part of a widespread or systematic attack against a civilian population with knowledge of the attack a crime stipulated under Section 5 (k) of UNTAET Regulation 2000/15; (Count 21) Crimes against humanity: Persecution of supporters of independence of East Timor in Lolotoe Sub-District, Bobonaro District, between May and September 1999, as part of a widespread or systematic attack against a civilian population with knowledge of the attack, a crime stipulated under Section 5.1(h) of UNTAET Regulation 2000/15.

17 On 7 June 2001, the Court decided to grant the defense additional time to prepare the defense to the indictment, and set the date of the next hearing to 4th July 2001.

18 On 4 July 2001, the accused Joao Franca da Silva, Jose Cardoso and Sabino Gouveia Leite did not appear in Court. The hearing was postponed to 5 July 2001 for the prison manager to provide the presentation of the accused before the Court.

19 On 5 July 2001, the Preliminary hearing was held pursuant to Section 29 of UNTAET Regulation 2001/25. At the hearing the Court ascertained if the defendant Jhoni Franca had read the indictment or if the indictment had been read to him, and asked if he understood the nature of the charges, his right to

be represented by a legal advisor, his right to remain silent, to plead guilty or not guilty to the charges, as provided for in Sect. 30.4 U.R. 30/2000. The Defendant made a statement that he had read the indictment and understood the charges against him. The same procedure was followed for his co-accused Jose Cardoso and Sabino Gouveia Lete. The Court then accepted the list of evidence submitted by the Public Prosecutor and the list of witnesses submitted by the defence. The Court dismissed the motion filled by the defence of Jhoni Franca requesting not to submit the statements of the accused and the witnesses to the Court before the trial. The Court also overruled the request for release of the accused Sabino Gouveia Leite. The date of the trial was fixed on the 23rd August 2001.

20 On 10th July 2001, considering that the Special Panel for Serious Crimes was dealing for three weeks with the trial hearing of another case (Los Palos case), decided to adjourn the trial hearing of Joao Franca alias Jhoni Franca case to 18 September 2001. One month later, on 13 August 2001, the preliminary hearing of the case was adjourned sine die, because of the continuation of the trial of Los Palos case.

21 On 22 October 2001,the Public Prosecutor submitted the following statement in Bahasa Indonesia: statements of Orlando Leao Ati (25/9/00), Domingos Augosto (28/11/00), Cyrus Banque (14/9/00), Norberto Belo (29/9/00), Joao Belo (3/8/00), Herminio Belo (03/8/00), Amelia Belo (04/8/00), Aurea Cardoso (18/8/00), Jose Cardoso (27/7/00), Mariana Da Cunha (08/9/00), Tomas Da Costa (26/9/00), Olivia Juvita Dos Reis (26/9/00), Agrefina Dos Santos (22/10/00), Anibal Perreira (27/9/00), Mario Gonsalves (04/8/00), Rosa De Jesus (04/8/00), Jose Gouveia Lete (18/8/00), Fernanda DE Deus Martins (2/10/00), Adao Manuel (04/8/00), Isabel da Costa (07/9/00), Victim A (06/7/00), Luisa Monis (27/9/00), Jose Monis (18/8/00), Eugenio Noronha (03/8/00), Jose Perreira (26/9/00), Judith Dos Reis Sarmento (5/6/00) and Anapaula Soares Ximenes (03/8/00)

22 On 11 November 2001, date of the conclusion of the trial of Los Palos case, the date of the trial of the present case was scheduled on 27 November 2001.

23 On 16 November 2001, the Public Prosecutor submitted to the Court the following documents: Statement of Victim B (25/5/00) in Tetum and English, and the statement of Victim C (06/7/00) also in Tetum and English.

24 On 20 November 2001, the Public Prosecutor filled the following documents: statements of Bendito Da Costa dated 4 August 2000 in English and Tetum, statement of Herminio da Costa dated 7 September 2000 in English and Bahasa Indonesian, "Situation of Human Rights in East Timor, Note by the Secretary General" in English and Bahasa Indonsesian, "Report of the Indonesian Commission on Human Rights violation in East Timor", January 2000 in English, Agenda Item 96 Question of East Timor, in English and Bahasa Indonesian, Agenda Items 9 and 14 Commission on Human rights fifty-sixth session in English.

25 On 27 November 2001, during the hearing, the defense for Joao Franca and his co-accused filed a request for release of the accused Jhoni Franca pending the trial. The Court rejected the request from the defense and decided the extension of detention of the accused for the duration of the trial. The trial hearing was scheduled on the 8th February 2002.

26 On 13 December 2001, the Public Prosecutor transferred to the Court a summary autopsy report on bodies exhumed in East Timor from February 16 to August 26, 2000.

27 On 8 February 2002, the Public Prosecutor, the accused and their legal representatives, upon being called, attended at the hearing. After opening the session, the court asked the parties whether they were ready for the trial, in which case the Court will go ahead with the opening statement of the Public Prosecutor. All the parties informed the Court that they were ready, however, the Public Prosecutor raised the issue of submission of what kind of evidence the defense intends to present for the trial. The defense replied that there were still trying to meet the witnesses and looking for the evidence to submit to the Court. The Court ordered the defense to submit a list of its evidence and the witnesses it intended to present for the trial by the 15th February 2002. The Court postponed the trial hearing of the case to 22 February 2002. As 22nd February 2002 was a UN holiday, the hearing of the case was postponed on 4 March 2002.

28 On 15 February 2002, the defense of the 3 accused persons submitted the list of their witnesses. The Defense of Jhoni Franca submitted a list of 9 witnesses composed of Manuel do Rego, Liang Monis, Carlos da Costa, Filomeno Alfonso Monis, Ronaldo Da Costa, Paulo Amaral, Luis Alfonso, Jacinto Miranda and Fatima Baas.

29 On 25 January 2002, the Public Prosecutor submitted the original letter from Sabino Gouveia Leite to Jose Gouveia Leite dated 6 may 1999.

30 On 20 February 2002, the Pubic Prosecutor filled an application for leave to further amend the indictment against the accused persons, pursuant to Section 32 of UNTAET regulation 2000/30. The application was reiterated during the trial hearing on the 4th March 2002, where the prosecutor explained the content of the motion to further amend the indictment. The Court decided to grant leave to the Public Prosecutor to amend the indictment on the 27th March 2002 and decided that the proposed amendment be part of the indictment.

31 The ordinary trial was scheduled on the 5th March 2002. It was conducted over 12 Sessions (From 5 March 2002 until 29 October 2002).

32 On the 5th March 2002, the Public Prosecutor delivered his opening statement and read out the indictment in an open hearing. The Defendant Jhoni Franca as well as his co-accused did not want to make any statement concerning the charges against them. The defense Counsel for Jose Cardoso objected to the use of the terms "victims" when referring to the three women alleged victims of rape and proposed the Court that the term of "witnesses" be used instead. The Special Panel, after hearing both parties, ruled against the objection made by the defense Counsel for Jose Cardoso. The latter being dissatisfied with the decision of the Special Panel filed an application to excuse the judges of the special Panel from their functions as Court of trial pursuant to Section 20.1 UNTAET Regulation 2000/11. At the request of the defense, the proceedings were suspended pending the decision of the Judge Administrator of Dili District Court on the defense application. The prosecution reacted to the request from the Defense and prayed the judge administrator to dismiss the application by the defense Counsel and find that there is no basis for the application. The Judge Administrator dismissed the application from the defense on 11 March 2002. Instead he ordered the same judges of the Special Panel to continue handling the trial of the case until its completion.

33 On 11 March 2002, the Court decided to continue the trial of the case on the 27 March 2002, and thereafter the hearing was postponed to 8 April 2002.

34 From 8 to 12 April 2002, the Court heard the testimony of the witness Bendito Da Costa who was questioned by the Court, the Public Prosecutor

and the defense of the 3 accused persons. The hearing was postponed to 24 April 2002 to hear other prosecution witnesses.

35 On the 24th April 2002, considering that one of the judges involved in the case was sick, decided to postpone the hearing of the case on the 29 April 2002. However, on that last date, the hearing was postponed to 3 May 2002 in order to wait for the legal representative of the accused Jose Cardoso who was not available.

36 On 3, 7, 8, 9, 14 and 15 May 2002, the Court heard the testimonies of the witnesses Jose Gouveia Lete and Mario Gonsalves who were questioned by the Court, the Public Prosecutor and the defense. The hearing was postponed to 27 May 2002 in order to give time to East Timorese people to prepare the celebration of the Independence Day on 20 May 2002.

37 On 27 May 2002, considering that one of the judges was not available; the Court decided to postpone the trial of the case on the 8th July 2002. The case was later postponed to 16 September 2002, 15 October 2002 and 21 October 2002 because some judges of the panel were not available.

38 On 21 October 2002, the accused Jhoni Franca made a confession of guilty. He made a statement and pleaded guilty to the 4 charges of Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Gonsalves, Jose Gouveia Lete, and Aurea Cardoso and her two children, Herminio da Graca, Mariana Da Cunha, Victim A, Victim B and Victim C, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15. The accused also pleaded guilty to the charge of torture of Bendito Da Costa, Adao Manuel, Mario Gonsalves, and Jose Gouveia Lete, as crimes against humanity, contrary to Section 5.1(f) UNTAET Regulation 2000/15. The hearing was postponed on the 22nd October 2002 for the Court to verify the validity of the guilty plea.

39 After verifying the validity of his guilty plea, particularly in light of Section 29A of UNTAET regulation 30/2000, the Special Panel entered a plea of guilty against the accused on 22 October 2002, and convicted him on 5 charges of the indictment. The Public Prosecutor withdrew the remaining 2 charges of other inhumane acts of similar character intentionally causing great suffering or serious injury to body or mental or physical health, and one charge of persecution. The Court agreed with the withdrawal of those

remaining three counts and decided severance of the case of Jhoni Franca from the case of his former co-accused persons Jose Cardoso and Sabino Gouveia Lete. The hearing was postponed to 24 October 2002 for the pre-sentencing hearing.

40 On 24 October 2002, the Court heard the testimonies of the witnesses Adelino Franca, Jacinto Maranda, Fatima and Fransisco Domina Martins, with respect to the personality of the accused person. The hearing was then postponed to 29 October 2002 for the final written decision.

41 On 29 October 2002, the Court read out to the public the disposition of the decision and decided to issue later the final written decision, what is done now with the release of the present judgment.

42 Interpreters into English, Bahasa Indonesian, Tetum and Bunak languages assisted every act before the Court.

C. THE GUILTY PLEA

43 As stated earlier, the accused pleaded guilty to the charge set forth in the indictment against him. In accordance with section 29A.1, the Special Panel sought to verify the validity of guilty plea. To this end, the Panel asked the accused:

a) If he understood the nature and the consequences of the admission of guilt;
b) If his guilty plea was voluntarily made, if he did it freely and knowingly without pressure, or promises;
c) If his guilty plea was unequivocal, i.e. if he was aware that the said plea could not be refuted by any line of defense;
d) If he had consulted with his legal representative regarding his guilty plea.

44 The accused replied in the affirmative to all these questions. He further admitted in order to support his guilty plea all the facts of the case as contained in the indictment and in the materials that were submitted to the Court. The Special panel accepted the plea of guilty of the accused. Furthermore, it was found that all the essential facts required to prove the crime to which the admission of guilty relates have been established as

required by Section 29A.2 of regulation 2000/30. The accused Joao Franca da Silva Alias Jhoni Franca was convicted of Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Gonsalves, Jose Gouveia Lete, and Aurea Cardoso and her two children, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Herminio da Graca, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Mariana Da Cunha, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Victim A, Victim B and Victim C, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15; Torture of Bendito Da Costa, Adao Manuel, Mario Gonsalves, and Jose Gouveia Lete, as crimes against humanity, contrary to Section 5.1(f) UNTAET Regulation 2000/15.

D. APPLICABLE LAW

45 As specified in UNTAET Regulation No.1/1999, U.R.No.11/2000 as amended by U.R.2001/25, and U.R.No. 15/2000, the Special Panel for Serious Crimes shall apply:

- UNTAET Regulations and directives;
- Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
- Pursuant to Sect. 3 UNTAET Regulation No.1/1999, the law applied in East Timor prior to 25.10.1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as they do not conflict with the internationally recognized human rights standards, the fulfillment of the mandate given to UNTAET under the United Nations Security Council Resolution 1272 (1999), or UNTAET regulations or directives.

F. FACTS OF THE CASE

46 The prosecutor described how the accused Joao Franca Da Silva alias Jhoni Franca, as Commander of the Kaer Metin Merah Putih militia in Lolotoe, with authority and control over members of the KMP militia, he among others, was responsible for:

47 The imprisonment or other severe deprivation of Physical Liberty in violation of fundamental rules of international law, of Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Gonsalves, Jose Gouveia Lete, and Aurea Cardoso and her two children in Lolotoe Sub-district Bobonaro District, between May and July 1999[1].

48 The imprisonment or other severe deprivation of Physical Liberty in violation of fundamental rules of international law, of Herminio Da Graca, in Lolotoe Sub-district Bobonaro District, between May and July 1999[2].

49 The imprisonment or other severe deprivation of Physical Liberty in violation of fundamental rules of international law, of Mariana Da Cunha, in Lolotoe Sub-district Bobonaro District, between May 1999[3].

50 The Imprisonment or other severe deprivation of Physical Liberty in violation of fundamental rules of international law, of Herminio da Graca, Maria Da Cunha, Victim A, Victim B and Victim C in Lolotoe Sub-district, Bobonaro District, between May and July 1999[4].

51 The torture of Bendito Da Costa, Adao Manuel, Mario Gonsalves and Jose Gouveia Lete, between May and July 1999, in Lolotoe Sub-district, Bobonaro District[5].

52 The Prosecutor underlined that those acts or omissions by the accused were undertaken as part of a widespread or systematic attack directed against the civilian population, and especially targeting those who were considered to be pro-independence, linked to or sympathetic to the independence cause for East Timor, with knowledge of the attack.

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[1] Amended indictment, paragraphs 28 to 48.
[2] Amended indictment, paragraphs 50 to 52.
[3] Amended indictment, paragraphs 53 to 59.
[4] Amended indictment, paragraphs 60 to 68
[5] Amended indictment, paragraphs 28 to 48

53 The accused is individually criminally responsible for the crimes alleged against them in this indictment in violation of Section 14 of UNTAET Regulation 2000/15. Under section 14.2 and 14.3(a) to (c) individual criminal responsibility results if the individual committed, planned, instigated, ordered, solicited, induced, aided, abetted or otherwise assisted in the commission of the crimes, or attempted commission. Individual criminal responsibility also results if an individual in any other way contributes to the commission or attempted commission of the crime, if such contribution is intentional and is either (i) made with the aim of furthering the criminal activity or purpose of a group; or (ii) is made with the knowledge of the intention of the group to commit the crime.

54 Joao Franca Da Silva alias Jhoni Franca is criminally responsible as superior for the acts of his subordinates in violation of Section 16 of UNTAET Regulation 2000/15. Superior criminal responsibility is the responsibility of a superior for the acts of his subordinates if the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary steps or reasonable measures to prevent such acts or to punish the perpetrators thereof.

55 In his final statement, the Public Prosecutor requested the Court to sentence Joao Franca Da Silva Alias Jhoni Franca 6 years of imprisonment to Count 14, 1 year imprisonment to count 15, 1 year of imprisonment to count 16, 6 years imprisonment to count 17and, 7 years imprisonment to count 18.

56 The defence admitted to all the allegations contained in the indictment with respect to each of the charges to which he is pleading guilty. He admitted all the allegations contained in the paragraphs 28 to 48, 50 to 52, 53 to 59, and 60 to 68 of the indictment. He further admits that as Commander of Kaer Metin Merah putih militia in Lolotooe, he, among others, was responsible: (1) for the imprisonment or severe deprivation of physical liberty of Bendedito Da Costa, Amelia Belo, adao Manuel, Mario Gonsalves, Jose Gouveia Leite, Aurea Cardoso and her two children in Lolotoe Sub-District, between May and July 1999, in violation of fundamental rules of international law, (2) for the imprisonment or severe deprivation of physical liberty of Herminio Da Graca, in Lolotoe Sub-District, between May and July 1999, in violation of fundamental rules of international law, (3) for the imprisonment or severe deprivation of physical liberty of Mariana Da Cunha in Lolotoe Sub-District, sometimes in May 1999, in violation of fundamental rules of international law, (4) for the imprisonment or severe deprivation of physical liberty of Victim A, Victim B and Victim C in Lolotoe Sub-District, between May and

July 1999, in violation of fundamental rules of international law, (5) for the torture of Bendicto da Costa, Adao Manuel, Mario Gonsalves, and Jose Gouveia Leite, in Lolotoe Sub-District, in May 1999, in violation of fundamental rules of international law.

57 The accused admits also that the crimes listed above to which he is unequivocal and unconditionally admitting were committed as part of widespread and systematic attack against a civilian population with knowledge of the attack.

58 From the submissions of the Public Prosecutor and the admissions made by the accused persons, it is clear that the offences alleged have been committed in 1999 before the promulgation of U.R.2000/15, U.R.2000/11 and U.R.2000/30 on Transitional Rules of Criminal Procedure as amended by U.R.2001/25, which apply in the matter as underlined above[6]. According to the principle nullum crimen sine lege, the law applicable has to be the law which was in force when the offences were committed. Therefore, the first issue to be analyzed by this Court will be the applicability of UNTAET regulations with respect to the crimes the accused is charged.

E. APPLICABILITY OF UNTAET REGULATIONS WITH RESPECT TO THE CRIMES THE ACCUSED JHONI FRANCA IS CHARGED.

59 The principle *nullum crimen sine lege*, no crime without law, has developed as a general principle of criminal law and as a rule prohibiting retroactive application of criminal laws. It is counted among the so-called "principles of legality,"[7] and it may be found in various international legal instruments including international human rights and humanitarian law treaties.[8]

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[6] Op.cit. Page 12

[7] M. Cherif Bassiouni, The Sources and Content of International Criminal Law: A Theoretical Framework, in International Criminal Law, Second Edition, Volume I, Crimes, (M. Cherif Bassiouni ed. 1999) at 32.

[8] *See*, for example, Article 11(2) of the Universal Declaration of Human Rights; Article 15(1) of the ICCPR; Article 7(1) of the European Convention on Human Rights; Article 9 of the America Convention on Human Rights; Article 7(2) of the African Charter on Human and Peoples' Rights; Article 67 of the Fourth Geneva Convention; and Article 13 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind.

60 The principle *nullum crimen sine lege* is found in Section 12 of UNTAET Regulation No. 2000/15, which reads as follows:

> *12.1 A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.*
>
> *12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.*
>
> *12.3 The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.*

61 The text of UNTAET Regulation No. 2000/15, Section 12.1 provides that "[*a*] *person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.*" According to the ordinary meaning of this phrase,[9] the act must have been criminalized under international law or the domestic law applicable in East Timor. It would not be sufficient for the act to be merely prohibited by international law. International law must recognize that the act gives rise to individual criminal responsibility. While this appears to be a stricter articulation of the principle than that found in the jurisprudence of the International Military Tribunal (IMT), it is in accord with more contemporary understandings of the principle.

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[9] The periodic reports of the UN Secretary-General to the Security Council on UNTAET's activities and developments in East Timor that precede the promulgation of UNTAET Regulation 2000/15 do not elaborate on the content of UNTAET Regulations and do not contain any "drafting history" of Section 12 of UNTAET Regulation No. 2000/15.

62 The principle *nullum crimen sine lege* was addressed in the Judgment of the IMT, which observed that the principle was a principle of justice:

> *In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.*

In this passage, the IMT seemed to imply that it would be sufficient for the perpetrator to know at the time the act occurred that his or her conduct was wrongful.[10]

63 However, more recent articulations of the principle seem to require that the act have been a crime under international law at the time it occurred.[11] For

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[10] The IMT reasoning is sometimes still applied today. For example, international criminal law scholar Scharf has put forward an argument that the exercise of treaty-based universal jurisdiction over nationals of non-State Parties does not violate the principle of *nullum crimen sine lege*. Drawing from the IMT pronouncement that the principle is "in general a principle of justice" and Control Council Law No. 10 jurisprudence, he concludes:

> Similarly, whether or not a defendant's state of nationality is a party to the Hostage Taking Convention, the Airport Security Protocol, the Maritime Terrorism Convention, or the Safety of U.N. Peacekeepers Convention, the perpetrator cannot seriously argue that he did not know that taking hostages or attacking civilian airports, ships, or U.N. peacekeepers was a crime. Moreover, the existence of these multilateral conventions (negotiated under the auspices of major international organizations) constitutes notice that the perpetrator can be called to answer for such crimes in the courts of the State Parties to these treaties. Thus, the nullum crimen principle is not violated by the exercise of treaty-based jurisdiction over the nationals of Non-Party States.

Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, New Eng. L. Rev., Winter 2001 at 375.

[11] Related to the query under discussion is Principle 1 of the Nuremberg Principles which states that "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." *International Law Commission, Principles of International Law Recognized in the Charter of the Nüernberg Tribunal and in the Judgment of the Tribunal,* available at http://www.un.org/law/ilc/texts.

example, Article 15(1) of the ICCPR provides that *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."* Thus, the principle *nullum crimen sine lege* applies to acts and omissions that constitute a criminal offence;[12] the basis of the crime must be found in either domestic law or international law, i.e., treaty law or international customary law.[13]

64 A recent articulation of the principle of *nullum crimen sine lege* is found in Article 22.1 of the ICC Statute[14] which, in language almost identical to that set forth in Section 12.1 of UNTAET Regulation 2000/15, reads: "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Per Saland, chair of the working group dealing with Article 22 of the ICC Statute, explains "[t] he material content of the principle of legality (that a person is not criminally responsible unless the act constitutes a crime under the Statute) was never a contentious issue."[15] He further notes in this respect "[t] he term 'conduct' was generally accepted to denote a criminal act

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[12] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY at 276 para. 7 (1993) [hereinafter CCPR COMMENTARY]. International humanitarian law also contains *nullum crimen sine lege* provisions, for example, Article 6(2)(2) of Protocol II, which follows closely the wording of Article 15(1) of the ICCPR and Article 75(4)(c) of Protocol I, which reads in relevant part "No one shall be accused or convicted of a criminal offence on ccount of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed."

[13] *See* CCPR COMMENTARY, *supra* note , at 276, para. 6.

[14] This article is found in the section of the Statute entitled "General principles of criminal law."

[15] Per Saland, *International Criminal Law Principles* 189 at 194-95, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS (Roy S. Lee, ed. 1999).

or omission." [16] It must be noted, however, that *generally* the principle *nullum crimen sine lege* will not be an issue before the ICC, since the court has only prospective jurisdiction, i.e., jurisdiction over crimes committed after the entry into force of the ICC Statute (Article 11.1 of the ICC Statute).[17]

65 Speaking about the principles of *nullum crimen sine lege*, *nulla poena sine lege*, and no *ex post facto* application of laws, international criminal law expert Bassiouni describes the different functions of the principle at issue and states:

> *To satisfy the principles of legality, a crime must be defined sufficiently to put people on notice that a particular conduct has been characterized as criminal. The principles of legality thus require a clear and unambiguous identification of the prohibited conduct. These principles are deemed part of fundamental justice because they protect against potential judicial abuse and arbitrary application of the law.*[18]

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[16] *Id.*, at 195.

[17] A *nullum crimen sine lege* problem might arise, however, in the case that a particular state makes an *ad hoc* declaration in accordance with Article 12(3) of the ICC Statute, thus recognizing the ICC's jurisdiction for a particular crimes, or when the UN Security Council, acting under Chapter VII of the UN Charter, refers a case to the ICC. William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT at 57 and accompanying notes (2001).

[18] *M. Cherif Bassiouni, The Sources and Content of International Criminal Law: A Theoretical Framework* 33, in INTERNATIONAL CRIMINAL LAW, 2D ED. Volume 1 (M. Cherif Bassiouni ed., 1999). *But see also* Bassiouni who states earlier:

> The criminal aspects of international law consists of a body of international proscriptions containing penal characteristics evidencing the criminalization of certain types of conduct, irrespective of particular enforcement modalities and mechanisms. But conventional ICL seldom explicitly declares a given proscribed conduct as a crime under international law or as an international crime. In fact, there is much confusion about the labeling of international crimes.

Id., at 31.

66 Thus, it seems that, in order to satisfy the principle of *nullum crimen sine lege*, the act must have been a crime under international law giving rise to individual criminal responsibility at the time the conduct occurred.[19] Next, the question arises as to how strict the principle is: is it sufficient for the act to be criminal or must the conduct be proscribed as a crime in the specific terms in which it is being prosecuted?

67 Section 12.2 of UNTAET Regulation No. 2000/15 addresses the issue of construction and the possibility of analogy by providing: *"The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted."* This provision is verbatim the text of Article 22.2 of the ICC Statute.

68 However, it may be that under Sections 12.1 and 12.3 of Regulation 2000/15, the rule against analogy applies only to interpreting the text of the Regulation alone:

> *A person shall not be criminally responsible . . . unless the conduct in question constitutes . . . a crime under international law or the laws of East Timor*
>
> . . .
>
> *The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.*

69 These two provisions leave open the possibility that analogy may be used with respect to applying definitions of crimes at international law. In this regard, it should be remembered that Article 22 of the ICC Statute, from which drafters of UNTAET Regulation 2000/15 drew Section 12, was concluded during a Diplomatic Conference that negotiated the text of a treaty. Prohibiting analogy has a different meaning in the context of a treaty than it might have otherwise. Specifically, ICC Statute definitions will only apply for future acts, given the court's prospective jurisdiction. Thus, the rule

[19]This requirement, of course, is limited to acts occurring before the Regulation 2000/15 entered into force.

may be limited to just the Rome Statute text. In other for a besides the Court, such as the East Timor Special Panels, the rule might not apply in every problem of interpretation.

70 A problem may arise if the process of judicial interpretation reaches behind the text of Regulation 2000/15 to find definitions of crimes in international law.[20] The potential problem centers around the possibility that definitions may be more limited in customary law than they are in the Regulation. Thus, the rule against analogy may prevent applying the Regulation's definition where a) an act is prosecuted under a definition in the Regulation, b) international law is looked to in support of that definition, and c) the definition in customary law is more limited than the Regulation's definition. As stated before, the Regulation's definitions derive nearly word for word from the Rome Statute of the International Criminal Court. But unless that Statute is declaratory of customary law, the rule against analogies may limit applicability of parts of the Regulations's definitions with respect to conduct occurring before the Regulation's entry into force.

71 For example, none of the pre-1998 statutory definitions of crimes against humanity includes "enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence." However, the rules prohibiting rape, enslavement, and inhumane acts apply by analogy to other severe sexual acts. Similarly, impermissible grounds for persecution did not previously include ethnicity, culture, or gender, but those bases may be covered by analogy to certain war crimes, specifically, discrimination prohibited by Common Article 3 of the Geneva Conventions of 1949.[21] In either case, elaborations on the definition of crimes against humanity cannot happen if recourse may not be had to analogy. On the other hand, if it is understood that the Rome Statute's definition of crimes against humanity is the same as that found in customary international law, then analogy need not be

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[20]Recall that Section 12.1 provides that "[a] person shall not be criminally responsible unless the conduct in question constitutes, and the time it takes place, a crime under international law. . . ."

[21] Common Article 3 provides "persons taking no part in hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria."

employed. Also, since UNTAET Regulation 2000/15 contains clear definitions of most crimes that fall within the jurisdiction of the Special Panels, the issue of analogy does not seem to be a problem with respect to specificity of crimes.

72 However, because drafters of UNTAET Regulation 2000/15 may have relied on the rationale of drafters of the ICC Statute, there may be a need for more in-depth research into the drafting history of that Statute. Specifically, it may be necessary to clarify whether the Rome Statute drafters meant to include customary international law with respect to definitions of crimes or whether they meant that the rule against analogy would preclude using customary definitions.[22] Accordingly, it is also unclear whether the drafters of Section 12.2 of the UNTAET Regulation had in mind the same limits on applying analogy.

73 Given this uncertainty, it would be worthwhile to explore whether use of analogy is permissible in other contexts. In his comprehensive book on crimes against humanity, international criminal law expert Bassiouni explains how analogy serves different purposes:

> *Though the 'principles of legality' are essentially legislative constraints, they also serve as rules of judicial interpretation. In that context, the basic rule of interpretation embodying the 'principles of legality' is the prohibition or limitation on the use of analogy in judicial interpretation.*
> . . .
>
> *The purposes of the 'principles of legality' are to enhance the certainty of the law, provide justice and fairness for the accused, achieve the effective fulfillment of the deterrent function of the*

[22] This is uncertainty is heightened in light of the Per Saland's observation above: "t]he material content of the principle of legality (that a person is not criminally responsible unless the act constitutes a crime ***under the Statute***) was never a contentious issue." (Saland, *supra* note 15,at 195.) (Emphasis added.) Lack of contention may have arisen from the presumption that the *nullum crimen* problem would be completely avoided because the Statute would be applied only prospectively. While this may suggest that there was no intent whatever to rely on customary definitions, such a conclusion is not necessarily correct.

criminal sanction, prevent abuse of power and strengthen the application of the 'Rule of Law.[23]

74 Yet after a brief historical overview of the permissibility of analogy in such criminal law systems as in Germany, England, U.S., Islamic criminal justice systems and Marxist-Socialist systems, Bassiouni concludes with respect to analogy the following:

> *International criminal law as it is now, and certainly as it was in 1945, requires the existence of a legal prohibition arising under conventional or customary international law, which is deemed to have primacy over national law, and which defines a certain conduct as criminal, punishable or prosecutable, or violative of international law. This minimum standard of legality permits the resort to the rule ejusdem generis with respect to analogous conduct . . ..*[24]

75 Use of analogy in applying customary definitions is necessary because traditionally, international criminal law has lacked the specificity of national criminal law in defining crimes. This is due to the fact that international conventions are usually drafted in a context where a balance must be struck between what is legally and diplomatically feasible in the treaty making process. Additionally, diplomats who seldom have expertise in international criminal law usually draft conventions.[25]

76 This lack of specificity is less problematic when international law is being promulgated with the purpose of importing it into national law because it is assumed that the national systems will add the specificity necessary to meet the principles of legality. In contrast, the Special Panels in East Timor will apply law that is *directly* enforceable.

77 In cases where a direct enforcement system applies (such as in contemporary international criminal courts and tribunals like the

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[23] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, Second revised edition (1999) at 123-124.

[24] *Id.* at 144.

[25] *Id.*, at 143.

ICTY, ICTR, and ICC), Bassiouni argues for a higher standard of specificity and states:

> *Indeed, it should be remembered that if ICL's normative proscriptions are to be applied directly to individuals even without the mediation of national criminal justice systems then the standards of specificity of ICL norms must rise to the higher standards required by many existing legal systems. Concern with the specificity requirement of the principles of legality has recently emerged, as evidenced in the statutes of the ICTY, ICTR and the ICC. Thus, particularly because ICL can be enforced through a "direct enforcement system," it has to meet the same standards of specificity, which apply in the general principles of criminal law recognized in the world's major legal systems. "Direct enforcement systems" of ICL are, for the purposes of this discussion, indistinguishable from national criminal justice systems and there is no justification for applying a lesser standard of legality to this ICL enforcement method.*[26]

78 This seems to imply that a high level of specificity of crimes is required to satisfy the principle of *nullum crimen sine lege*, but it does not seem to require that the conduct, although designated as criminal, must be proscribed as a crime in the specific or exact terms in which it is also being prosecuted. This provides some room for applying analogies.

79 The European Court of Human Rights has addressed the issue of analogy. Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) uses language that is almost identical to that of Article 15 of the ICCPR in prohibiting *ex post facto* laws. The European Court of Human Rights has heard several cases alleging violations of Article 7, and in each of these cases, the Court responded with the same language regarding *nullum crimen sine lege*:

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[26] M. Cherif Bassiouni, THE SOURCES AND CONTENT OF INTERNATIONAL CRIMINAL LAW: A THEORETICAL FRAMEWORK, IN INTERNATIONAL CRIMINAL LAW, Second Edition, Volume I, Crimes, (M. Cherif Bassiouni ed. 1999) at 34.

[A]s the Court held in its Kokkinakis v. Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52), Article 7 (art. 7) is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of "law" Article 7 (art. 7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foresee ability (see ... the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37).

However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law making is a well-entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[27]

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[27] *See* S.W. v. the United Kingdom and C.R. v. the United Kingdom, judgments of 22 November 1995 (Series A nos. 335-B and 335-C, pp. 41-42, paras. 34-36, and pp. 68 and 69, paras. 32-34, respectively; *also quoted in* Case of K.-H.W. v. Germany, Judgment of 22 March 2001 (Application no. 37201/97), and Case of Streletz, Kessler and Krentz v. Germany, Judgment of 22 March 2001 (Applications nos. 34044/96, 35532/97 and 44801/98).

80 In conclusion, it is probably not necessary that the crime be proscribed in exact and precise terms, as long as the conduct is a crime under international law giving rise to individual criminal responsibility.

81 It it is also necessary to address the issue of whether the principle of *nullum crimen sine lege* requires that the penalty be prescribed. Known as the principle of *nulla poena sine lege*, this principle is dealt with in Section 13 of UNTAET Regulation No. 2000/15, which reads: *"A person convicted by a panel may be punished only in accordance with the present regulation."*

82 Here, the issue of analogy is not as difficult as it is with respect to the definitions of crimes. There is much support for the proposition that where a) a country's laws prescribe particular penalty for a particular crime, b) an international or internationalized court is established for that country, and c) the new court must decide how to punish a similar crime, the new court may look to country's penalty provisions for guidance. Article 24 of the Statute of the International Criminal Court for the former Yugoslavia provides that "[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." Article 23 of the Statute of the International Criminal Tribunal for Rwanda has the same provision, *mutatis mutandis*. However, there is no similar provision in the ICC Statute.[28]

83 On the issue of applying penalties by analogy, Bassiouni concludes:

> *International criminal law as it is now, and certainly as it was in 1945, requires the existence of a legal prohibition arising under conventional or customary international law, which is deemed to have primacy over national law, and which defines a certain conduct as criminal, punishable or prosecutable, or violative of international law. This minimum standard of legality . . . permits the application of penalties by analogy to similar crimes and penalties in the national criminal laws of the prosecuting state having proper jurisdiction*[29]

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[28] *See* Articles 77 and 78.

[29] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, Second revised edition (1999) at 144.

84 With respect to the application of *nullum crimen sine lege* to crimes within the subject matter jurisdiction of the Special Panels, the Court has to examine the application of the principle of *nullum crimen sine lege* to the subject matter jurisdiction of the Special Panels under UNTAET Regulation No. 2000/15. In particular, this part investigates whether the "serious criminal offences" enumerated in Section 1.3 of UNTAET Regulation 2000/15 were already crimes under international law either as customary international law binding on all states;[30] or, in the absence of customary law and at least to the extent defendants were Indonesian citizens,[31] as treaty law binding on Indonesia.

85 Section 1.3 of UNTAET Regulation No. 2000/15 states that the Special Panels have jurisdiction over the following serious criminal offences: genocide, crimes against humanity, war crimes, torture, murder and sexual offenses. If it is clear that some acts like murder and sexual offences were presumably criminalized under domestic law during the relevant period (Sections 8 and 9 of UNTAET Regulation 2000/15), it is not the same other acts like genocide, war crimes and crimes against humanity.

86 Section 5 enumerates the crimes against humanity that fall within the Special Panels' jurisdiction and reads, in relevant part:

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[30] *See also* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc, S/25704, 3 May 1993 [hereinafter Report of the Secretary-General regarding the ICTY Statute], accompanying the proposed statute for the International Criminal Tribunal for the Former Yugoslavia. Paragraph 34 of this report addresses the principle of *nullum crimen sine lege* and reads, in relevant part:

> 34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serous violations of international humanitarian law.

[31] There may be a question about to what extent East Timor fell within the scope of Indonesia's treaty obligations. This question arises from uncertainty as to whether East Timor was legally part of Indonesia.

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(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 are 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;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

87 Of these different crimes against humanity, the following were included in the jurisdiction of the International Military Tribunal (Article 6(c) of the Charter of the International Military Tribunal (IMT)): murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated. In addition, the ICTY and ICTR Statutes enumerate the following crimes against humanity within each tribunal's jurisdiction (Article 5 ICTY Statute and Article 3 ICTR Statute, respectively): murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts. According to the Report of the Secretary General that accompanied

the draft Statute of the ICTY, these acts are considered crimes under customary international law.[32]

88 In the present case, the accused Jhoni Franca is charged with Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law contrary to Section 5.1(e) UNTAET Regulation 2000/15, with torture as crimes against humanity, contrary to Section 5.1(f) UNTAET Regulation 2000/15.

89 The Special Panel will therefore analyze whether or not those specific crimes against humanity enumerated in the paragraph above and with which the accused is charged, are considered to be customary international offences in law.

90 Imprisonment and other severe deprivation of physical liberty in violation of fundamental rules of international law. The IMT Charter and Tokyo Charter do not enumerate imprisonment among the crimes against humanity that can be prosecuted, but Control Council Law No. 10 as well as the ICTY and ICTR Statutes do.[33] Although the customary international law character of imprisonment seems to be undisputed, this might not be true for "other severe deprivation of physical liberty in violation of fundamental rules of international law."

91 The 1998 Diplomatic Conference in Rome, which concluded the ICC Statute, added the term "other severe deprivation of physical liberty, "for greater certainty."[34] It is stated in this regard:

The concern was that "imprisonment" might be interpreted restrictively so as to cover only "prison"-like situations, so the additional words make clear that a broader scope was intended for this crime. Consistent with the relevant authorities, the crime was defined so as to exclude legitimate cases of imprisonment (such as imprisonment of convicted criminals following a genuine trial, lawful quarantine and so on).[35]

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[32] *See* Report of the Secretary-General regarding the ICTY Statute, *supra* note X, para. 34.

[33] THE ELEMENTS OF CRIMES AGAINST HUMANITY, *supra* note, at 88.

[34] *Id.*

[35] *Id.*

92 In *Krnojelac*, the ICTY Trial Chamber noted that the right of an individual not to be deprived of his or her liberty arbitrarily is also enshrined in a number of human rights instruments, both international and regional.[36] However, the Chamber noted that as these instruments show, this right does not constitute an "absolute right", and it can be restricted by procedures established by law.

93 Torture as crimes against humanity. Torture is stipulated in Article 5 of ICTY statute which provides that: " The international tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population...(f) torture..."[37]. It is also included in Article 3 of ICTR Statute which says that" the international tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds...(f) torture. Article 7 of ICC statute as article 5 of UNTAET Regulation 2000/30 provides that: ...Crimes against humanity means any of the following acts when committed as part of widespread or systematic attack and directed against any civilian population, with knowledge of the attack...(f) torture..." It is necessary to underline that the definition of torture in the ICC Statute is exactly the same as the one in Section 5 of UNTAET Regulation 2000/15.

G. FACTUAL FINDINGS

94 In light of the admissions of all the evidence, especially the testimonies of the witnesses Benedito Da Costa, Mario Gonsalves and Jose Gouveia Leite, and the statements made before the investigator by the witnesses in the case, especially the witnesses Amelia Belo, Aurea Cardoso, Rosa De Jesus, Adao Manuel, Hermnio Da Graca, Mariana Da Cunha, Victim A, Victm B, Victim C, the reports on the situation of Human rights in East

[36] *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment of 15 March 2002 [hereinafter *Krnojelac*], paras. (Including Article 9 of the UN Declaration of Human Rights, Article 9 of the ICCPR, Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid, Article 5 of the European Convention on Human Rights, and Article 7 of the American Convention on Human Rights).

[37] ICTY statute at art.5

Timor, note by the Secretary General, Report of the Indonesian Commission on human rights violations in East Timor, January 2000, the Court is convinced that the following facts occurred[38]:

95 The widespread or systematic attacks were directed against the civilian population in East Timor in 1999. The attacks occurred during two interconnected periods of intensified violence. The first period followed the announcement on 27 January 1999 by the Government of Indonesia that the people of East Timor would be allowed to choose between autonomy with the Republic of Indonesia or independence. This period ended on 4 September 1999, the date of the announcement of the result of the popular consultation in which 78.5 per cent voted against the autonomy proposal. The second period followed the announcement of the result of the popular consultation on 4 September through 25 October 1999.

96 The widespread or systematic attacks were part of an orchestrated campaign of violence, that included among other things incitement, threats to life, intimidation, unlawful confinement, assaults, arson, and other forms of violence carried out by members of the pro-autonomy militia, members of the Indonesian Armed Forces, ABRI (*Angkatan Bersenjata Republik Indonesia*) renamed TNI (*Tentara Nasional Indonesia) in 1999*, and members of the Indonesian Police Forces (*POLRI*) with the acquiescence and active participation of Civilian and Military authorities.

97 In 1999, militia groups operated throughout East Timor. Their goal was to support autonomy with Indonesia. The Integration Fighting Forces (PPI), (*Pasukan Pejuang Integrasi*) under the command of Joao Tavares was the umbrella organization under which these militia groups were organized. It had the backing of the TNI and the Civil Administration. PPI Commanders issued, called upon and incited militia groups and their members to intimidate independence supporters and those perceived to support them. The militia groups participated in the widespread or systematic attack and acted and operated with impunity.

98 The Indonesian Military in East Timor consisted of both regular territorial forces (BTT) and Special Combat Forces, i.e. the Strategic Reserve Command (KOSTRAD), (*Komando Strategis Angkatan Darat*) and Special Forces Command (KOPASUS), (Komando Pasukan Khusus), all of which had units, staff officers and soldiers stationed in East Timor.

[38] Those statements and reports were filed with the indictment and admitted by the accused person during his guilty plea, as underlined in paragraph 44 of the present judgment, supra, page 11.

99 These large-scale attacks were directed against civilians of all age groups, predominantly against individuals who supported or were perceived to support independence and resulted in lethal injury including death by sharp force injury, gun shot injury, blunt force trauma or a combination of the three.

100 Widespread or systematic attacks were also carried out against property and livestock, including mass destruction of houses by fire, stealing of property, killing and stealing of livestock.

101 The widespread or systematic attack resulted in the internal displacement of thousands of persons. Additionally, the forcible transfer and deportation of the civilian population within East Timor and to West Timor, Indonesia was an essential feature of that orchestrated campaign of violence.

102 Under terms of the 5 May 1999 Agreements, between Indonesia, Portugal and the United Nations on the popular consultation, the Indonesian security authorities had the responsibility to ensure a safe environment devoid of violence or other forms of intimidation as well as the general maintenance of law and order before and during the popular consultation. The TNI and POLRI (which were the Indonesian Security Authorities) failed to meet these obligations and made no attempt to disarm or neutralize the militia groups. They were allowed to act with impunity.

103 Between April and October 1999, the TNI forces present in Bobonaro District were KODIM 1636 with its headquarters in Maliana. There were six sub-districts Military Commands (KORAMIL) each headed by a DANRAMIL. In 1999, the KORAMIL in Lolotoe sub-district was initially under the command of Sergeant Elias. After his deputy Sergeant Caetano was killed, 2nd Lt. Bambang Indra replaced him.

104 From February to October 1999, the Indonesian Police Force (POLRI), the state agency for upholding the law and public order were also present in East Timor. It also included a Mobile Police Brigade (BRIMOB), whose Units and members were stationed in East Timor, including in Bobonaro District.

105 Between February and September 1999, the Civil Administration in Bobonaro District was headed by the *Bupati* (District or Regency Administrator), who was appointed by the local parliament and Governor of East Timor with the approval of the Minister of Interior of the Republic of Indonesia. The villages were headed by village Chiefs (*Kepala Desa*).

106 In Lolotoe sub-district, the Indonesian Armed Forces in particular the TNI under the command and control of 2nd Lt. Bambang Indra, worked in close cooperation with two of the principal armed militia groups, namely Kaer Metin Merah Putih and the Dadurus Merah Putih (Red and White Typhoon).

107 On or about 5th May 1999, Joao Tavares as Supreme Commander of the PPI presided over the inauguration ceremony of the KMP militia. No attempt was made by the TNI and POLRI to disarm or neutralize the KMP militia or the DMP militia. They were allowed to act with impunity.

108 2nd Lt. Bambang Indra as commander (DANRAMIL) of the sub-district military had authority and control over the TNI in Lolotoe sub-district. The TNI in Lolotoe Sub-District under the command of 2nd Lt. Bambang Indra provided KMP militia with logistic support. Many members of the KMP militia received some form of compensation from the Indonesian Government for their actions against the civilian population of Lolotoe Sub-District in support of autonomy for East Timor.

109 Between April and October 1999, both the TNI in Lolotoe sub-district and the KMP militia conducted acts of violence against those members of the civilian population in Lolotoe sub-district who were considered to be pro-independence, linked to or sympathetic to the independence cause. The concerted attacks included intimidation, threats, unlawful arrests and detention, interrogations, arsons, murders, torture, inhumane and degrading acts, and other acts of persecution. Many acts were directed in particular against women whose husbands were presumed to be FALINTIL (Forcas Armadas De Libertacao Nacional De Timor Leste: Armed Forces for the Liberation of East Timor) or supporters of independence.

110 On 5th May 1999, Joao Tavares as Supreme Commander of the PPI appointed Joao Franca Da Silva alias Jhoni Franca as Commander of the KMP militia. Joao Franca Da Silva alias Jhoni Franca as Commander of the KMP militia had authority and control over members of the KMP militia. Joao Franca Da Silva alias Jhoni Franca remained a member of the KMP militia until he was removed as its Commander sometime in early June 1999.

111 On or about 22 May 1999 militia members of the KMP militia members went to the house of Bendito Da Costa and Amelia Belo. Militia members were armed with a rifle, machetes, swords and knives. They asked Bendito Da Costa and Amelia Belo where their son Mario was. At the material

time Mario was a FALINTIL member. Bendito Da Costa informed militia members that he did not know where Mario was. Militia members started to beat Bendito Da Costa. Militia members started to tie Bendito Da Costa to a pole in his house. He remained tied up there until the next day. On the next day members of the KMP militia returned. They tied Bendito Da Costa and Amelia Belo's hands behind their backs. Bendito Da Costa, Amelia Belo and their two children were forced to walk to Lolotoe. It was approximately a 2-hour walk. When they arrived at Lolotoe, Bendito Da Costa, Amelia Belo and their two children were taken to the KORAMIL, where they were placed in a small room and locked up. Bendito Da Costa, Amelia Belo remained in detention until sometime in July 1999.

112 Adao Manuel was a supporter of independence for East Timor. On or about 22nd May 1999, due to the threats against the supporters of independence, Adao Manuel was hiding at the church in Villa with Mario Goncalves, Jose Afonso and Afonso Noronha. The KMP militia knew about his presence at the church. Members of the KMP militia went to the church and forcibly brought out Adao Manuel from the church. His hands were tied and he was taken to the KORAMIL in Lolotoe sub-district. At the KORAMIL in Lolotoe sub-district Joao Franca Da Silva alias Jhoni Franca and other MM subjected Adao Manuel to severe physical violence. Adao Manuel's right ear was cut with a knife. Joao Franca Da Silva alias Jhoni Franca and other mititia members continuously beat Adao Manuel for two hours, after which he was dragged out to the playground, where he was still being beaten while being interrogated about his involvement with FALINTIL. Adao Manuel was detained in the KORAMIL in Lolotoe sub-district until July 1999, during which time he was subjected to further severe beatings by Joao Franca Da Silva alias Jhoni Franca and other militia members while being interrogated.

113 Mario Goncalves was a supporter of independence and a member of CNRT. Mario Goncalves gave public speeches in Guda Village encouraging the people to support and vote for the independence of East Timor. Mario Goncalves was afraid that he would be killed by the TNI/KMP militia and went to hide in the jungle for one month. Mario Goncalves then came out of hiding and sought refuge in the church in Villa. On or about 24th May 1999 about one hundred members of the KMP militia led by Joao Franca Da Silva alias Jhoni Franca went to the church. Mario Goncalves was ordered to come out of the church. When Mario Goncalves came out of the church he was beaten by the KMP militia members whilst being dragged to the field outside the CNRT office. At the field, Joao Franca Da Silva alias Jhoni Franca ordered members of the

KMP Militia to beat Mario Goncalves in turns. Approximately thirty-seven KMP militia members beat Mario Goncalves. Joao Franca Da Silva alias Jhoni Franca also attacked Mario Goncalves with a machete, cutting him on his right arm and stabbing him in the left shoulder. Joao Franca Da Silva alias Jhoni Franca cut off Mario Goncalves' right ear. His ear was thrown on the ground and Joao Franca Da Silva alias Jhoni Franca forced Mario Goncalves to eat it. Mario Goncalves feared for his life and did as he was ordered by eating his right ear. Joao Franca Da Silva alias Jhoni Franca ordered that Mario Goncalves to be held with the other detainees in the KORAMIL building in Lolotoe. Mario Goncalves was detained there until sometime in July 1999.

114 Jose Gouveia Leite was the vice-secretary for CNRT in Lolotoe. At the material time he was a supporter of the independence movement. On or about 24 April 1999 Jose Gouveia Leite feared for his life and ran into the jungle as he had heard that the members of Dadurus Merah Putih militia had come to his village of Guda and were looking for him. On or about 7 May 1999 he received a letter through his brother in law Anebel requested that Jose Gouveia Leite come down to Lolotoe and report to the leaders so that he can be freed. On or about 21 May 1999 Jose Gouveia Leite left the forest and went to Lolotoe . Shortly after his arrival, Joao Franca Da Silva alias Jhoni Franca and other militia members went to see him and took Jose Gouveia Leite to the elementary school, where they ordered the militia members present to beat him up. Jose Gouveia Leite was thereafter taken to the CNRT office in Lolotoe sub-district and again beaten continuously along the way. At the playground outside the CNRT office, Joao Franca Da Silva alias Jhoni Franca told Jose Gouveia Leite to confess his involvement with FALINTIL. He confessed. Joao Franca Da Silva alias Jhoni Franca ordered 6 KMP militia members to beat Jose Gouveia Leite again. Jose Gouveia Leite was cut above his eye and bled. Jose Gouveia Leite was thereafter taken to the Sub District Police Office where they met an Indonesian officer, Martin. Jose Gouveia Leite was then taken to the KORAMIL in Lolotoe sub-district and interrogated and beaten. Jose Gouveia Leite was detained in the KORAMIL Lolotoe sub-district with the other detainees. He was released sometime in July 1999.

115 On or about 20th May 1999, Aurea Cardoso and her two children were hiding at the house of Euzebio Da Costa because they feared for their lives as she and her husband were supporters of independence. Approximately 60 members of the KMP militia surrounded the house. Among the KMP militia present, Aurea Cardoso recognized one Antonio Bere whom she knew to be from Guda sub-village. Antonio Bere knocked on the door and

KMP Militia to beat Mario Goncalves in turns. Approximately thirty-seven KMP militia members beat Mario Goncalves. Joao Franca Da Silva alias Jhoni Franca also attacked Mario Goncalves with a machete, cutting him on his right arm and stabbing him in the left shoulder. Joao Franca Da Silva alias Jhoni Franca cut off Mario Goncalves' right ear. His ear was thrown on the ground and Joao Franca Da Silva alias Jhoni Franca forced Mario Goncalves to eat it. Mario Goncalves feared for his life and did as he was ordered by eating his right ear. Joao Franca Da Silva alias Jhoni Franca ordered that Mario Goncalves to be held with the other detainees in the KORAMIL building in Lolotoe. Mario Goncalves was detained there until sometime in July 1999.

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called for Aurea Cardoso to come out. She could not find the keys to the front door and when she delayed in coming out, the KMP militia present started throwing stones. Aurea Cardoso then exited the house with her two children through the window. Aurea Cardoso was informed that she and her two children were to be arrested by the militia because they could not locate her husband Sebastiano Amaral. Militia members took her and her children first to Zoilpo Village where they stayed overnight and thereafter to Lolotoe. They were detained at the Koramil. On the next day Joao Franca Da Silva alias Jhoni Franca interrogated Aurea Cardoso on the whereabouts of her husband and whether she supplied food to FALINTIL while threatening her that if she did not speak the truth he would cut off one of her children's ear and force her to eat it. Aurea Cardoso and her two children were detained at the KORAMIL in Lolotoe sub-district. Aurea Cardoso and her two children were released sometime in July 1999.

116 Sometime in July 1999, benedito da Costa and other detainees in the Koramil were released.

117 During their detention at the various places in Lolotoe sub-district, Bendito Da Costa, Amelio Belo and their two children, Adao Manuel, Mario Goncalves, Jose Gouveia Leite, Aurea Cardoso, and other detainees were locked in a small room without proper sanitation facilities. The detainees were subjected to extremely unhygienic conditions and were not given food or water regularly.

118 Herminio De Graca was a member of the CNRT and was its chief representative in Zoilpo sub-village in Guda Village. In discharging his duties as Chief Representative of CNRT in the sub-village, Herminio Da Graca spoke to the local population about democracy, self-determination, freedom from colonization and freedom of choice. He addressed approximately six thousand people in seven villages. Sometime in May 1999, as Herminio Da Graca was on his way to Maliana on his motorbike, he was stopped by two KMP members, one of whom was Jose Mauputa . They informed Herminio Da Graca that Joao Franca Da Silva alias Jhoni Franca wanted to see him. The 2 members escorted Herminio Da Graca back to Lolotoe to the house of Joao Franca Da Silva alias Jhoni Franca. There, Joao Franca Da Silva alias Jhoni Franca questioned Herminio Da Graca about FALINTIL. After 2 hours Herminio Da Graca was ordered to report to the KORAMIL on the next day, which he did . On the next day, a TNI sergeant interrogated Herminio Da Graca at the KORAMIL about his links to FALINTIL. While questioning him, the sergeant sat on a chair and placed the chair leg on Herminio Da Graca's foot. Herminio Da Graca was

then sent to the house of Manuel Da Costa, a low-ranking TNI official, where he was detained until sometime in July 1999.

119 On or about 20 May 1999 about 50 KMP militia members and a few TNI soldiers went to Guda village to the house of Jacob Da Costa Barros, a pro-autonomy supporter. While there, they ordered that the villagers be assembled outside the house of Jacob Da Costa Barros. They gave a speech to the villagers present telling them that there is information that the villagers were supporting FALINTIL with food and that some of the female villagers were having relationships with FALINTIL members. The names of Mariana Da Cunha, Victim A, Victim B and Victim C, were read out from a sheet of paper accusing them of having relationships with FALINTIL members. Mariana Da Cunha, Victim A, Victim B and Victim C were independence supporters and that there was common knowledge of this fact. Militia informed the villagers that KMP militia present would go to Tobur sub-village and ordered the villagers present to remain at the house of Jacob Da Costa Barros until they returned. Later on that day, members of the KMP militia returned to the house of Jacob Da Costa Barros. They ordered that Mariana Da Cunha and others be taken to Lolotoe. Mariana Da Cunha was then taken to a house in Lolotoe, where she was held against her will six nights. On or about 27 May 1999 Joao Franca Da Silva alias Jhoni Franca came to the house where she was detained and released her.

120 Sometime in May 1999, members of the KMP Militia and TNI, went to the residences of Victim A, Victim B and Victim C in Guda Village. Members of the KMP militia and TNI were armed with automatic weapons, grenades, machetes and knives. Some of them were wearing with TNI uniform. Victim A, Victim B and Victim C were taken to a house in Lolotoe. Joao Franca Da Silva alias Jhoni Franca was at the house, Victim A, Victim B and Victim C were held against their will at the house for approximately one week, during which time they were forced to cook for members of the militia. Sometime in May 1999, Joao Franca Da Silva alias Jhoni Franca, and other KMP militia members thereafter took Victim A, Victim B and Victim C to the PKK building in Lolotoe. Victim A, Victim B and Victim C were held against their will at the PKK building for 3 days. A few days later, Victim A, Victim B and Victim C were later moved to the house of Joao Franca Da Silva alias Jhoni Franca and were forced to stay there for approximately one month. During this time, Victim A, Victim B and Victim C were forced to cook for Joao Franca Da Silva alias Jhoni Franca. On or about 8 July 1999 Victim A, Victim B and Victim C were taken back to Guda Village and were then returned to their

respective homes. Throughout the period of their detention, Victim A, Victim B and Victim C were guarded and their movements controlled. They lived on the threat of death and believed that they had no option other than to obey their captors.

H. INDIVIDUAL CRIMINAL RESPONSABILITY

121 The accused is individually criminally responsible for the crimes alleged against him in this indictment in violation of Section 14 of UNTAET Regulation 2000/15.

122 Joao Franca Da Silva alias Jhoni Franca, together with other militia and TNI officers committed and incited to the commission of the acts of imprisonment and torture. By imprisoning and submitting Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Gonsalves, Jose Gouveia Lete, and Aurea Cardoso and her two children, herminio Da Graca, Mariana Da Cunha, Victim A, Victim B and Victim C to other severe deprivation of Physical Liberty in violation of fundamental rules of international law, and by torturing Bendito Da Costa, Adao Manuel, Mario Gonsalves and Jose Gouveia Lete, Johni Franca was engaging his responsibility.

123 Under section 14.2 and 14.3(a) to (c) individual criminal responsibility results if the individual committed, planned, instigated, ordered, solicited, induced, aided, abetted or otherwise assisted in the commission of the crimes, or attempted commission. Individual criminal responsibility also results if an individual in any other way contributes to the commission or attempted commission of the crime, if such contribution is intentional and is either (i) made with the aim of furthering the criminal activity or purpose of a group; or (ii) is made with the knowledge of the intention of the group to commit the crime.

124 Moreover Joao Franca Da Silva alias Jhoni Franca knew or had reason to know that the TNI and Militia under his direction and control were committing the acts described above, or had done so. Additionally they failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

125 Joao Franca Da Silva alias Jhoni Franca is criminally responsible as superior for the acts of his subordinates in violation of Section 16 of UNTAET Regulation 2000/15. Superior criminal responsibility is the responsibility of a superior for the acts of his subordinates if the superior

knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary steps or reasonable measures to prevent such acts or to punish the perpetrators thereof. It has been shown that acts incriminated were committed by, or at the instigation of, or with the consent of, a person in authority. That person was Joao Franca Da Silva alias Jhoni Franca who instigated acts that were subsequently committed by their subordinates.

I. LEGAL FINDINGS

126 Article 5 of UNTAET Regulation 2000/15 sets out various acts that constitute crimes against humanity, when those acts are committed as part of a widespread and systematic attack and directed against any civilian population, with knowledge of the attack. Among those acts we find Torture and Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.

127 The accused Jhoni Franca is accused of Torture and Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.

Torture

128 The Special Panel considers that torture is a crime against humanity pursuant to Article 5(f) of UNTAET Regulation 2000/15. The same section in (d) defines torture as " 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 from, inherent in or incidental to, lawful sanction. UNTAET Regulation 2000/15 provides the same definition of torture as in Rome Statute.

136 The most instructive definition of the elements of torture as a crime against Humanity can be found in the PCNICC's Draft Elements of Crimes[39] falling within the jurisdiction of the ICC. Indeed according to Article 9 of the ICC, the Draft Elements of Crimes shall assist the Court in interpreting the crimes. Although, the Draft Elements of Crimes has to date not been

[39] Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Elements of Crimes

relied on by the ICC, in light of the fact that they present an articulation of the elements of offences in contemporary international criminal law and assist in the interpretation of Article 7(1)(f) of the ICC Statute, which is similar to Section 5 of UNTAET Regulation 2000/15, the Special Panel considers the PCNICC's Draft Elements as containing the most instructive definition of the offence of torture for purposes of the law of East Timor. In the PCNICC's Draft Elements, the elements are as follows:

> *"1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.*[40]
>
> *2. Such person or persons were in the custody or under the control of the perpetrator.*
>
> *3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.*
>
> *4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*
>
> *5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."*

137 Torture is also defined in Articles 3 ICTY and 5 of the ICTR Statutes respectively as:

> ..any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[41]

138 This latter definition of torture is also the war crimes definition of torture and because it includes the requirement for the torture as a crime against humanity to have a purpose, it is not

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[40] It is understood that no specific purpose need be proved for this crime.

[41] ICTY rules at article 3

instructive in this case. The absence of the requirement for the element of purpose is an important change in the substantive law relating to torture as it allows for an expansive application of the crime unlike the previous restrictive application.

139 It is important to point out that the law of East Timor contains a similar definition of torture as that of the Statutes of the Tribunals in Section 7 of UNTAET Regulation 2000/15. As the Accused Johni Franca was charged under Section 5, which has a different definition from Section 7, the Special Panel does not find it necessary to discuss the Section 7 definition of torture and will restrict itself to Section 5 of UNTAET Regulation 2000/15.

140 The Special Panel therefore following the PCNICC's Elements of Crimes, defines the essential elements of torture as:

> "1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.[42]
>
> 2. Such person or persons were in the custody or under the control of the perpetrator.
>
> 3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
>
> 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
>
> 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

141 It has been shown that Johni Franca was acting as Commander of KMP and that through his actions he inflicted severe physical or mental pain or suffering on several victims as charged. Even though it appears that there may have been a purpose to his actions it being either to punish those perceived to support the pro-independence movement or to obtain information from them, evidence of purpose was not

[42] It is understood that no specific purpose need be proved for this crime.

conclusively led. In any case, the Special Panel has already stated that there is no requirement for purpose.

142 In the present case, the Special Panel finds that the following elements of torture as a crime against humanity have been satisfied:

143 *The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.* Evidence led on behalf of the prosecution, admitted by the Accused and accepted by the Special Panel established that numerous victims were subjected to severe physical pain at the hands of the accused or on his orders. The gravest instance was the accused cutting of the ear of Mario Goncalves and ordering him to eat it. The Special Panel finds that this must have caused the victim severe physical pain as well as serious mental pain arising out of being asked to eat his own flesh.

144 *Such person or persons were in the custody or under the control of the perpetrator.* The Accused person admitted that the victims of torture were in his custody and control. Indeed, the victims of the torture are also the victims of unlawful imprisonment. The Special Panel finds that the element of custody and control of the victim has been sufficiently established by the evidence led.

145 *Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.* The Special Panel finds that there was no legal justification for the infliction of pain or suffering on the victims and none has been suggested by the Accused. It is clear from the evidence that the infliction of torture on the victims was not undertaken pursuant to any legal process.

146 *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.* It has been shown that the torture was perpetrated as part of a widespread or systematic attack, and that acts of violence and

threats directed against the civilian population in Lolotoe Sub-District targeted those who supported or were perceived to support independence, principally for political reasons. Members of the civilian population were subjected to orchestrated violence because of their opinion on the future political status of East Timor, because they supported FALANTIL or were sympathetic to it or its members.

147 *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.* The Accused admitted to the Special Panel that he was aware of the context in which his unlawful actions were committed.

Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.

129 The Special Panel considers also that Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law is a crime against humanity pursuant to Article 5(e) of UNTAET Regulation 2000/15, which however mentions it without adding any specific definition.

130 However since Section 5 of UNTAET regulation says that "crimes against humanity means any of the following acts when committed as part of widespread or systematic attack and directed against any civilian population with knowledge of the attack, we can say that the imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law must be perpetrated as part of a widespread or systematic attack, and with knowledge of the attack.

131 It has been shown that the Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law was perpetrated as part of a widespread or systematic attack, and was directed against the civilian population, with the knowledge of the attack.

132 Article 7 (1) (e) of the Rome Statute contains a similar definition of the Crime against humanity of imprisonment or other severe deprivation of physical liberty as that contained in Section 5(e) of UNTAET Regulation 2000/15

133 At the same time the PCNICC's Elements of Crimes provides the following elements for the Crime Against Humanity of

Crime against humanity of imprisonment or other severe deprivation of physical liberty:

> *1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.*
>
> *2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.*
>
> *3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.*
>
> *4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*
>
> *5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*

134 The Accused person admitted to imprisoning the persons alleged by the prosecution in the indictment. The Special Panel considers that this conduct was in serious violation of fundamental rules of international law and that the Accused was aware of the factual circumstances that established the gravity or seriousness of his conduct taking into account the length of the detention, the numbers of people detained and other factors accompanying the detention such as torture or beatings of some of the detainees.

135 The Special Panel considers that the imprisonment was committed as part of a widespread and systematic attack directed against the civilian population. The Accused himself admitted to this.

136 Finally, the Special Panel considers that the Accused was aware that conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

137 Pursuant to the consideration of the aforementioned elements, it is found legitimately and in accordance with the law that the Defendant has committed in May 1999 the crimes of torture and imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law , as specified in Sect. 5.1 (e) and (d) of U.R. n° 2000/15.

J. VERDICT

138 For the aforementioned reasons, and in light of the admissions of all the evidence made by the accused in addition of his plea of guilty, pursuant to Sections 29A and 39 of UNTAET Regulation 2000/30 as amended by Regulation 2001/25, the Special Panel accepted on the 22nd November 2002 the plea of guilty of the accused Joao Franca Da Silva Alias Jhoni Franca made on the 21st October 2002, finds that all the essential facts required to prove the crimes to which the admission of guilty relates have been established as required by Section 29A.2 of Regulation 2001/25.

139 The accused Joao Franca Da Silva Alias Jhoni Franca was Convicted of: Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Bendito Da Costa and Amelia Belo, Adao Manuel, Mario Gonsalves, Jose Gouveia Lete, and Aurea Cardoso and her two children, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Herminio da Graca, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Mariana Da Cunha, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of Victim A, Victim B and Victim C, as crimes against humanity, contrary to Section 5.1(e) UNTAET Regulation 2000/15. Torture of Bendito Da Costa, Adao Manuel, Mario Gonsalves, and Jose Gouveia Lete, as crimes against humanity, contrary to Section 5.1(f) UNTAET Regulation 2000/15.

140 Pursuant to these findings of guilty, the Court will proceed to sentence Jhoni Franca, in order to determine an appropriate penalty.

K. SENTENCING

Facts related to the sentence.

141 The Public Prosecutor and the defense suggested in their agreement that the accused be given a penalty of 7 years.

142 The accused advanced the circumstances prevailing in 1999 which brought him to join militia, the effort he made in order to avoid suffering from the victims, the fact that he is still young and like to be with his "people": He told the Court: "*(...) I was forced or had to join the autonomy to choose the best way to postpone my death. At that time I didn't join to hurt my nation, my people, which I have lived with for the least 25 year but because of the regime that was in power. At that time I started as a youth of clandestine, (...) at that time in 1999 arose the militia in Maliana (...) the militia and the TNI started to carry out operations searching for pro independence youths (...) I was a youth and the head of organizing of all the activities of the clandestine (...) I was approached by Indonesian intelligence commander Sutrisno. He said to me it is better that you surrender than die. To postpone my death I went (...) I joined, at the same time he new my background as pro independence youth, (...) at that time he appointed me as a commander of KMP. I had to act according to their orders and wishes but I had no full power. I was a commander of dolls and was told what to do by the regime of the TNI. After I became a militia I had to satisfy the hearts of the TNI who ordered me to tell the youth to join the pro autonomy. To satisfy their hearts I carried out these things but forever it never happened an arrest, a capture or burning. The TNI started to suspect me; they said you organized all these strategies to have this against us. (...) 1 day later the commander of TNI asked me you must do something because you have been suspected by the TNI. (...) I who had never thought about hurting the people like me, was forced by the powerful regime and the scenario of TNI, at that time I was forced to act that were not humane against my people but it was not of my desire. I was a commander of dolls and told by the powerful regime if I didn't do these, I would be the first to die. And now I must face the law. I did things, once more I would like to inform that I did my acts in 1999 that happened in Lolotoe, and now I have to face the law. My friends, brothers, I say this: I never capture anyone I didn't burn any house. I was just a doll commander for 1 month there was a lot of things I did against my brothers like Mario Gonclaves; at that time I was forced*

to do that thing to save all the people and victim A & B personally at the time of there detention in a student work house I felt myself that they were human and still young. I moved them from their place of detention for their own survival, they said in a guest room. I didn't hurt them, what happened to them I wasn't commander anymore. I request that the victims. I would like to say to them that I regret what I did to them and the people of Lolotoi and the victims of 1999. The court will decide on a sentence. I would like to say I am still single I would like to go home and be with my people once again, I thank you judges"

143 The Special Panel has taken into account the following:

Mitigating circumstances:

144 It is important to recall that the accused pleaded guilty to the charge against him. As the Court established, his guilty plea was made voluntarily and was unequivocal. Jhoni Franca clearly understood the nature of the charge against him and its consequences. As already decided by this Court in the case the case of Dos Santos[43] a person, who is honest to admit guilt, coming with an open heart and an open mind, has to be treated consequently. There are not many cases, in which the accused persons admit guilt.

145 Joao Franca da Silva Alias Jhoni Franca cooperation with the Court was substantial. He freely admitted the participation in charges of imprisonment and torture. The accused has aided in the administration of justice by cooperating and providing full disclosure of the crimes that occurred.

146 Jhoni Franca, prior to the commission of the crime for which he has been convicted, lived in a very coercive environment. There was pressure from militia to join criminal activities. As the accused stated, the coercive environment has been a factor for the accused in joining the militia and committing the crime, although there are some who refused to join criminal activities. The fact that some joined while others were able to resist, does not mean that there was no coercive environment. The coercive environment, in which the crimes were committed, has been a crucial factor for the Accused in committing the offences. He was not able to resist the solicitations of the regime that was on power at that time. He

[43] The Public Prosecutor v. Do Santos

said: "*At that time I started as a youth of clandestine, (...) at that time in 1999 arose the militia in Maliana (...) the militia and the TNI started to carry out operations searching for pro independence youths (...) I was a youth and the head of organizing of all the activities of the clandestine (...) I was approached by Indonesian intelligence commander sutrisno. He said to me it is better that you surrender than die. To postpone my death I went (...) I joined...*"

147 Joao Franca da Silva Alias Jhoni Franca expressed remorse for the crime that occurred. He asked for forgiveness. The accused is remorseful, by saying in the Court that he was sorry. He did not want the Court to go to the trouble of proving something that his conscience wants to release. The accused said in the Court that he is apologizing for harming his people; he is apologetic to the victims of his acts, all the victims of the events occurred in 1999, the people of Lolotoe.

148 The Special Panel bears also in mind the family background of the accused and the fact that the accused is young and can be useful to the society. The fact that he is twenty seven years old and that he has been very cooperative with the Court, in addition to showing remorse publicly, would suggest possible rehabilitation. The close relatives of the accused came to testify before the Court. The parents of the accused are alive, as well as some of his brothers and sisters. He has a family to go back to. He is not an outward character that cannot integrate into society. He himself told the Court that he would like to go home to be with his people once again. There is a need to restore him to his normal life as soon as possible for his rehabilitation.

149 The Special Panel has also taken into consideration the fact that the accused has no previous conviction.

150 Having reviewed all the circumstances of the case, the Special Panel is of the opinion that exceptional circumstances in mitigation surrounding the crime committed by the accused afford him some clemency.

Aggravating circumstances:

151 The victims were defenseless persons whose inability to respond to the threats and harm was unconditional;

152 Although the convicted person told the Court during the pre-sentencing hearing that he was a doll, his function was proven to be that of the

decision-maker of all the actions in fulfillment of a plan drafted by Indonesian officers and performed by paramilitary groups against the independence supporters in East Timor, which leads to the conclusion that he was one of those who were supervising those actions and therefore exercising a role of authority during the imprisonment, and the torture.

Sentencing policy

153 According to Sect. 10.1 (a) of UR-2000/15, for the crimes referred to in Sect. 5 of the aforementioned Regulation, in determining the terms of imprisonment for those crimes, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals. "In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (Sect. 10.2).

154 The penalties imposed on accused persons found guilty by the Panel are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished (*punitur quia peccatur*). They are also intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights (*punitur ne peccetur*).

155 Finally, the objective of prosecuting and punishing the perpetrators of the serious crimes committed in East Timor in 1999 is to avoid impunity and thereby to promote national reconciliation and the restoration of peace.

156 The Panel considered all the aggravating and mitigating circumstances upheld both by the practices of East Timorese courts in applying the Penal Code of Indonesia (KUHP) and the standards derived from the ICTY and the International Tribunal for Rwanda, apart from those provided for under UR-2000/15 as well as under general principles of law.

Conjunction of punishable acts

157 The crimes of imprisonment and torture as crimes against humanity for which the accused Jhoni Franca was convicted are a conjunction of

punishable acts. It was proved that the victims were first arrested and imprisoned and then tortured while in prison. Therefore, the Panel deems that the accused performed several acts (imprisonment and torture) which forms in itself more than one crime with such a relationship that they must be considered as one continued act.

158 The Sect. 10.1 of UR-2000/15 recommends the Panel to apply Indonesian law in determining the terms of imprisonment for the crimes against humanity committed in East Timor[44]. Accordingly, Art. 64(1) of Penal Code of Indonesia (KUHP) provides that only one of the most severe penal provisions shall be imposed[45]. In this case, since the punishment for the crimes of imprisonment and torture are the same, only one of them shall be served. The accused shall therefore serve only the punishment for one of the convictions.

159 Taking into account the aggravating and mitigating circumstances, the conjunction of acts and the gravity of the crime and the abovementioned considerations, the Special Panel deems appropriate the punishment of 5 (five) years imprisonment

[44] Sect. 10.1 of UR-2000/15: "A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present Regulation: (a) imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals (...)".

[45] Art. 64(1) of KUHP: "If among several acts, even though each in itself forms a crime or misdemeanor, there is such a relationship that they must be considered as one continued act, only one penal provision shall apply whereby, in case of difference, the most severe penal provision shall be imposed."

L. DISPOSITION

For the aforementioned reasons, having found the accused JOAO FRANCA DA SILVA ALIAS JHONI FRANCA guilty, considering the arguments of the parties, the evidence presented at the sentencing hearing, the transitional rules of Criminal Procedure, the Special Panel finds and imposes sentence as follows:

With respect to the defendant JOAO FRANCA DA SILVA ALIAS JHONI FRANCA:

(1) GUILTY for all the 4 charges of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, as crime against humanity, a crime stipulated under Section 5.1(e) UNTAET Regulation 2000/15;

(2) GUILTY for the charge of torture as crime against humanity, in violation of Section 5.1(f) UNTAET Regulation 2000/15;

(3) In punishment of those crimes, sentences JOAO FRANCA DA SILVA ALIAS JHONI FRANCA to an imprisonment of 5 (five) years.

(4) Orders the defendant to pay the costs of the criminal procedure.

Credit for time served

According to Section 10.3 U.R. 15/2000, section 42.5 UR-30/2000 and Article 33 of Indonesian Penal Code; the Special Panel deducts the time spent in detention by JOAO FRANCA DA SILVA ALIAS JHONI FRANCA, due to an order of an East Timorese Court. The defendant JOAO FRANCA DA SILVA ALIAS JHONI FRANCA was arrested and detained since 15 February 2001 to date. Therefore he was under detention for 1 year 8 months and 14 days. Accordingly, previous detention shall be deducted from the sentence today imposed, together with such additional time he may serve pending the determination of any final appeal.

Enforcement of sentence

Pursuant to Sections 42.1 and 42.5 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.

This decision is provided in one copy to the Defendant and his legal representative, Public Prosecutor and to the prison manager.

The Defense has the right to file a Notice of Appeal within the coming 10 days and a written appeal statement within the following 30 days (Sect. 40.2 and 40.3 UR-2000/30).

This Judgment was rendered and delivered on the 5th December 2002 in the District Court of Dili by

Judge Sylver NTUKAMAZINA, Presiding

Judge Benfeito MOSSO RAMOS

Judge Maria NATERCIA GUSMAO PERREIRA

(Done in English and Bahasa Indonesia, the English text being authoritative)