



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRIAL de DILI

SECÇÃO CRIMES GRAVES

Case No. 20/2001

Date: 9.12.2004

Original: English

Before:

Judge Antonio Helder Viera do Carmo

Judge Oscar Gomes

Judge Francesco Florit, presiding and rapporteur

Registrar: Joao Naro

Judgement of:

The Prosecutor

V.

Florencio Tacaqui

JUDGEMENT

The Office of the Public Prosecutor:

Mr. Charles Nsabimana

Counsel of the accused

Ms. Maria Rocheteau

INTRODUCTION

The trial of Florencio Tacaqui - d.o.b. 21.10.1962, place of birth Natuna, Passabe sub district, Oecussi district, former teacher, married, currently in Becora prison - before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereinafter: the "Special Panel") started on the 14 July 2003 and ended today with the rendering of the decision.

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

PROCEDURAL BACKGROUND

On 27th September 2001, the Public Prosecutor filed before the District Court of Dili a written indictment (in English version) against Florencio Tacaqui and ten others, charging them with several counts of crimes against humanity. A severed copy of the indictment related exclusively Florencio Tacaqui was filed at a later stage.

Copies of the statements of several witnesses and copies of the statements of the accused Florencio Tacaqui himself, were attached to the indictment. Reports of forensic medical examination of victims, reports of anthropological examination of the remains of victims and ancillary documents, were also attached. Reports of Indonesian and international bodies and institutions relating to the events of 1999 in the territory of East Timor were also attached.

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

After the preliminary hearing, the trial started on the 14th July 2003.

In the course of the trial several witnesses were heard, in Dili and in the village of Passabe, in the enclave of Oecussi. The Court visited the crime scene in Passabe. At the end of the trial, closing statements were made.

After the closing statements took place, the hearing was postponed for the disposition (26 July 2004) and then to the present date for the final written decision.

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

FACTS OF THE CASE

In the indictment, with the formulaic and ritual description of facts which is common to most of the indictments filed before the Special Panels, the Prosecution alleges that, in the context of the events that disrupted the country of Timor in 1999, the presence of organized militia in the District of Oecussi, and in Passabe specifically, involved a group called Sakunar, to which the accused belonged. Allegedly, most of the members of Tacaqui's family were the leaders or eminent members of the Sakunar militia in Passabe.

In the accusation, Tacaqui is said having taken part in the illegal activities of the Sakunar group which consisted of the persecution of CNRT members, of the repression of pro-independence supporters and their activities and of the intimidation of the population to induce it to choose for autonomy in the popular consultation of the end of August 1999; after the result of the poll were known, the Passabe section of the Sakunar militia group is said to have unleashed a violent reprisal on the villages that were believed to have supported independence fighters during the course of the campaign or rejected the presence of pro-autonomy campaigners.

In this general context, the counts are structured around three main specific episodes, two of which happened before the popular consultation and a third, the main one, after it.

In the first episode (count 1), that took place in the second half of April 1999, more than forty believed CNRT members were gathered by Sakunar militiamen in the house of Gabriel Colo, *chef de suco* of Abani (Passabe sub-district) and local militia leader, to be beaten and were held, imprisoned or deprived of physical liberty, for several days.

In the second episode (counts 2 and 3) Mr. Tacaqui, together with others, allegedly attacked a group of CNRT supporters holding a secret meeting. As a consequence of the attack, which occurred on the 9th August 1999 in Abani, a man, Jose' Bubun was pursued and assaulted by the accused causing severe injuries to the victim.

The third episode refers to a cluster of events which unfolded immediately after the outcome of the popular consultation and are described, in the indictment, as reprisal activities against the pro-independence community.

In the Prosecutor's allegation it is stated that between the 8th and the 10th of September 1999 the villages of Nibin Tumin and Kiubiselo were raided by militias who murdered people, destroyed properties and forced a significant part of the population to flee the villages and seek shelter in West Timor.

A large-scale operation run by the Sakunar militia took place in the area of Passabe. The operation begun with raids against the villages of Nibin, Tumin and Kiubiselo (in the course of which many people were allegedly killed and others injured: counts 3 and 4 respectively), it continued with the deportation of large part of the population of the three villages to West Timor (count 5); but the most relevant part of the operation, in the accusatorial perspective, was still to come and it happened on the following day when a group of the displaced people (the male youth of the villages) were allegedly concentrated in Imbate, tied up and lead to Teolassi (close to Passabe) where they were murdered or severely injured by the militia members (counts 6 and 7).

The Prosecutor is of the opinion that Tacaqui participated in the events as described in counts 3 to 7 of the indictment.

The last count (8) is one of persecution.

No new fact are described as the basis of the count but all the events listed in counts 1 to 7 are re-read and re-qualified, cumulatively, as severe infringements of fundamental rights in

prejudice and discrimination of members of CNRT and/or supporters of independence of East Timor.

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

Mr. Tacaqui is charged as follows for crimes against humanity:

count 1) Imprisonment or other deprivation of physical liberty in violation of fundamental rules of international law: by his acts or omissions Florenco Tacaqui, is responsible with others for the imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of forty three CNRT member and/or pro-independence supporters at the Police Station in Passabe Sub-District, Oecussi District from 18 April 1999 to 24 April 1999 (Section 5.1(e) and 14 and or 16 UNTAET Regulation 2000/15);

count 2) Inhumane acts intentionally causing great suffering or serious injury to body or mental or physical health: by his acts and omissions Florenco Tacaqui is responsible with others for intentionally causing great suffering or serious injury to body or mental or physical health of Jose Bubun on 9th Aug. 1999, in Pope sub-village, Abani village, Passabe sub-district, Oecussi district (Section 5.1(k) and 14/1 of UNATET Regulation 2000/15);

count 3) Murder: by his acts or omissions Florenco Tacaqui, is responsible with others for the murders of Armando Sani from Nibin village, Nitibe sub-district, Oecussi district, Marcos Sufa Afoan, Filipus Tualaka, Laurentino Ulan Cono, Augustino Neon, Naub Lape, Alberto Afoan, Nenu Catu, Ciprianus Anin and Francisco Elu, from the village of Tumin, sub-district of Nitibe, district of Oecussi, Victor Punef, Yacobus Sici, Jose Noni, Augustino Ulan, Zacharias Ena, Mikhael Sasi, Yacobus Oki and Jose Sici, from Kiobiselo village, Nitibe sub-district, Oecussi district, on 8th September 1999 (Section 5.1(a) and 14/16 of UNATET Regulation 2000/15);

count 4) Inhuman acts causing great suffering or serious injury: by his acts or omissions Florenco Tacaqui is responsible with others for intentionally causing great suffering or serious injury to body or mental or physical health of Laurencio Leo Mali in Tumin village, Nitibe sub district, Oecussi district, and on Mateus Sufa and Josefino Bose, Kiobiselo village, Nitibe sub district, Oecussi district on 8th September 1999 (Section 5.1(k) and 14/16 UNATET Regulation 2000/15);

count 5) Deportation or forcible transfer of population: by his acts or omissions Florenco Tacaqui is responsible with others for the deportation or forcible transfer of population from the villages of Nibin, Tumin and Kiobiselo, Nitibe sub district, Oecussi district, to Imbate in West Timor on 9th September 1999 (Section 5.1(d) and 14/15 of UNTAET Regulation 2000/15).

count 6) Extermination: by his acts or omissions Florenco Tacaqui is responsible with others for the extermination of forty-seven men from the villages of Tumin and Kiobiselo, Nitibe sub district, Oecussi district, on 10th September 1999 (Section 5.1(b) and 14/16 of UNTAET Regulation 2000/15 and 14/16).

count 7) Inhuman acts causing great suffering or serious injury: by his acts or omissions, Florenco Tacaqui is responsible with others for intentionally causing great suffering or serious injury to body or mental or physical health of Marcus Baquen, Josefino Ulan, Pedro Cono, Crispiano Bobo, Sebastiano Sunef (Ulan Sufa), Augustino Ase (Afoan Ase) and Mateus Kusi on 10th September 1999 at Nifu Panef, near Passabe village, Oecussi district (Section 5.1(k) and 14/16 of UNTAET Regulation 2000/15).

count 8) Persecution: by his acts and omissions Florenco Tacaqui is responsible with others for the persecution of members of CNRT and/or his supporters of independence of East Timor in Oecussi district (Section 5.1(h) and 14/16 of UNTAET Regulation 2000/15).

FACTUAL AND LEGAL FINDING

The Prosecutor's case is based on three events or group of events that took place at a relevant time distance from each other, in different locations and against various victims. Accordingly, with one exception, each witness was only present at one episode and did not witness other events.

In the course of the trial thirty-five witnesses were heard on the various charges and beyond: facts as diverse as the "belulik" and traditional believes or the meetings of the Commission for Reception, Truth and Reconciliation (CAVR) were scrutinized, together with issues more closely related to the facts described in the charges.

The Court also visited the crime scene and reheard five witnesses during the course of the trial.

In general, the Court found the ascertainment of facts to be very difficult.

The transcripts of the hearings amounted to a conspicuous volume of hundreds of pages; each witness spoke at length and the opportunity was left to the parties to ask questions (subject only to the relevance of the questions), yet it can hardly be said that many of the witnesses gave a crystal-clear version of the facts upon which they were asked to testify. In general, on the collection of oral evidence, all the difficulties already met in previous trials before the Special Panels surfaced again in the present case: the interpretation of the words of the witnesses, issues relating to their credibility and reliability, the capacity to understand the context in which their narrations are embedded are crucial and more troublesome in the Timorese cultural environment than in other jurisdictions. Most of the people who came before the judges to say what they saw of the facts and to give their contribution to the trial, were basically illiterate and scarcely able to narrate events in a congruent and exhaustive manner. Their ways to refer things appeared very often (also due to difficulties of translation –from English or Portuguese to Tetum and then to Baikeno and back, sometimes answers didn't match with the questions asked) obscure and numb, like a piece of wood or of stone in the process of being worked by the artisan to become an utensil or a decoration. However, in the inherent conflict and contraposition of Parties that the trial is, with Parties trying to see

their own truth confirmed, the shape of things to come sometimes was dispersed with the result that the testimony came not neat and sometimes almost unreadable.

It has sometime happened that this exposure of some witnesses to the cross-examination and to the rules and customs of inquiry by the Parties (a distinct and positive feature of adversarial trial in many jurisdiction) has brought confusion and contradiction, instead of clarity, with witnesses unable to come out from the bundle of contradictions created from their own words. In many cases the original version of a fact or of a detail regardless of relevance was modified during the course of testimony and the attempt to clarify the facts lead to renewed sources of confusion. As a result, the transcripts of the hearing can be used by the Parties at their ease in a sort of careful cherry-picking of truths available, as it is made evident by the consideration that most of the witnesses for each count are referred to (and their version is used) by each Party, in support of the respective, contrasting version.

What's more, it should be noted that a pattern of behavior was noticed in many witnesses: the paucity of their culture was used by them as a defense. In other words, when a contradiction emerged, the excuse of the limited capacity to understand or remember was readily used by the same interviewed to justify even the most macroscopic of contradictions. Facing a request for clarification, or being asked which were the correct of two versions, the answer was often: "I don't know: we are simple people; we didn't go to school; we are illiterate; we are not like big people; we are son of God, what we know we say, what we don't know, we don't say". Sometimes, when the contradiction was made clear to the witness and he was asked why, for example, he hadn't added the name of the suspect to the list of aggressors, at the time of the investigation, the reply was: "I made the name, if they wrote it or not, I don't know". The same pattern of behaviour was repeated for several times, in different testimonies and appeared to be a pattern of formulaic excuse, as an easy escape from the pressure of the examination.

Before examining the witness statements in order to find the facts of the case, few words are needed in order to understand how the investigation unfolded. If a positive trend can be found in the inquisitorial approach that has prevailed in the interpretation of the Transitional Rules of Criminal Procedure (UNTAET Regulation 2000/30), it lies in the fact that the Court is given, before the beginning of the trial, the entire file of statements given by the witnesses during the course of the investigation and can (not only use them to refresh the memory of the witness in case of lack of memory or of contrasting versions –section 36.4 of the Regulation- but also) strive to understand in which circumstances the investigation itself started and grew. In turn, this exercise can give some useful insight on the modalities of the inquiry and the way in which the case was eventually brought before the Court. Indeed, if it is a given that the Prosecutor enjoys a significant discretion in the way the investigation is lead (provided he/she investigates incriminating and exonerating circumstances equally – section 7) and in the modality in which the result are presented to the Court, it's obvious that the Court itself can try and draw elements of evaluation (of the credibility of the witnesses, for example) from the general progress of the inquiry.

In this perspective, it is very important to follow the progression of the inquiry.

The investigation started, after the landing of the Interfet contingent in the district of Oecussi (October 1999). Once villagers started to return to the villages targeted by the Sakunar militia group, they gave their first statements to the Interfet investigators.

The very first statements are dated 19.12.99 (from the witnesses Cosmas Ulan, Jacinto Doutel, Abrao Eko), they are headlined "Passabe murder" and bring a short account of the events which allegedly happened in the subdistrict of Passabe between the 9th and the 10th September 1999 (the mass murder of Teolassi, count 6 and 7).

The following inquisitorial step was taken few days later, in the days surrounding Christmas '99, when some four new declarations were collected from the witnesses Josefino Ulan (23 Dec.), Mateus Kusi (24 Dec.), Crispiano Bobo (27 Dec.) and Sebastiano Sunef (29 Dec.). The subject of the depositions is still indicated as "Passabe murders" but the narration of the facts slightly broadens, coming to include, if also only in passing and only in the declarations of Sebastiano Sunef and Crispiano Bobo, the attacks to the villages of Kiubiselo and Tumin (part of counts 3, 4 and 5).

At the beginning of January 2000 (on the 6th of that month) two more statements were collected from Josefino Bose and Agostino Ase: the first witness testified on the attack on his village, Kiubiselo, on the 8th September 1999 (part of counts 3, 4 and 5), while the second referred about the events in Teolassi (counts 6 and 7).

More than two months elapsed before the next statements were taken, around the middle of March, in the villages that had been the target of the most relevant attack of the Sakunar militia group: twenty eight witnesses were heard in four days (17-21 March), generally encompassing, in their narrations, the facts described in the counts from 3 to 7.

Eventually, the last two witnesses on the same line of inquiry (i.e. on the same facts of the 8th to 10th Sept. 1999) were heard on the 11th and on the 13th of April 2000 (Agostino Cono and Domingo Caet respectively). In those occasions, the two witnesses referred (Agostino Cono was heard for the second time) to the attack on the village of Kiubiselo of the 8th September and to the murders that occurred in the course of it.

It is important to understand that at this point (13th April 2000) the inquiry was virtually completed. It is true that other investigative initiatives were going to be taken or were underway but they were of such nature that they were not directed to extend the area of the facts under inquiry or the list of the accused. Indeed, the medical examinations of some ten victims (the direct observation of the victims was carried out in the second half of March 2000 and the report were given to the Prosecutor on the 1st April 2001) and the anthropological examination of the remains of some 47 victims exhumed in Teolassi (the examination started at the end of August and was completed at the beginning of October 2000; the final report was filed at the middle of April 2001) were aimed at achieving a comprehensive picture of the case and to prepare it for the trial also under the technical forensic aspects.

In the same year, some months later, a final witness was heard. In September 2000 Bernardinus Sanam was interviewed, for four days, on the structure and modalities of operation of the Sakunar militia, on its leadership and also on specific operations. He was not called to confirm his declarations in Court.

This Court notices the quite extraordinary circumstance that after more than one year of an investigation which had included the examination of more than forty witnesses on the facts of extraordinary magnitude happened in Kiubiselo, Tumin, Nibin and Teolassi, the facts described in counts 1 and 2 were unknown and the name of Florencio Tacaqui was almost unknown to the investigators.

The presence of the accused and his role in the facts had not yet dawned upon the investigators because none but two of the numerous witnesses had mentioned him at that stage (i.e. until 25 January 2001). But two, we said, those only two being Agostino Mesac (heard on 17.3.00 but not called to the trial due to the scarce relevance of the deposition: he reported on the burial of the bodies on the 10th September) and Domingos Quelo (heard on 19.3.00: he recollected the presence of the accused during the attack to the village of Kiubiselo but doesn't say anything specific on his count).

On the other hand, during the course of the inquiry each of the other witnesses mentioned several persons (but not Mr. Florencio Tacaqui) as the perpetrator of the crimes listed in count 3, 4, 5, 6, 7 and 8 (crimes in count 1 and 2 had not yet been reported by anyone) which had been, at that point, extensively investigated.

In other words, for more than nine months, from middle April 2000 to the end of January 2001 no new contribution to the knowledge of the facts was made or any research of further perpetrators or new criminal facts was attempted. As a matter of fact, the inquiry was closed, and the case was made ready for trial.

But something new and unexpected happened in at the end of January 2001, which cause the investigators to reopen the case and reconsider their strategy: the most relevant and innovative fact of all, in a way an extraordinary event in an inquiry which was otherwise deemed to end in a file that would have been put on a judge's bookcase to rest forever (like all those where the accused are "believed to be in Indonesia"), was the arrest of Mr. Tacaqui on the 26th January 2001. What is important to understand is that, up to that moment and according to the statement of only one of more than 40 witnesses, Mr. Tacaqui was an obscure militia member, whose name was only mentioned (as Lorenzo Takakib) as the tenth in a list of thirteen attackers against the village of Kiubiselo, on the 8th September.

The arrest of Mr. Tacaqui took place on the 26th January 2001 and brought about the refocus of the inquiry, in two ways which will be illustrated later.

On the same day of the arrest, two witnesses were heard, Matias Mesac and Fernando Quelo. They both accused Mr. Tacaqui of an episode which had never been referred before by any witnesses (and which later would constitute count 1); on this assumption (and noting that the accusatorial declaration were received by CIVPOL officers in Passabe not sooner than 8 p.m. o'clock of a Friday night) the accused was held under arrest over the weekend. Then, with the new week (29th January 2001), a new collection of evidence started to be gathered so to accumulate, in few days, a relevant number of statements, which will be later examined, on the presence and the involvement of the accused in the events listed in each one of the eight counts.

This, in brief, is the story of the unfolding of the inquiry which allows us to draw the preliminary conclusion that, without the casual arrest of Mr. Tacaqui (casual in the sense that

it was not the result of a search by the Authority or that any activity of intelligence had been displayed to prepare it: indeed, as noted, Tacaqui was not one of the key figures in the investigation) those in charge of the investigation on the milita's rampage in Passabe could and would have not expanded the sphere of the investigation to the crimes of deprivation of the personal freedom of CNRT supporters and the aggression against Jose' Bubun. Accordingly, counts 1 and 2 of the indictment would have not existed.

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Before moving to the fact-finding, it is finally proper to consider the condition of the accused himself, who has been silent during the majority of the inquiry and the totality of the trial. This behavior has not only had a procedural side, rather a radical approach to life itself, since the accused has never resumed speaking again since sometime around the end of year 2001. Apparently (but no evidence has been introduced on this issue nor has the Court troubled itself with a specific research) he stopped any sort of communications after being served the indictment, which he formally received (signing the receipt) on the 12 October 2001. The oddity of the behaviour of Tacaqui is blatant: in jail he has lead and leads a normal life, has never shown signs of psychological disturbance, obeys orders and keeps himself and his environment tidy and in good order; though, he has been refusing any kind of relation with the outer of himself. When placed together with others, he does not show disinterest but will not interfere in others' speeches nor take any autonomous initiative: he will sit or stand as a reflex of others' behaviour, not on his own motion.

This pattern of behaviour, unmodified for almost three years, is obviously disturbing for the Court who has been put before the cumbersome enigma of this silent man: is he fit for trial or not? Can he understand what is happening around him or is the Court proceeding against someone who, being lost in a reality to which the Court is extraneous, is present in flesh and blood, but absent in mind?

Should the second interpretation be the case, the trial should have been stopped and the accused provided with treatment, not incarceration.

To assess the psychological condition of the accused, two experts, at different stages of the proceedings, were appointed by order of the Court to carry out psychiatric examinations: they both found the accused fit for trial and, despite the unusual nature and inexplicability of it, spoke of an 'elective mutism'. In other words, at the basis of the conduct of Tacaqui there is a choice, the selection of a behaviour that rescind any need to communicate not only with the authority (which would be enough to exercise the right to silence in juridical terms) but (and this makes it more troublesome) with the entire world. We just said that this silence is inexplicable, meaning that it's hardly possible to find a justification why Tacaqui is imposing himself something that is far beyond what is necessary to preserve his right not to be compelled to confess or to declare against himself. In the trial, for him as for any accused, it could be enough to refuse the opportunity, always given to the defendants, to express their view on the charges and the ongoing proceedings, but why refuse giving instructions to his Defense Counsel, why renounce to help himself by concealing everything beyond the sight of his nonetheless expressive eyes? Expressive eyes, indeed, and an intense sight, always ready to follow the trial and any part of it. It is the view of the Court that when addressed, Tacaqui clearly understood what was said, choosing not to reply. The observation by the Court of the conduct of Tacaqui was continuous, during the trial, at any stage and in any moment, in the courthouse or outside it (in Passabe, the Court lived together with the

accused for three days, for much longer hours and in much different conditions, because more relaxed, than it occurs in the normal court context; meals were eaten together, Tacaqui was personally escorted by the judges in some occasions and the trips in themselves gave the opportunity to keep an eye on the accused): he never expressed himself but at the same time it was evident that his mind was not absent and that he was following the unfolding of the trial.

The Court understands the concerns of the Defence Counsel about the scarcity of the observation by the two experts on the behaviour of the accused; on the other hand, given the conditions of this fledgling Country, with limited resourced put on the National Health System and no resident psychiatric professional (Dr.Hume was a UN employed, while Dr.Duncan was in Timor Leste occasionally and for personal reasons and volunteered for the job), no further inquiry or wider examination could reasonably be carried out.

The two professionals who examined the case before the preliminary hearing and at the trial stage, couldn't do anything more than visiting the jail, meeting the accused, trying to speak with him (with no reply, obviously), interviewing the jail guards and examining the available and relevant documents. In all, the direct contact that each of them had with the accused didn't last more than one hour each time. Of course this is little time, but it must be agreed that the two professionals were able, despite the limited spell, to pick the main features of Tacaqui's simple and repetitive way of conduct, a skeletal existence, with a limited range of exhibited emotions, which the Court, on its side, had the opportunity to observe during all the course of the trial. In essence, it does not appear to be inappropriate to find that the conclusion to which the two experts came matches with and is corroborated by what has been observed by the Court with the help of simple experience and (hopefully) common good sense.

At no time Tacaqui appeared out of context or not *compus sui* and, on the opposite and as far as the observation in Court allows to draw conclusions, he showed, in any occasion, signs of understanding and proportionate reactions to what was happening in court (when addressed, when requested to stand or, on one occasion, to swap his seat with the Prosecutor's assistant). Eventually, if also the behaviour of the accused is far from normal and the Court is not inclined to negate the oddity of the extraordinary life Mr.Tacaqui has been living since three years now, there's as well no room to say that he can not have a full understanding of the reasons why he is being tried or of the basic rules of the trial. A possible depression, which has surfaced as an alternative explanation of the mutism (Mr.Duncan, who allowed it, put it in hypothetical terms) is, as such, undiagnosed and controverted (in the word of the same specialist, who illustrated that "the emotional withdrawal" –which could be a character of a depression- is not accompanied by other recurrent signs of depression and, on the contrary, is contrasted by modalities of behaviour which would be unusual for a depressed).

Trying to understand the reasons of the choice of Tacaqui is naturally beyond the faculties of this Court: any speculative option is, naturally, nothing more than an hazard or a guess. A not confessable promise or an extortion, the desire to protect the family from vengeance or the need to fulfill an oath; a radical refusal of all or some of the charges, held too infamous to be even received or the intimate conviction that the conviction is already written and all the trial is a fake or a mockery; even the interruption of a ritual of traditional religion, all these, at times, have been alleged as the reasons for Tacaqui to stop speaking. For the Court

it's enough to know that two experts, independently and at different times have found the accused fit for the trial.

Before examining each single count the Court feels itself compelled to analyze, on the basis of the evidence, the role of the accused in the Sakunar militia in Passabe.

Since the crimes attributed to Tacaqui are not the product of an individual action but they are the result of the activity of a group, understanding the position and the function of the accused in the group itself becomes relevant.

In neither of the two indictments filed in the case (the original indictment signed on 27th September 2001 against eleven accused including Florencio Tacaqui and the "severed indictment" signed on the 28th January 2002) Florencio Tacaqui is described properly as a militia leader or commander nor is his responsibility invoked under a "command responsibility" formula.

On the opposite, in the first indictment he is qualified as an 'ordinary' militia member (while other accused as Simao Lopes, Laurentino Soares and Gabriel Colo are qualified as commanders of Sakunar militia in Oeccusi or in Pasabe) and his role is described accordingly (point 15); where the criminal responsibility of the accused is discussed in the indictment (chapter IV, pg. 12 and following) the name of Tacaqui is not included amongst those (Simao Lopes, Laurentino Soares, Gabriel Colo, Andre Ulan and Anton Sabraka) for whom the "Superior Criminal Responsibility" was recalled – i.e., as explained, as "a superior for the act of his subordinate if the superior knew or had a 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 perpetrator thereof".

The second indictment is a simple repetition of the relevant parts of the first one, in relation to the only accused who, being jailed, was ready to face trial. Accordingly, and correctly, the Prosecutor didn't modified Tacaqui's role and his function in the militia and deleted the sub-chapter on "Superior Criminal Responsibility" in chapter IV which was pivotal in the case against Lopes, Soares, Colo, Ulan, and Sabraka but was of not relevance in the case of Mr. Takaqui.

Yet, in the course of the trial, Mr. Takaqui has been repeatedly described as a militia leader by many witnesses; the Prosecutor himself, forgetful of what was the starting assumption, in many occasions empathized the high rank of the accused in the Sakunar structure.

The Defense Counsel, on the other hand, has constantly and rigorously contrasted the factual reconstruction that made of a simple militia member a leader and underlined the inadmissible shift in the Prosecutor's perspective.

The importance of understanding which the role of the accused in the Sakunar hierarchy was lies obviously not only, as a matter of law, in the need to determine correctly the source of his eventual responsibility but also, as a matter of fact, in order to evaluate the involvement

of the accused in the events themselves and to assess his knowledge (if any) of the attacks and the eventual degree of moral participation in them.

The starting point in this search is a document that can be found in the file at page 608 and consists of a list of militia adherents, for the village of Abani, Passabe; in it, Florencio Tacaqui is listed not as an ordinary member (there are 202 of them) but as one of the 6 “Pembina pasukan” together with Tomas Subun, Julio Da Costa, Agostinho Punef, Andre Ulan, and Filipus Bonat.

The author of the document appear to be Gabriel Colo (the accused’ uncle) and the document, if also not signed, is dated 30 April 1999.

For the source from which it comes and for the time in which it was made the list is an uncontested testimony of the role of ‘pembina pasukan’, i.e. advisor or counselor of the platoon or battalion, enjoyed by the accused, which at least permits to establish his close link to the leadership of militia in the area of Passabe.

Whatever the role of advisor could mean, it is confirmed by Tacaqui himself in the statement he gave to the investigators few days after his arrest. While the value of the declaration made during the enquiry by the accused who later refuses to speak at the trial stage will be examined later, suffice it to say now that in the course of the interview (Page 813) when confronted with the list, the accused acknowledged his membership to the Sakunar, adding to be enrolled not as a matter of wish but rather on obligation: “they asked all those who are literate and educated to be involved in the pro-autonomy campaign... the order came from the head of the sub district so we all had to be worried”.

On the other hand, the Court cannot neglect to consider one element which has been loomed by the prosecutor along all the course of the trial, i.e. the family relation of Mr. Tacaqui with other militia leaders. Indeed, it emerges clearly that Mr. Tacaqui is Gabriel Colo’s nephew (*chef de suco* of Abani, suco of Passabe, and head of local militia group). Other co-accused like Andre Ulan, Domingos Obe, and Julio Da Costa were family members and members of the same militia group.

In this contest it can hardly be believed that Tacaqui’s membership to the militia was a forced one. The ritual defense put forward by militia members when questioned about the reasons to join pro-autonomy organization (“I was forced to join; if not they would have killed me”) is much less believable if proffered by a close relative of the supposed recruiter.

About the dominant role of the Colo family in Passabe the Panel has heard some witnesses of high credibility who in plain words referred to the singular and peculiar behavior of that family group in 1999 (including the two Tacaqui brothers -Keo, also known for the name of Gabriel Colo and Carlos, Florencio Tacaqui’s father – Domingos Obe, Julio Da Costa and Andre Ulan).

Paulino Neki (administrator of traditional justice in Pasabe) heard on the 3rd of March in Passabe, recollected that “when the two option were given, then they started to do the work of autonomy... his work (Mr. Tacaqui’s) was with his father and his uncle Gabriel Colo and all the other whose names has been mentioned; they would do their work.... their work was like killing people, destroy people’s animals, burn people’s houses”.

Then this exchange follows:

- "Mr Paulino you said that before 1999 you saw Mr. Tacaqui and you knew his family and everybody lived normally".
- "Yes there was no problem".
- "So why then in 1999 some people turned violent and killed people?".
- "Because of the people who did the clandestine work; these people (the militia) turned violent to them".
- "And the authorities that were here, the Indonesian authorities, police and administration and so on, what would they do when there was violence like that?".
- "They would be working together, the police, the military were working together.... they were working together and they were just quiet, they would not say anything here in Passabe and they beat up 43 people".

Paulino Ena, heard the following day in Passabe, similarly identifies the family linkage of Mr. Tacaqui with Gabriel Colo (*chef de suco* in Passabe) and Andre Ulan, police officer. Like the previous witness, he emphasized the shift in attitude of Mr. Tacaqui and his family in the course of 1999:

- "Since when does he have the knowledge of Mr. Tacaqui; is it for a long time?"
- "I have known him for 23 years.... I have known all his family, his brothers, his parents, his sisters...."
- "Before 1999 you knew Mr. Tacaqui and you used to speak to him normally?".
- "Before 1999 we never had any problem with him".

Later he speaks of Laurencio (Florencio) Tacaqui, Carlos Tacaqui, Mateus Taboi and Andre Ulan as a group that formed "this autonomy".

The same with Agustinho Molo who, answering the questions of Judge Oscar Gomes, so details: - "Before 1999, did you know ... Sr. Tacaqui?".

- "I knew him, he was born here and his house is that one over there".
- "Do you know all his family?".
- "I know his father, his father's name is Carlos Tacaqui, he was the chef of suburb here. His brother (i.e. of Carlos Tacaqui, so the uncle of Florencio Tacaqui, Gabriel Colo) was the chef of the village and at that time he was the police officer in charge of this area... two options were given to the people; these two options were CNRT and autonomy and after they (i.e. those mentioned in the immediately previous answer, the members of Tacaqui's family) formed the autonomy group, they told us that if we didn't follow the autonomy group they would arrest us and beat us".

Shortly after, in the deposition he mentioned the circumstances in which he was beaten (he refers to the episode described in Count One, evidently, but was not called as a witness by the prosecutor) and mentions all the members of Tacaqui's family, his relatives, as participating in the action: "Senor Agustinho do you know the people who beat you?".

"I know that person; that person's name is Julio Da Costa he was the secretary... Julio Da Costa was senor Tacaqui's secretary. They once that gave orders to Julio Da Costa to beat me up. Julio was a big man, he had a big body... they were all sitting there together and the names I am going to tell you now: Carlos Tacaqui, Gabriel Colo, Julio Da Costa, Laurencio Tacaqui, these are the heads, and Tomas Subun".

It must be noticed, to prevent possible arguments that the circumstance, which are referred by the witnesses are not second-hand. The witnesses have direct knowledge of the facts (i.e. the formation of the pro-autonomy militia group; the participation and the leading role of the Tacaqui family; the beating of Mr. Molo at the presence of the members of the same family, who were giving orders) which were part of the community life in Passabe in 1999. What has been referred by the three elderly people is not hearsay (which occurs when the witness refers circumstances known by him/her not directly but because referred to him/her by another person) nor is subject to the ban against “boatos” illustrated by the Defense Counsel at page 38 of her written final allegations. Indeed, on this last point, while it is a shared principle that generic allegations or voices cannot be given evidentiary weight (for the reason correctly outlined by the Defense Counsel, i.e. there is no way to check their source and cross examine it) a well different situation occurs when the witness says something by direct knowledge after direct observation of facts which are common knowledge in a sufficiently restricted area.

Facts like the presence of the Tacaqui family in Passabe or the jobs of some of the members of that family in this small community (Gabriel Colo was the chief of Abani, the main *suco* of Passabe; the accused was a teacher, and consequently a distinguished member of the community; Andre Ulan was a Police Officer) or the functions performed by them in the course of the “Pacara” (ceremony at they opening of the activity of the militia in Passabe) in April 1999 or, again, the constant presence of the militia and the activity played by it may well have been the object of a direct observation in a village of limited extension like that in which all the actors and spectators of this story lived.

For example, while the leadership of Florencio Tacaqui in the militia group in Passabe, though referred by many witnesses, may well be regarded as a hearsay or ‘boato’ since no witness had a direct knowledge of the formal elements which could have constituted the leadership (i.e. in act of appointment) and the quality of leader for Mr. Tacaqui appeared to be generally induced by his relation with other leaders and by his level of intellectual supremacy (the literacy being a gateway of superiority and command), the participation of the accused in the “Pacara” (in the course of which he was seen speaking by two witnesses) and in other activities of the militia, been directly seen and referred by witnesses, is something which comes from direct knowledge and can result in building the second-level knowledge that Tacaqui was involved in the campaign laid by Sakunar and that he had a relevant role in it.

In the end, all the circumstances listed above lead to the conclusion that the accused was probably not a leader but was neither a *quisque de populo* within the militia members. His privileged position as a counselor or advisor implicated and inherent involvement in the decision making process of the leadership of the militia. His presence to the meetings (where at least in one occasion he took the word), naturally not as a simple listener or as a forced participant but on the side of the speakers, and his membership to the family of the leaders of the Sakunar in Passabe show his prominence and give credibility to the version of him being a followed member of the group of command.

This reconstruction is corroborated, as it will be possible to consider later, in the course of the examination of the witnesses’ testimonies on single episodes, from which the attitude of Tacaqui emerges in a way, which is not compatible with a merely executorial role. Likewise,

Tacaqui's defense on this point, which can be summarized in the argument that his association to the militia and to the head of it was forced, is not supported by factual elements, is illogical, is contrasted by the emergence of evidence and, ultimately, is untenable.

Indeed, the argument ("I was forced to join") is a ritual defense which sounds weak in the case of the accused who could have had, for his higher standing in the community of Passabe and his relation with the supreme leader of the militia group to whom he belonged, an easy job to resist the pressure or even the threat to join the illegal activity. But he didn't and never showed signs of disagreement; on the contrary, as it will be explained, in some episodes he took a leading role (at least in the execution if not in the determination of the criminal action to take) or took the initiative, which is obviously incompatible with the allegation of a forced adhesion to the Sakunar and its plans.

It is fit to approach the issue of the presence of a widespread and systematic attack in the crimes listed in the indictment. Indeed, this requirement, which is a constitutive element of any crime against humanity and is the feature that, more than others, gives identity and vividness to the category of c.a.h itself, appear to be present in the crimes listed by the Prosecutor in the present case with such a clarity and indisputability that a long illustration of it may be spared.

The Parties have not spent many words to argue on the point, in one way or the other, since it is evident that the kind of crimes allegedly committed wouldn't be conceivable out of the contest of a wide organizational effort.

The Court has already illustrated, in relation to the role of the accused, some of the characteristics of the activity of the militia in Passabe; in the course of the examination of each single episode listed in the indictment there will be the opportunity to add more details.

The picture that will emerge and that can be anticipated since now for ease of illustration, will confirm that all the crimes described in the indictment can not be conceived out of the contest of the activity of the militia: the contribution of the single militiaman was nothing more than a part of the activity of a vast group whose ends transcend the will and the destiny of the single member.

These ends not only are notorious, since have been almost constantly detected in the course of the work of this Panel, but they are easily deductible from the shape of the crimes described in the counts. Witnesses, it will be shown later in the motivation, spoke of meetings of the militia to plan the criminal activity, of ceremonies held to impress and threaten the CNRT supporters, of the presence, at least in one occasion, of the head of the militia umbrella group from the district of Oecussi; the same scale of the operations described in the counts tells of actions committed not occasionally or for an occasional motive.

In this case, more than in others brought before the Special Panels where single criminal actions were tried, the entire or a large part of the whole activity of the Sakunar militia of

Passabe is put under examination: it was an activity that lasted months and produced an escalation of violence: the systematic nature of the attack is inherent.

The examination of the facts would not be complete without the unveiling of an issue which has been sleeping in the course of the trial but must be faced and solved now, if only in passing.

In the indictment, relevance is given to an episode happened in Malelat on the 29th August 1999 in the course of which many houses or huts were destroyed and two men (Saturlino Nino and Tomas Nino) were abducted. Starting from page 8 of the original indictment and following in page 9 (in the severed indictment it's on page 6), points 31 to 37 illustrate the unfolding of the attack to the village and describe the participation by Mr. Tacaqui.

On these facts unfortunately (because uselessly and meaninglessly), three witnesses were heard (Fernando Quelo; Domingos Mala and Serafin Sufa); they confirmed the attack to the village and the disappearance of the two villagers. Only one of the witnesses (Fernando Quelo) clearly and vigorously remembered and denounced the presence and the part taken by the accused in the course of the attack while the other two resulted of scarce relevance with regard to Florencio Tacaqui.

Despite the collection of enough evidence to point to the accused as one of the perpetrators of the criminal attack, no practical result can be drawn from the effort made by the prosecution and the time spent by the Parties and the Court.

Indeed, it cannot be missed that the factual description of the facts contained in points 31 to 37 didn't find a correspondent transposition in a specific count of the indictment.

On the face of this, it can scarcely be assumed that the accused was charged with (and could be put in the position of defend himself from) a specific charge if not for else for the lack of the requisite listed (for each fact and charge, it must be meant) Under Regulation 2000/30 in Section 24.1 letter d, i.e. the identification "of the provisions of law alleged to have been violated by the accused"; this omission, despite the waste of resources by all the participants to the trial must be regarded as a case killer sufficient, on its own to preclude a decision of guilt or innocence by the Court on the facts happened in Malelat .

The oversight can not be cured by the Court: Section 32 UNTAET Regulation 2000/30 specifically states that eventual amendments of the indictment must be requested by the Prosecutor, for the sake of preventing loss of impartiality by the judge.

As said before, the facts included in the counts are collocated in a relatively vast span of time, stretching from April to September 1999. They purport to represent the whole or at least the largest part of the activity of the Sakunar militia in the sub-district of Passabe. Apart from the last count (which, in the Prosecutor's view, sums up all the previously listed illicit conducts in a 'umbrella' charge and so, did not deserve the proof of further factual elements), witnesses have been heard in batches, in relation to each episode, starting from

the facts described in count 1 and ending with the facts described in count 7. This course of action was aimed to simplify the work of the court and of the Parties, in the hope that a temporal setting would help clarifying the whole picture.

It is worth to follow now the same method.

The first charge is one of imprisonment or illegal deprivation of liberty of more than forty CNRT supporters or sympathizers in Passabe, in April 1999.

It stems from the declarations of two individuals given the same day of the arrest of the accused. Fernando Quelo and Matues Mesac made a brief and vague account of what happened in Passabe in April '99, later confirmed and broadened in following statements.

Before the Court four witnesses were heard on the episode described in count 1: Matias Mesac, Antonio Lafu, Fernando Quelo and Marcus Bobo.

Let's read what they said in court.

Matias Mesac and Fernando Quelo were heard twice by the Court, the second time only for the need to confirm before the panel, with a new member, what they had said before.

Since the witnesses, specifically asked, confirmed the truthfulness of what they had said on the 14 July 2003, and taken in consideration the reasons of the renewal of the deposition of the witnesses (the change of member of the Panel), the Court is inclined to read and use the transcript of both the hearing when Mr. Mesac and Fernando Quelo were heard. The original hearing was led with full respect of the rules of the adversarial system (if also we concede that the Defense Counsel explicitly remarked his refusal to ask questions in the absence of instructions by his client) and the interrogation was made primarily by the presiding judge. The transcript is a integral reproduction, word for word, of the narration of the witnesses and of the requests of the judge and of the parties; the witnesses confirmed, repeatedly, that what was said in the first hearing was true, making explicit reference to the testimony; the transcript can now be relied upon *per relationem* by the judges.

For Mr. Lafu, who couldn't come a second time to Dili to confirm with his testimony what he had already told the Court (due to the serious illness of a next to kin), the Panel has decided by Court order, to admit the Court transcript as substantial evidence on the basis of the interpretation of Section 36.3 letter UNTAET Regulation 2000/30.

The three witnesses have substantially confirmed the episode described in count 1 which can be summarized as follows.

In the second half of April 1999, at the onset of the pro autonomy campaign in Passabe, the joined forces of the newly formed militia group (Sakunar), of TNI representatives and of the local police force held, in various manners, a group of suspected CNRT supporters or pro-independence fighters in order to impose them to abandon their political activity; a number of people close to forty were obliged to gather to the house of the *chef de suco* of Passabe (Gabriel Colo) and for several days were prevented from leaving with threats and beatings. At the end of the spell, the victims of the abuse were forced to participate to a ceremony in

the course of which they were asked to take a blood oath to abandon the campaign for independence.

The facts, so shortly summarized, have found full confirmations in the words of the witnesses Mateus Mesak, who knew Florencio Tacaqui very well (they were colleagues and “they had married in the same family”).

He referred that on the night between 17th and 18th April 1999 a group of some thirty militia members (the witness mentions several of them) under the command of the accused came to his house and seized him. He was forced to follow them to the house of Gabriel Colo where other fellow CNRT members had already been concentrated. The witness recollects the presence of police force, military and administrative officers as guards and of a group of around 50 activists pro independence as detainees.

Mateus Mesak goes on describing the reason for the forced presence at Gabriel Colo’s house: he says he was repeatedly questioned (for hours) about his membership to the CNRT, and invited to surrender the membership card; eventually brought back home, he and his wife were forced by extortion to give the membership card; brought back to Gabriel Colo’s house again, he was severely beaten by a man called Tomas Subun and left with injuries. Andre Ulan and Domingos Obe also participated at various stages. While it is not clear from the testimony when the deprivation of liberty came to an end it appears that Mateus Mesak had to pay both Mateus Punef and Gabriel Colo in order to regain his freedom.

On the presence and the role of Mr. Tacaqui in the events the witness stated that the accused commended the group that abducted him from his house and that Tacaqui was later present on the place. The witness was not beaten by Mr. Tacaqui but saw the accused beating Fernando Quelo and Antonio Lafu.

Quite interestingly, asked about the leadership of the Sakunar militia in Passabe, the witness listed Gabriel Colo, Andre Ulan, Tomas Bubun, Carlos Tacaqui, Januario and Julio da Costa but not Florencio Tacaqui who, anyway, was together with them “like people with the knowledge”.

Marcus Bobo, heard at the beginning of this year (on the 19 January), had known Florencio Tacaqui for a long time as well.

The witness describes the operation by the militia group in terms very similar to those used by Mr Mesak. He was taken from home on the 21st April and brought to the house of the *chef do suco* and chief of militia in Abani (the principal *suco* in the village of Passabe) Gabriel Colo who was together with Andre Ulan, Filip Bunak and Tomas Subun. The witness was beaten by Filip Bunak, Joakim Tacaqui and Andre Ulan to get a confession of membership to “Clandestine”

Fallen unconscious, he was brought to the local hospital where he stayed three days after which he was brought to the police station. There, he was questioned again by Anton Sabrak and before being returned to freedom, was obliged to attend a ceremony in the football field in Passabe where he was forced to a ritual blood oath to abandon the activity of the CNRT.

During all the course of the operation (from the 21st to the moment when the oath was given) he was never free to go home or to leave the various premises where he was brought (Gabriel Colo's house, hospital, Passabe police station). He only recollects the presence of Florencio Tacaqui at Gabriel Colo's house, on the 21st April.

Anton Lafu describes the happenings of those days in a similar manner, it also he was not physically forced to go to the *chef do suco*'s house ("the witness should start telling us why he was..... in Gabriel Colo's house particularly" – in the morning I could not stand anymore and I knew and I surrendered myself" – "Had he been threatened before. – "Yes").

The witness was severely beaten by Andre Ulan, Filip Bunak and Antonio Quelo, the first being a police officer and the others members of the army.

The account of the facts goes on mentioning the participation of Florencio Tacaqui in the beating of Fernando Quelo and the witness himself who was eventually hospitalized to survive the injuries he suffered.

In the hospital ward he was not left free ("The six of us in the hospital ... were there for three days and ... they continued to threaten us, we didn't feel any good. They came and they started to pull the drip on our hands... and then they took us to put together with the others at the police station....there;...every night, the Tentara (soldiers) used to come and beat us up then at the police station everyday, the Tentara, the police and the Sakunar local militia group- used to scream and scream and threaten us continuously. And then after three days the head of the militia, Simao Lopes coming from Oecussi, they went to do the swearing in ... in Pasabe... they forced us to follow autonomy")

The transcript could be quoted extensively since the description of the operation against pro independence supporters in Passabe is referred in details by the witness Antonio Lafu, but this goes beyond our needs and could result in a pure confirmation of what other witnesses said on the issue.

What is rather worth noticing are same details as for example, the precise indication, by Mr. Lafu, of the role and function of Florencio Tacaqui in the Sakunar militia in Passabe.

To the question: "... within the Sakunar what was the position of Tacaqui" he replies: "I have a document in regard to Sakunar, first I know that is Florencio Tacaqui he is like the leadership for Sakuna. They were the team advisors for Sakunar from team, these people were the ones that gave advice not for good things but for the way the Sakunar would have to act. Because they were university students".

And if it is true that the contribution to the comprehension of facts is then weakened by the admission that, not being *intraneus* he couldn't have a precise knowledge of the internal activity of the militia ("in regard to their activities... I couldn't know because we of CNRT could not come close to their meeting or any of their duties, if we did we were sure to die") nonetheless this part of the testimony sheds a light on the common understanding of CNRT members.

Likewise interesting is the perception by the witness (confirmed by other witnesses) that Police and TNI members participated together with the Sakunar militia in the operation, at

any stage; the constant presence of the Police forces aside the TNI forces and the leadership of the Sakunar militia group is an indicator of the existence of a single plan or at least of shared ends and of the will to achieve them jointly. What's more, the circumstance that members of the Tacaqui family were present in each of the three institutions in Passabe (Police, TNI, Sakunar militia) granted coordination and the perception, by the community and the CNRT members or pro independence fighters, of a joint criminal enterprise strengthening the force of the pro-autonomy side.

The common enterprise was confirmed also by Fernando Quelo, the last witness on the facts of the spring 1999 who gave a full account of the episode from the very beginning, remembering he was ordered by a policeman (named Riadi) to go to the house of the leader of the militia (Gabriel Colo) where he saw the leader himself, Florencio Tacaqui (his nephew) and Tomas Subun.

He gave a complete account of the facts; through his words a detailed and precise picture of the events comes out. What emerges is the existence of a coordinated, large-scale operation aimed to impose and determine the course of the political campaign for the following months leading to the referendum of end August 1999. So, we came to understand, from his own words, that the CNRT members and pro-independence supporters were surrendered to the Police forces and held by them at the Police Post on the same 18th April (in other word they were not kept under restriction at Gabriel Colo's house for more than few days), they (the supporters of independence) were kept there for the rest of the days up to the ceremony which took place at Passabe Soccer Field (on the 23rd of April). During all the time spent under restriction, they were not allowed to leave, they were repeatedly beaten and threatened.

On Tacaqui specifically the witness remembers being violently beaten by him and by Tomas Subun but doesn't recollect his presence at later stages of the operation.

The testimonies given by the four witnesses on the facts happened in Passabe at the time of the formal opening of the activity of the militia in the sub district are homogeneous and well grounded; there is no substantial contradiction amongst the four voices in remembering the facts. The whole episode was a show of power and determination by the militia and co-siders to quash any activity of the opponent side in the area of Passabe. To prepare the arrival of the supreme leader of the Sakunar militia in the district of Oecussi (Simao Lopes) on the 24th of April, a large scale and capillary operation was set up to intimidate the supporters of independence. A large number of militiamen with the support of Police and TNI were involved for several days in something that had been planned in precedence. The gathering and seizure of more than 40 opponents involved a relevant organizational effort. Nobody escaped, the victims were forcefully compelled by means of violence or threat to stay at the house of the *chef do suco*, before being brought to the Police Station and, after several days, to the ceremony.

Trying to diminish the huge event and the impact of it on the community of Passabe or the part in it of Florencio Tacaqui is vain: despite the efforts of the defense counsel in points 104 to 107 of the final allegations, the role played by the accused emerges in full light.

Indeed, the Court heard he participated to the abduction of Antonio Lafu (he headed the group that arrested him), to the beatings (of Fernando Quelo, at least); he was repeatedly (we

should say: continuously) present at the premises of the *chef de suco* (his uncle) where the opponents were originally concentrated (he was seen there on the 18th, 19th and 21st of April). What's more, given his direct participation and closeness to the leadership (the detail given by Fernando Quelo on Gabriel Colo and Florencio Tacaqui exchanging knowing looks at his arrival at the house is highly talkative), together with the role of advisor, it is legitimate to draw a further conclusion: he was aware of the entire operation and by assuming a not simply executive role, he bears a part of the responsibility of the entire action which, cannot be seen, as suggested by the Defense Counsel only by the fragment. Saying, for example, that Tacaqui was there doing nothing (which has been effectively referred by only one of the four witnesses) does not correspond to a correct interpretation of the testimonies nor help the general reconstruction of the facts. Tacaqui was not there occasionally or by chance, he was not simply assisting to an event, which was unfolding beyond or aside him and his will. More, the event himself was only a part, if also the most relevant mark of it, of a hate campaign, which had already started. There would be no other conclusion able to explain, for example, why two of the witnesses were not forced physically but by threat, to go to the place where they were going (and probably they knew they would have been) to be beaten. Only an already established atmosphere of danger, threat and menace can explain why they were compelled to join the group of the victims; the victims themselves, 40 and more people, were kept seized not by binding their arms or their legs but by the force of fear.

The size of the action and the fashion that it took (a first stage run chiefly by the militias, a second one which saw the hand-over of the prisoners to the police; a third phase when the prisoners were brought again under the control of the militia to participate in the mock swearing in) shows clearly that there was a general plan of what happened. This plan was not the coinage of a single person who with his means would have never achieved all this, but of a group wherein Tacaqui was one eminent member.

To neglect his role or his status in the militia of Passabe would be a gross blunder, as big a mistake as thinking that the operation it self was the opening of the campaign. It was not.

Let us now turn to try and understand the juridical qualification of the activity.

Here as well, focusing on the single part means losing the big picture. It must in fact be understood that if also the militia group and its leadership took hold of the CNRT supporters and sympathizers only for at most four days (18th – 21st April), nonetheless they must be held responsible well beyond that, namely for the deprivations of liberty of the victims for all the term expressed in the count: in fact, it would be vain to think that the detention (however it can be qualified) by the police at the Passabe Police Station, was an autonomous action deprived of relations with what had preceded (the “detention” at Gabriel Colo’s house) and what followed (the final ceremony).

In this case the Police operated in connection with the militia and not independently. And this shows what was the level of intertwining of the militia and police with the consequent rise in the level of impunity. For example, a witness referred that one of the victims was beaten by a policeman at the house of the administrator of the village.

Similarly, Mr. Tacaqui is responsible for the whole and not only for the part to which he was present. He may have not been present at the police station; he may have not been present to the

final ceremony with the finishing touch of the abjuration oath sealed drinking the blood spilt together. But he took integrally part as a collateral member to the entire criminal endeavor.

The Defense Counsel objected that an illegal detention didn't occurred, for reasons which will be said shortly; Tacaqui, she added, could at most be recognized the author of specific acts of violence (against Mr. Lafu and Quelo) which, though can not be put at the basis of a conviction because were not described in a charge.

The main defect of this argument lies in a lack of perspective: the (systematic) violence administered on the victims should not be seen in isolation but as an instrument to maintain the deprivation of liberty of the victims and to get confession on membership of CNRT or other pro independence organization or information on them.

In this sense, violence and threats were simply instrumental to the imprisonment (or however the deprivation of physical liberty can be qualified) as instruments of repression (coercion) to prevent escapes. In this line of thought, violence is assimilated to the restriction of bodies in jail and does not emerge as an autonomous crime, since it is contained in the minimum measures implicit to maintain the deprivation of liberty.

But when violence went beyond the threshold of minimum measures inherent or implicit or needed to get and maintain the deprivation of liberty for some days of those forty individuals belonging to the CNRT or supporters of the pro independence campaign (for example when the victim were beaten unconscious) then violence emerged as an autonomous crime which would deserve autonomous consideration. The broad statutory definition of torture as crime against humanity UNTAET Regulation 2000/15 (Section 5.2: "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) includes any form of severe pain or suffering inflicted on those in custody or under control of the perpetrator. Likewise the definition of torture, as ordinary crime falling within the competence of the Special Panels if the acts are perpetrated, like in the present case, between 1.1.99 and 25.10.99, consist of the infliction of sever pain or suffering.

Correctly the Prosecutor didn't accord specific worth to the violent conducts committed by militias in the course of these days because they didn't meet the required standard of severity. In other words, these acts of violence didn't deserve the attention of the Special Panel because they didn't amount to anything more than maltreatments (section 451 Indonesian Panel Code), a Crime, which falls outside the competence of the Special Panels for Serious Crimes.

In the end, on the qualification of the whole conduct what rests to be defined and properly qualified in juridical terms is the constrictive conduct itself. In other words, can it be stated that what happened in those days in Passabe amounted to imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law as put out in Section 5 letter e Regulation 2000/15?

From the description of facts received by the Court, it's fully evident that no imprisonment took place at any stage. The word itself brings etymologically the unavoidable idea of seclusion in jail or in a detention camp, with some sort of physical hurdle to be overcome to

regain freedom. Which, naturally didn't occur or at least was never proven nor alleged in the case.

On the other hand, the condition of constant restriction and limitation of movement of a relevant number of opponents, obtained through violence and fear must be held to amount to a form of severe deprivation of liberty included in the relevant norm, as one of the two ways to commit the crime described in Section 5 letter e.

The conditions, in which the victims were held under the impending menace of physical grief, deprived them for almost a week of their autonomy of movement.

The Court didn't hear any witness on the modalities of the deprivation itself, or in other words if there was any additional suffering inflicted on the victims, if they were starved or deprived of sleep, or if any other grievance was administered to the detainees. But this is of scarce relevance for our actual purpose, since the only good to be relevant for the provision at stake (Section 5.1 letter a Reg.2000/15) is the right to physical liberty.

Recognizing that a deprivation of liberty was perpetrated, as the Court thinks it is appropriate, is not enough to establish a criminal responsibility, since two questions still survive.

1. Was the deprivation so dramatic and though on the victims to be qualified "severe" and, so, be included in the legal provision?
2. Which is the norm of international law that is infringed by the abusive deprivation of liberty.

On the severity of the deprivation of liberty the main element in order to evaluate the behavior of the perpetrators of the crime in this case is the number of the victims.

The Court acknowledges that, compared with other events qualified as crimes against humanity brought before international tribunals or even previous cases judged by the Special Panels of the Dili District Court (e.g. in the "Lolotoe Case"), the illegality described in count 1 appear to be modest and not largely extended in time (in the so called "Lolotoe Case" the detention of the victims had lasted around one month and an half); though what matters and is enough to bring the deprivation of personal liberty to such a degree of hardship to meet the standard of "severe" required by the norm is the width of the behavior which affected a vast number of CNRT members or sympathizers in Passabe and surroundings. The operation was meant to be a lesson, to expose the consequences to join the side opposed to the militia, to humiliate and to warn the entire community by oppressing a large number of members of the opposition to autonomy.

The operation not by chance was run at the early stages of the campaign. If on a single individual the deprivation of liberty may have not lasted so long to amount to a severe subtraction of bodily freedom faculties because, maybe, he was released after few days of constriction, nonetheless the whole picture of the event is chilling and impressive: a platoon of opponents were kept and beaten for up to seven days with no other choice but to be subject to the abuses.

It's not difficult to find the legal standard that internationally protects the personal freedom of individuals and whose infringement constitutes an element of the provision of section 5.1 letter (e) UNTAET Regulation 2000/15. While perplexities could be raised on the applicability of the International Covenant on Civil and Political Rights of 16 Decembers 1966, namely articles 9 and 10 (never ratified by Indonesia and, accordingly, not an enforceable instrument for the juridical qualification of facts –detentions and deprivations of liberties included- in the Timorese territory occupied by Indonesia), no doubt should be left, on the contrary, on the applicability and enforceability, at the time, as a source of customary international law, of the provisions of the Universal declaration of human rights, specifically articles 3 and 9, that state in a broad extension the intangibility of individual liberty. If it doesn't appear to be worth examining the issue of the embodiment of the principle stated by the Universal Declaration into a customary norm of international law, given the general agreement on the issue amongst scholars, it is only to notice that the norm doesn't contribute to the troubled issue of admissibility of a customary source of law into the Timorese legal system: while the behaviour described by the criminal provision is sufficiently defined by section 5.1 letter (e) UNTAET Regulation 2000/15 to avoid possible criticism of violation of the principle “nullum crimen sine lege”, the extra-criminal source of law is recalled as an integration and specification of the sanctioned behaviour.

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On the episode included in the second count, two clear and incontrovertible witnesses were heard by the Panel, Jose' Bubun, the victim and Domingos Teme, another of the participants to the secret meeting of pro-independence supporter.

Jose Bubun and Domingos Teme referred the modalities of the aggression, of the hunt of the victim in the back of the house by Tacaqui and Domingos Obe, of the way in which Tacaqui (and Obe, immediately after) hit Jose' Bubun, cutting him a toe and slashing his body in several points. The victim showed the Court the wounds on his body and repeatedly asserted the name of the aggressor.

The two witnesses appeared trustworthy and credible, for their direct involvement in the episode, as victim of the militia violence, and for the possibility they had to see and recognize the accused, whom they already knew, from a close distance; their testimony did not show any contradiction or sign of uncertainty: the pair repeated basically the account of the facts they already reported when they had been heard at the police station in Passabe, the same day (for Domingos Teme) or only twelve days after the arrest of the accused (for Jose' Bubun). Their narration before the Court was homogeneous, congruous and credible. They mentioned similar details (e.g. on the role of Tacaqui, on the person who kick the door opened, on the lights, on the number of militias participating to the action) and showed a good level of self-confidence. In conclusion, there is no reason to deprive the witnesses of their inherent credibility and indeed, with good sense and reasonability, the Defense Counsel did not offer an argument to the contrary. Ms. Rocheteau only tried to underline, in her final statement (pg.9, point 123) that some aspect of the assault may appear scarcely credible or contradictory (for example where she put forward the argument that if the assaulters had torches, why they allowed victims to recognize themselves or when she asked why, if Tacaqui had a gun, he didn't use it?). These questions obviously may have different explanations (for example, noting that nobody said Tacaqui and Domi Obe were recognized thanks to the light cast by the torches they were holding and that we don't know anything

about the gun, and if it was a traditional rakitan, its inefficacy would be much greater than a katana) and anyway don't address the only question that has a weigh: why should the witnesses lie? Small contradictions may always arouse from testimonies and witnesses may not have the capacity to understand the incongruities that sometimes emerge from their narrations, yet, if the incongruity is not radical, this does not affect the credibility of the whole statement and can even be a argument in favour of the credibility of the witness who shows that his/her declaration was not prepared.

The Court intends to underline that from the account of this episode, a further element of confirmation of the role of Tacaqui in the Sakunar militia in Passabe directly comes: as confirmed by the words of the two victims, the accused, together with his brother in law headed the group of the militias and took the greatest share of the responsibility in the action: the two of them were those who violently entered the house where the meeting were being held, shouting threats to the participants, holding machetes and torches and chasing the escapers in search of them. It was Mr. Tacaqui to reach and blow his strike with the katana on the body of Jose' Bubun. In the opinion of the Court this behaviour sheds sufficient light on the leading role of the two in the commando of attackers (if not of the Sakunar group in Passabe in itself) and give a justification of the perception, common to all villagers of Passabe and all the victims of the crime perpetrated in Passabe by the Sakunar, that Florencio Tacaqui was a leader and that his family had a prominent role in the activities of the Sakunar in the sub-district. In other words, this is yet another element confirming what has been already concluded upon before, that Tacaqui was not a generic militiaman but rather a relevant element of the militia. Maybe not the main leader but surely a valid and followed member with a relevant level of autonomy, to whom the leadership of a relatively small action could be entrusted. A man, in the end, who at least must have enjoyed a discrete degree of confidence and credibility before his uncle, Gabriel Colo.

On the qualification of the crime the Panel thinks that treating it as an attempted murder is more appropriate: the blow that were delivered to Mr. Jose' Bubun may very well have proven fatal if the katana had properly reached the head of the victim who fell to the ground in the course of his run to escape but was subsequently able to escape again. It doesn't appear hazardous to affirm that the crime under judgment would be murder if the victim had not been swift to react to the slip.

The facts described in Counts 3 to 7 may not be treated singularly. As outlined before, they belong to a cluster of events which took place after the result of the popular consultation of the end of August 1999 were known and, for the number of people involved as assailants and as victims, for the closeness of the events and the interconnections amongst them, they require a unitary treatment by the Panel in order to put each single episode in the proper setting. It will turn out in this way that it is reasonable to affirm that they stem from a unique criminal deliberation and that, accordingly, they must be read as a unique criminal enterprise aimed to a unique end.

In the indictment, the facts of this period have been divided into five counts. It is misleading to read each of them as a fact on its own. The period of deliberation was from the 4th to the 7th of September and this explains what later occurred.

What is the element of unification of these events? The fact that they represent the vindictive response to the outcome of the referendum. As a singular act of revenge, they are based on only one deliberation that took place between the 4th and the 7th of September. There was some evidence presented at trial as to the exact time and place of this deliberation. One witness- Abrao Sila, from the suco of Abani, heard on the 6th April 2000- alluded to a meeting a week before the attack (and to the participation to it by Florencio Tacaqui) in the house of the *chef of suco*; at the request of the defence counsel he referred that all the commanders (he included Tacaqui amongst them) took the word and addressed simple militiamen

Anyway, *res ipsa loquitur*: the facts themselves show that the events must have been planned and coordinated in detail. The events involved hundreds of men gathered by militia members. From the 8th of September onwards, it was no longer the time of deliberation, but the time of execution of the plan. At this stage, the militia members proceeded almost without the possibility to go back. To add more, the same unfolding of the events, closely time-related, allows to assumption that the massacre of Teolassi was the natural follow-up of what had preceded and was not an extemporaneous event: dislike many other episode scattered on the ET territory in September 1999, in the present case, the attack against the villages was not held sufficient to end the revenge, rather, to bring the crime against humanity to its most atrocious culmination, the massacre of unarmed and helpless prisoners had to be carried out. It is impossible, for a crime of this magnitude and complexity to be spontaneous or generated progressively.

The acts referred in Counts 3 to 7 were denoted by a level of violence and brutality previously unknown: happening after the outcome of the referendum on independence or autonomy was known, they marked an extraordinary escalation in the violence against the civilian population. It is not difficult to read in them different motivations from those that had supported precedent criminal activities of the militias and a vindictive flavour previously absent.

The Court thinks, for the reasons which will be later outlined, that the following facts have been proven before it:

1. on the 8th September a large-scale operation was undertaken by the militia; several hundreds militiamen were engaged for three days (8th-10th September); part of them were forced to join the activity of the militia under the threat of death;
2. in the course of the operation three villages (Tumin, Nibin and Kiubiselo villages that most prominently had given support the fighters for independence or had rejected the campaigners for autonomy) were attacked, on the 8th September, in the morning, and their population forced to flee; several casualties were caused in the attack, a vast part of the villages destroyed by fire and livestock stolen;
3. the follow up of the attack to the villages was the concentration of people coming from the villages to Imbate, were the young and male of the community were separated from the old and from the women; this youth was kept under arrest, tied up, beaten and then compelled to march for several hours in the dark up to a place called Teolassi, were the majority of them were atrociously murdered in a massacre which constituted the most heinous and vile episode amongst those brought to the attention of the Special Panels;

4. the remains of forty-seven dead bodies were found at the burial site in Teolassi, in the outskirts of Passabe; the burial site was an area sacred for the Tacaqui family;
5. the accused did not participate to all the events; the accused took part to the attack to the village of Kiubiselo in the course of which a number of casualties took place and at least two individuals were severely wounded;
6. the accused didn't participated in the massacre that took place between the 9th and the 10th September in Teolassi.

After summing up the events for clarity, it is now necessary to verify the footing of the fact finding in the declarations of the witnesses.

On counts 3 and 4 (charges relate to the murders and injuries committed in the three villages on the 8th of September) the following witnesses were heard:

Domingos Quelo: he recollected vividly the attack to his village (Kiubiselo) and the circumstance in which the deaths of Augustino Ulan and of his uncle Victor Punef occurred. He detailed that he directly saw Gabriel Colo, Lorenzo Tacaqui, Francisco Tarsi and Antonio Sabrak amongst the militiamen. He gives a full account of the episode, from the onset to the follow up of the following day, i.e. the flight of the villagers to Imbate in search of shelter; he remembers the destruction of properties and the theft of goods and animals. He confirms that some villagers tried a reaction but because of the disproportion of forces and means, they had to give up. Specifically asked about the role of the accused, he remembers him shooting by holding the gun in horizontal position at body level. As mentioned in the transcript, the presiding judge noticed that the witness spontaneously made the gesture of holding the gun horizontally adding that Tacaqui was targeting people. He gives a justification of his knowledge of the accused (he was a teacher of Junior High School in Passabe, i.e. an eminent member of the community).

It is fitting noticing and repeating that Domingos Quelo (heard by the Prosecutor on 20.3.2000) was the only witness who, before the arrest of the accused, mentioned, if only in passing, the presence of the accused to the events of the 8th/10th September 1999. This circumstance naturally adds credibility to his words. In the statement he referred that Tacaqui participated to the attack to the village of Kiubiselo. No further detail was given.

Matias Sufa: before the Court the witnesses gave a version that only in part reflects what he referred to the investigators. Specifically, he described the beginning of the operation in Kiubiselo by the militia in analogous fashion (he was inside his home, heard people screaming, shot of guns; getting out of the house, he saw many militiamen coming from Passabe); after this debut, he added that he saw and recognized Gabriel Colo and Florencio Tacaqui just moments before being shot in the left eye. In the course of the trial the witness was informed by the presiding judge that when interviewed by the investigators, he referred in different terms, i.e. that he didn't mention Tacaqui and that the presence of Gabriel Colo was not directly witnessed by him but was a circumstance known to him only second-hand. The witness was not able to solve the contradiction if not with the recourse to ritual excuses heard several times (e.g., he referred the names but he didn't know if the investigators kept a record of it and similar). These excuses are not enough and obviously discredit and impinge with the credibility of the witnesses: it is not reasonable that investigators invent the circumstances described in the statement (particularly the names referred to the witness by co-villagers and, in turn, referred by him to the investigators) and, even more, that the name

of Tacaqui slips out of the list made by the witness to the investigator. What said in the statement, i.e. that he went out of the house to see what was happening but he was (almost immediately) hit in the eye, is more credible.

In the end, the witness gave a very small contribution to the knowledge of the facts, only valid to confirm the attack by the militia to the village of Kiubiselo. As in his pre-trial statement (to which reference may be made since it has been used in Court to refresh the memory of the witness, pursuant section 36.4, last part, UNTAET Regulation 2000/30) the crucial phases of the attack are not detailed and Mr. Sufa's account of the episode is very short, giving the impression that he managed to promptly leave the crime scene, immediately after being wounded.

Laurencio Leo Mari: the last witness on the episode of count 3 could only concentrate his memories on the destruction of Tumin by two militia groups, one coming from the village of Oicelo and the other from the direction of Oecussi. The two groups invested two different areas of the village, killing, looting and stealing animals and things. The militiamen amounted, in the witness' version, to 1500. Requested by the Prosecutor, the witness made a rough list of the casualties that occurred in Tumin in the course of the attack on the 8th September. Then the testimony flowed on details of scarce relevance for the reconstruction of the facts, as far as the accused is involved. At the close of the statement, Lorenzo Leo Mari added he has never personally known the accused Tacaqui, since he came from a different area of the Country and was not born and bred in the area of Oecussi or Passabe.

In conclusion, looking retrospectively the evidence furnished by the witnesses, it must be acknowledged that there's not much against the accused; however, what can actually be found, mostly in the words of Domingos Quelo, is sufficient to affirm the responsibility of the accused. The certified presence of Tacaqui on the crime scene and his active role in shooting are conclusive elements of his direct involvement in the causation of the deaths and wounds of the casualties which took place in Kiubiselo on the 8th September. Nobody knows who directly shot Victor Punef and Agostino Ulan (who were killed in the course of the attack) as well as nobody will ever be able to identify those who directly hit and wounded Mateus Sufa and Josefino Bose.

In this action, the information that we have depicts a very small part of the overall picture. Nonetheless, it is sufficient- when taken in consideration with other elements- to define accurately the level of participation of Tacaqui in this action.

The sheer scale of the attacks on Tumin, Nibin and Kiubiselo required considerable planning and organization within the militia.

If also Tacaqui was not the final point of the militia structure and he did not bear ultimate responsibility for decisions, he neither was not a mere executor of the orders given by the militia leaders and he participated in the determinations made by the militia leaders. He had some degree of participation in the planning of the activity of the militia and the choice of targets. At a very minimum, he was an advisor and someone who the rest of the community listened to and followed. His mere presence was enough to fortify the determination of the group. Within any military or quasi-military hierarchy, there exists a chain of command that flows from the leader/s to the rank and file. There are often middle-level figures that act as intermediaries. As has been explained above, and as illustrated by his leading role in the

action of the group covered by Count 2 of the indictment to depict his role as purely corollary does not appear to be enough.

Further, there is reliable testimony from Mr Domingos Quelo that Tacaqui actively participated in the attack on Kiubiselo. According to this witness, Tacaqui was present at the scene and shoots his gun at body height.

Considering the law on this issue, in a group action, in which several individual share the commitment to commit a crime and the responsibility of the outcome of their action, the commission of the typical action is not necessary if a contribution of any sort is given to the crime. The jurisprudence of the Special Panel on this issue has evolved considerably.

It finds its first example in the case *The Prosecutor vs. Joseph Leki*¹. In this case, the Court found:

*Since he joined the militia, the accused obviously knew about the purposes of the group. To participate in those operations, regardless he was carrying a gun or not, was his contribution to the killings of the first three victims. The evidence he was carrying a gun, as the Court could assess above, enhances his performance to the results. Just holding a gun during a siege maneuver against unarmed civilians, he played an undoubting role to the commission of the three deaths.*²

A different approach was used in the case *The Prosecutor vs. Agostinho da Costa*³. The Panel identified:

*The accused committed the murder jointly with others. At least he will be responsible for the contribution to the murder of Manuel de Oliveira. The evidence that he was carrying a gun, and that he himself shot towards the victim (...) enhances his performance to the results.*⁴

In an attempt to give greater specificity to the responsibility of the accused, the Court came to the decision in the case *The Public Prosecutor vs. Anastacio Martins and Domingos Goncalves*.⁵ There, the Court applied the following analysis:

“The material or objective element, or actus reus, will be a cooperative behavior, of any significance and not merely passive, which, by adhesion to the action of the group, gives a contribution to the achievement of the common aim: in the specific cases, the presence and the participation, by the accused, in the execution at least of a part of the general plan of raid and murders, strengthened the determination of the group, giving moral support to the will and determination of the other participants to the action. The fact that the two accused did something specific in the course of the action –by stabbing or chopping some of the victims or, in the case of Anastacio Martins, giving orders- distinguishes their contribution in comparison with the simple presence of other militia members which were on the spot but have not been prosecuted for their mere passive role [...] On these premises, the multiplicity

¹ *The Prosecutor vs. Joseph Leki*, case 05/2000, Judgment issued on 11 June 2001.

² Page 8, paragraph 3 of the Judgment

³ *The Prosecutor vs. Agostinho da Costa*, case 07/2000, Judgment issued on 11 October 2001

⁴ Page 14.

⁵ *The Public Prosecutor vs. Anastacio Martins and Domingos Goncalves*, case 11/2001, Judgment issued on 13 November 2003.

of murders and other crimes [...] is merged in an unity where the identity of the single crime is lost and the participants bear the burden of the whole. In the end, it was a single, yet multifaceted, action and those who gave a contribution to it are responsible not for the single element that they directly committed but for its' entirety."

Here, the Court considered that the criminal responsibility of Anastacio Martins derived from his participation in the group, distinguished by his leading role at the scene of the attack.

In the present case, and as far as the attack on Kiubiselo is concerned, in addition to the usage of a weapon, the factors that distinguish Tacaqui's responsibility from other mere militia members are his position in the militia, particularly his contribution to the activity of planning, in addition to the fact that he was a member of the militia of some significance who participated in the attack. The presence of Tacaqui was a factor that fortified the attack, bolstering the will of the members by encouragement and the threat of force.

On count 5 suffice it to say that no sufficient evidence has been heard before the Panel. From many witnesses came the indefinite contribution that they were forced to leave their village and they tried and found shelter in West Timor, though no conclusive element for the comprehension of the facts was furnished to the Court. Indeed, if the displacement of the people was in the original plan or was linked as a mere consequence of the attack to the villages, what number of people moved, how many went to Imbate, who possibly gave the orders and in which occasion, are all details which are missing. The Court understands that for facts of this sort there may be an inherent vagueness by the witnesses (for number of people involved and scarce capacity by the witnesses, to understand and refer facts of this proportion); however, the lack of knowledge on count 5 cannot be filled. It appears that the same Prosecutor was conscious of the weakness of the material on which to ground a request of conviction: in his final statement no illustration on the issue is offered.

The accused is acquitted from the charge of count 5.

Counts 6 and 7 summarize the most severe single fact brought to the attention of the Special Panels for Serious Crimes. The events covered by these counts- essentially, the violent deaths of forty-seven men in Teolassi- are events that this Court considers proven. Given this scenario, the Court considers that the Prosecutor has failed to prove the presence and contribution of Mr.Tacaqui to these events.

The Court finds that a vast part of the testimony heard in Court on the issues raised in Counts 6 and 7 is faulty. What is more, as illustrated above, the Court has noticed that the Prosecution has collected the only accusatory statements and witnesses *after* the arrest of Tacaqui. On the contrary, all those witnesses (9) that had given statements before the 26th of January 2001 on the same episode did not mention the accused or his presence at the crime scene.

Given the complexity of the narrations and the contradictions emerged amongst the testimonies, it is necessary to examine, if also in brief, each deposition and turn later to a general overview of the outcome of the oral evidence accumulated on count 6 and 7.

Summarizing the testimonies has turned out to be a complex task, because the declarations of each witness extended for many pages and they almost never followed a logic or intelligible structure. Reading the summaries will be not easier, despite the efforts of the judge rapporteur.

In the attempt to make the reading easier, when the speech of the witness is referred in the original terms, *italic* is used

1. The first witness heard by the Court on this matter was Amandio Nesi, who gave his evidence on the 26th of January 2004. He offered to the Court a version in striking contradiction to the version he had given immediately after the arrest of the accused (on the 29th of January and 7th of February 2001). While in those earlier documents he mentioned the accused as one of the perpetrators in the massacre at Teolassi, on the first occasion in Court he radically contradicted and then undermined his previous statements. This spectacular conflict of versions was underlined by the Presiding Judge, who repeatedly tried to bring the witnesses attention to the issue of a plausible explanation for the contradiction. The witnesses alluded to having been afraid of the Investigator when he made the first statements. He said, *'At that time when they asked me I told them I really said what I said to them. But I was scared, but really I do say that Mr. Florencio Tacaqui who is sitting here whether he killed anybody or burned any houses I don't know... Because it was the first time that we came to them [Investigators] and we saw the malae we were scared of the malae.'* He went on to testify about the involvement of Andre Ulan and Gabriel Colo and confirmed their involvement in the massacre. In referring to the events from the afternoon of the 9th of September in Imbate to the morning of the 10th of December in Teolassi, it appeared to the Court that he had a clear vision of the events and of the militia leaders present in the course of the action. He repeatedly refused to acknowledge the presence of the accused and Carlos Tacaqui. Reheard in the afternoon of the same day, he confirmed his statement of the morning. Heard again by the Court on 3rd of March 2004, he made a U-turn on his previous testimony in Court and gave no justification for this.

2. The second witness heard by the Court on this matter was Jamerius Lafu, who testified before the Court on the 27th of January 2004. In court, he referred in detail to the episode by listing a large number of militia leaders present and active at the crime scene. However he repeatedly asserted that Florencio Tacaqui didn't go to Imbate in West Timor (the place from which the march in the night started) and accordingly didn't participate to the criminal activity which followed; despite extensive questioning by the Presiding Judge he refused to acknowledge the presence of the accused who had been mentioned by him as present in Teolassi in the statements given by him to the Investigators on the 29th of January 2001 and on the 6th of February 2001. Heard in Passabe on the 3rd of March 2004 he confirmed his earlier statement given in Court saying that he did not know about the presence of the accused in Teolassi directly, but that *"my colleagues told me that he was there"*; he then confirmed that he directly saw Andre Ulan and Gabriel Colo in Teolassi but asked by the presiding judge *"when you were interviewed by the investigators you said that Florencio Tacaqui participated in the killing, now why this (double change of version) happen?"* the

witness replies significantly “*Because he was a commander of the militia, he also killed people*”.

3. The third witness was Marcus Afu. He testified on the 28th of January 2004, confirming what he said in his statements before the investigators dated 29th January 2001 and 6th of February 2001.

This is a summary of his testimony:

Initially the witness said he didn’t go to Imbatte in September 1999 but he knew that in Teolassi River “*they killed people in September 1999 because they were CNRT*”. “*Those who killed the CNRT people were Lorenzo Tacaqui, Gabriel Colo, Andre Ulan, Domingos Obe, Liberato Mauno, Lafu Elo*”. He later said he saw that with his own eyes because he was in Imbatte.

He was in Imbatte and they tied up the people. When they arrived in Imbatte it was already at night. He didn’t know if he went to Naituna. “*There were a lot of people*”.

He didn’t remember if anybody carried lights at the time. “*After Imbatte they took people and killed them in Teolasi*”. The witness walked with them. “*Florencio Tacaqui and Keo Tacaqui (Gabriel Colo) told them to go*”.

They arrived in Teolasi in the middle of the night. It was dark. “*The distance between me and Tacaqui was similar to that in the court from the main door outside to the bench of the judges*”. Because it was night the witness couldn’t see what clothes was wearing Tacaqui. Tacaqui and others were behind and the group of the witness was sent ahead.

“*In Teolasi they killed people, chopped them with machete and also shot them. Andre Ulan shot, Keo Tacaqui (Gabriel Colo) chopped and Loren Tacaqui chopped also*”. The witness didn’t know the names of the victims killed by the accused, they were not from Passabe, they were from Tumin. “*In Teolassi Tacaqui was like a bad person. He killed many people with a machete*” and the witness confirmed he saw him killing. During the incident, “*Florencio Tacaqui didn’t say anything, but just told the people to go back to the office*”. After the killing of these CNRT supporters they buried the bodies in that place.

4. Agustino Afu was the next (and fourth) witness, heard on the 3rd of February 2004:

This is a summary of his testimony:

In 1999 the witness was a CNRT member

The witness declared that in the District of Oecussi and specifically in Passabe militia groups chased the CNRT people and “*they beat them in the football field*”.

The witness knew Tacaqui was a teacher in a secondary school in Pasabe, where the witness lived.

In one occasion, in April, the witness saw Tacaqui hitting ten people in the football field of Passabe. On that incident the witness was himself punished and then left to go. Tacaqui was among those who arrested them before and then they were beating people there

One night, after the popular consultation, some people, including Arkanjo Nesi, Alfredo Laffu, Mateus Kolo, Marques Affu, Jamersi Laffu, Armandio Nesi and the witness himself, were called "*to pick some wood*". The order to pick the wood came from Lorencio Tacaqui, Gabriel Kolo, Andrew Wulan, Carlos Tacaqui, Domingos Ove, Alexio Sippa, Julio Da Costa, Liberatos Mauno, Domingos Kolo, Octovinos Anunutu and Mateus Tabui. But then it turned out it was not to pick up wood since the militia leader took them to a place called Letenai.

The witness added: "*We went first to the office of the chef de suco in Imbatte (whose name the witness doesn't know). In Imbatte there were two people tied up. Then they (the names aboved mentioned as giving the orders) tied up the people in the chief de suco's office. A lot of people from Pasabe were tied, approximately 50 people. This group of 50 people were first tied up and then taken to Letenai. They were given to the group of the witness in order to take them to Teolassi. We all left Imbatte around 12.00 o'clock at night and arrived in Teolassi around 4.00 o'clock in the morning. Because it was at night we couldn't see each other clearly. Petrol lights were used (petromas). There were 3 lights. The group was leaded by those giving orders, who were mentioned above*".

In Teolassi those men whose names the witness mentioned before (the leader's group), "*started to cut these people*". Victims were cut with machetes and they were also shot. "*Andre Ulan and Mateus Tabui shot guns, while Lorencio Tacaqui, Gabriel Colo, Domingos Ove, Liberatos Mauno, Octvianos Anunut, Julio Da Costa and Domingos Colo used machetes*". The witness saw "*Lorencio Tacaqui cutting those people's heads from a distance of about 50 metres. Lorencio Tacaqui was in front and I was behind*".

"*When they started to cut those people, my group was crying and I felt sorry for those people and left. I was scared and ran to my house and just sat there doing nothing*". The witness couldn't tell how many people Tacaqui killed with the machete because he ran away

From Passabe to Imbatte they went by foot, they passed by Naituna, and they arrived at Letenai at 7.00 o'clock at night. (Naituna is in Passabe and Letenaye is an area near Indonesia). They met Tacaqui in Passabe. They didn't met anyone in Naituna.

The witness knows Amandio Nesi, Jamario Affu. They went with him from Passabe to Imbatte via Naituna.

He added: "*In Teolassi there is a river, sometimes with water sometimes dry, a big river. On the day that the peoplè were killed I didn't approach the river*".

"*I told the investigators (in his previous statement) that I saw Tacaqui hit 10 people*". In Court the witness said that he told that (the number of people) because he was afraid, but confirmed that he saw, with his own eyes, Tacaqui hitting people. Apparently he had seen Tacaqui hitting ten people in the April's incident in the football field of Passabe.

In Teolasi river the witness ran away when the cutting of people started but he knows that Tacaqui cut people

The witness group was at the front and they (the leaders) were at the back and then they cut people and the group of the witness run away. After that the witness doesn't know what Tacaqui did because he had already run away, probably they went to other villages. After that they went to Nibin and they stole cows.

The witness didn't see Tacaqui clean his machete. He said to the investigator he had saw Tacaqui cleaning the machete because at that time they just came in so they were afraid of being accused for the murders.

The witness couldn't say what was Tacaqui wearing that day, because it was at nighttime and he didn't see clearly the cloth.

The witness said that the militia members stopped the beating at about at 4.00 o'clock. Whether they rested or left he doesn't know because he was already gone.

By stating the above, the witness confirmed his deposition given before the investigators in two occasions, i.e. on the 29th January 2001 and 7th February 2001 (i.e. three and tend days respectively, after the arrest of the accused).

Strikingly enough, the same witness, heard on the same facts before the arrest of Tacaqui (the statement is dated 20.3.2000, little more than six months after the events), gave a fully detailed account of them mentioning a list of people amongst the main perpetrators (the same names that later have been by him repeated to the investigator in the most recent deposition) but not recalling the accused Tacaqui.

5. Alfredo Paku was the next (and fifth) witness, heard on the 3rd of February 2004 as well.

This is a summary of his testimony:

The witness, a CNRT member, claims that in Passabe, in 1999 Lorenzo Tacaqui, Gabriel Colo, Audrey Ulan, Julio da Costa, Aleixo Sufa and Tomas Taboi were destroying, beating people (the witness says "*beating us*" meaning perhaps CNRT supporters) and telling them to look at the sunshine.

Concentrating his attention on the episode of Passabe, he refers that the militia commanders lied to the witness and other people telling them to pick up some woods. They told them to pick up the woods but they didn't go straight from the Militia Commander's house: instead they went from Passabe to a place called Naituna.

When they arrived in Naituna they were told to begin to pick up wood but after that they left and went to the place called Imbate. There was the Militia Commandant but also a lot of other people, "*like in a market*". The witness only recognized Andre Colo, as a Militia Commandant. When they arrived in Imbate they were told to wait in Imbate while the Militia Commandants went ahead. The witness thinks they went to the school building at Imbate.

After that, they tied some people and they called the group to which the witness belonged. A lot of people Kiubiselo who were CNRT supporters were tied in Imbate. Gabriel Colo, the Militia Commandant, tied them.

“After they tied those people up they told us to wait outside, and then they tied up people together, they were tied two and two together, and then gave them to each of us”. Then they were told to take them to Passabe, to the police station. However, in the way to Passabe, in a place called Teolassi, *“they killed people”.*

A lot of people, like in a market, left to Naituna from Imbate, militias outnumbered the prisoners, but most of them were civilians, normal people. Although in a previous statement the witness mentioned more or less 700 people (excluding the people who were killed) and seemed to agree with the number in court, the defense counsel challenged his capacity to count (the witness was able to count, one-by-one, the people in the Court room but didn't know how many months there are in a year. He knows there are seven days in a week though).

“Some people were armed with guns or machetes: Andre Ulan was holding a gun, Mateus Taboe was holding a pistol, Gabriel Colo was holding a machete, Lauren Tacaqui was holding machete, and also Aleu Suffa and Domingos Obe carried machetes. Those people started cutting people. I saw that with my own eyes”.

Other people were apparently also armed (*“all of us”*, said the witness). The witness himself carried a machete.

The witness can't recall how long the killing took or how many people were killed. The militia Commandant was killing the people.

The witness had one prisoner and he was told to hold him. They were told to hold one prisoner each two guards, so two people have one person. The man that the witness was holding was killed in Teolassi by Gabriel Kolo. The other militia commanders were also killing those people.

The witness declared he knew Florence Tacaqui since the witness was a little boy, adding that Laurence Tacaqui was present when they went from Passabe to Imbate and from Imbate to Teolassi, walking the same road together with them. *“In Teolassi he killed people. It was midnight and they took two big woods with a fire and three petromax lights”.* The witness was, with others, in front, and they (apparently the so-called commanders groups) were at the back, behind. They told the witness' group to go in front and, behind them, they were killing people. The witness was afraid and ran away. The witness said he saw that with his own eyes (*Witness showed physically the distance between him and Tacaqui*). The witness said that the group (of more than 700 people) was always together from Passabe and then to Naituna, Imbatte and then back again. The distance between the witness and Tacaqui was equal to the distance between the Court bench and the flag post.

By stating the above, the witness confirmed his deposition given before the investigators on the 2nd February 2001.

6. Mateus Colo was the next (and sixth) witness, heard a first time on the 5th of February 2004; the presence of radical contradictions between the declaration given before the Court and those given in a statement previously given to the investigators on the 17th march 2000, led the Panel to rehear the witness in Passabe on the 3rd March 2004.

Just incidentally and as a premise, it is fit to say that in the first statement in the course of the investigation, the witness had not mentioned Florencio Tacaqui at all (but mentioned Carlos Tacaqui, just to prove his knowledge of that family) and had summed up the story, from his own experience and viewpoint, as a fact of burial, having being called, in the morning of the 10h of September, after the massacre in Teolassi had already happened, to bury the corpses of those who had died. To add more, he recalled that militia leaders who called him and others guarding a militia post, lied to them on the real purpose of the call on duty, early in the morning of the 10th of September.

His testimony before the Court (we refer here to the first one, the second one having brought no change) followed another line and can be summarized as follows:

He referred about the facts happened in the area of Passabe on the 9th and 10th September. He spoke about the concentration of people in Imbate, about the procedure of finding of the prisoners and gave details about the march in the night from Imbate to Teolassi.

He repeated the story, already heard several times, of the massacre, giving the same details heard in other occasions. He mentioned the presence of the militia leaders or commanders (amongst whom) Florencio Tacaqui as well, he remembers specifically the accused hitting people with a machete.

He meticulously reported the crime in a fashion substantially homogeneous if not identical to many narrations given before him by other witnesses; by doing so he went along the version which had been the backbone of his statement given to the investigators on the 29th January 2001, i.e. three days after the arrest of Florencio Tacaqui.

Now, the Court notices (and will come on the issue again later) the unsolvable contradiction in which the witness fell and his changing attitude in referring the episode before and after the arrest of the accused: it is not necessary to spend words to underline the inconsistency of the two versions which can only find a solution in the radical negation of the trustworthiness of one of them. Despite the wide use of the first witness' statement in Court by the Defense Counsel and the Panel as well, in the attempt to refresh the witness' statement, Mateus Colo was unable to give any logical explanation.

7. The seventh witness was Sebastian Sunef, heard on the 6th of February 2004.

He is the only witness to refer to the whole of the events that took place in the first half of September 1999. He was in fact present in Kiubiselo on the 8th (referred as 9th, though) when the village was the target of the attack by the militia, was forcibly brought to Imbate and then, from there, to Teolasse on the 10th, managing to escape the massacre only because thought dead by the aggressors.

His account goes as follows.

On the 9th of September some people including Gabriel Colo, Andre Ulan, Frank Ase and others -there were lots of them- came in Kiubiselo and surrounded them (the people of Kiubiselo). First the witness was in his house, and when tried to run away he was captured. They were carrying arms and weapons and they start to shoot. They also burnt all the houses in Kiubiselo and also the pigsties. The witness' house was burned in the incident. Mr. Punef and Mr. Ulan were killed. There were other victims but the witness didn't see them killed at the time because he was far. Later he was told Tobis Ko and Poto Kelu were also killed.

The witness goes on: *"On the next morning, we all went to Inbatie. About 70 or more people from Kiubiselo, including myself and people from Tumin, were tied up and guarded by people of Passabe, may be 200, 300 people. I only know the names of some of them: Gabriel Colo, Andre Ulan, Antonio Sabraka, Liberatus Maunu, Neon Tolan"*.

"We arrived in Inbatte about 7 o'clock at night and we were told to wait in the office of the chef do suco in Inbatte. Later they we were taken to Teolassi, it was night, we walked quite far, at the light of 3 petromas (petrol lamp) and when we got to Teolassi the militia started to cut us, to kill. I was cut on the back of my neck. I don't know who exactly injured me because it was dark, far from the lights, and I was disoriented. After that the attackers just left. Some time later, I became unconscious; they thought I was dead. When I recovered, I checked the wound in the back of my neck and then left back to the forest. Other people managed to escape the killing, 9 people, namely Sebastian Sufa, Martino Bobi, Markus Baki, Petro Cono, Zuze Ulan, Mateus Kusi, Augustino Ase, Lafu Seko, Kariz Apalu. They also sustained heavy injuries".

The witness said they were targeted accused of being CNRT members. Gabriel Colo, Andrei Ula, Tomi Sobaka, said that. They had kill all the members of CNRT.

In the course of the investigation the witness had given a statement to the investigators on 29.12.1999, listing many militiamen present to the crime scene and a considerable number (31) of victims from his village. At the end of the statement he acknowledged having seen a man (the same day or the day before the gave the statement, the statement is unclear on the point -28th or 29th January 1999) at Oecussi police station, a man who had been present to the whole unfolding of the militia attack, from Kiubiselo to Teolassi. The prosecutor, in the attempt to establish the presence of the accused to the criminal events, asked the witness if he had seen that person again since than. The prosecutor got a positive answer: the witness pretended identifying that man as Florencio Tacaqui, present in Court. For reason that will later be explained, this identification is faulty and is a major backlash of the Prosecutor attempt to establish the responsibility of Tacaqui for counts 6 and 7.

8. The eighth witness was Arcanjo Nesi, heard on the 6th of February this year

He repeated what he said in the course of the investigation: what follows is an account of his exposition in Court.

In 1999 the witness was a farmer. After the consultation, on the following day, a man called Andre Ulan went and called the witness and others including Marcos Afu, Ammandu Nesi, Agustinos Afu, and Alfredo Lafu. Andre Ulan had gun in his hand. He told them that they were going to gather firewood. They got to the soccer field (about one hour from the witness' house) and were told that they were going to gather wood in a place called Naituna.

The witness only knew Andre Ulan among those who gave that order. Florencio Tacaqui was also in the soccer field and together with the other militias they went with them to Imbate. Two hundred or three hundred people went from Passabe to Imbate. The witness went from Naituna to Imbate with Marcus Afu, Agustino Afu and others. Tacaqui was also walking with them. The witness knew Tacaqui from before, he was a teacher in a pre secondary school. The witness didn't go to school but he usually goes to Passabe on Sundays for the mass.

Instead of gathering firewood, they were taken to Imbate and were told to wait at a place called Letenai. Florencio Tacaqui and other militia they have already tied up other people. The orders came from Mr. Tacaqui. The witness was ordered by Tacaqui and other militia "whatever I say you have to follow" and "if you don't follow us we will beat you up".

"After they tied up the people in Imbate, they told us to arrest them and take them to the office in Passabe. Before we got to Passabe, in Teolassi, they started killing the people. I was in the middle of the group. They began cutting the people and chopping the people with machete. Florencio Tacaqui was killing from behind. In Teolassi, all the militias have killed people. Andre Ulan and Florencio Tacaqui they were shooting. Andre Ulan was shooting and Florencio Tacaqui was cutting/chopping with machete. I was so scared that I ran away home".

9. The ninth witness was Josefino Ulan, heard on the 5th of April this year.

He refers the facts pertaining the massacre in a way very proximate to the rest of the witnesses heard before:

At that time there were group of militias that attacked them, the CNRT, (in Tumin?) on the 8 September 1999, and at that time they all ran away to a place called Imbate in Indonesia, where they had to register down their names

"The first ones to register their names were the parents and then the young people and also the students the ones that studied, the ones that studied in the university. And over there the chief of the village he did not allow us to leave. They were kept in the area that belonged to the chief of the village. They were kept there up to 5 o'clock in the afternoon when the militia arrived. They came and they surrounded the refugees inside the building. After that the chief of the village called Gabriel Colo, went inside to select the people. They entered to select and divide the people that did not study and those that studied would go into one group, people from primary school to senior high school in one group, senior high school up to university in one group. After that, they called the militias inside and they tied us up one by one. There were 75 people, all tied up two by two. At that time Gabriel Colo was the leader, I didn't see any other high-ranking militias. I didn't count how many militias there were that night, they were many, more than 100 militias, and were beating me up, they over numbered the people tied up".

"They removed us from the building at 10.00 o'clock. and they took us and went to Ainare, Sungai and Passabe". When they arrived in Passabe they shot three times and there were three groups. The witness was in the first group: "They cut me, stabbed me with a long knife while I was always with the hands tied up to the back. Then I fell down and they chopped me on the neck twice. We all fell down on the floor. Gabriel Colo said to his members to pull

them to one side. They had two big torches. When the lights were on, I pretended closing my eyes and when it was dark I opened the eyes. They pulled me to the side near a hole and suddenly I fell and they stabbed me on the back. They saw that I was still bleeding (breathing?) so they stabbed me again. Domingos Effi stabbed me and Antonio Ulan was the one who held me”.

The second part of the testimony was centered on the presence of Florencio Tacaqui to the events. The witness recollected the presence of the accused in Imbatte but was not able to confirm his presence at the crime scene in Teolassi.

This makes a relevant novelty with respect to the statement given by the witness just three months and an half after the events had happened (the account to the investigators dates back to 23.12.99, i.e. before the arrest of the accused), when the name of the accused was not mentioned, despite the witness mentioning as present other militiamen and leaders. To add to the surprise of the Panel, who, in search of a confirmation of the credibility of the witness, interrogated him on the modalities of the recognition and on the circumstances in which the witness in Imbate saw the accused, the witness himself linked his memory to the peculiarity of the curly hair of the accused.

For reasons that will be later indicated, the recognition and the testimony on the point is radically void of credibility.

10. The tenth witness is Marcus Baquim, heard on the 6th of April 2004.

The same pattern of testimony as the previous witness developed in the course of the deposition: Barcus Baquim diligently repeated the narration of the facts to which he participated as a victim, going through the same story already referred to the investigators (the witness was heard on the 19.3.2000, before the arrest of Tacaqui), with the addition, before the Court, of the name and the presence of the accused who had not been mentioned to the investigators.

On this, as well as on the modalities and contradictions in his account of the identification of Tacaqui (and on the scarce credibility of the testimony on this) few words will be spent later.

11. The eleventh witness heard on counts 6 and 7 was Abrao Sila, in the course of the hearing 6th April 2004.

Again, the same pattern of testimony as the two witnesses who preceded him developed in the course of his deposition: while he didn't mention the accused in the course of the interview during the investigation and before the arrest of Tacaqui (the witness was heard on the 18th March 2000 and gave an extensive and detailed declaration mentioning several participants to the facts which took place from the 9th to the 10th September between Imbate and Passabe) he recollects his presence in Court. While on this last mentioned point it will necessary to come later, here is a short account of the statement:

The witness, a villager of Abani, Passabe, met “*Florencio Tacaqui in one meeting in the house of the chef do suco, about one week before the date of the massacre. The meeting was amongst the five people mentioned before*” (he had referred to the group of Gabriel Colo, Andre Ulan, Mateus Taboi, Julio da Costa and Florencio Tacaqui). They were the ones that

had meeting. And then they called the people to go and also listen and participate. Gabriel was the one who spoke, they had guns and they had knives and one by one they all spoke. They spoke that *“now CNRT have wan they will be the one ... we have governed for 24 years: people that belong to CNRT we will kill them”*.

In Passabe, between 9th and the 10th of September 1999 the witness did not do anything but the people like Gabriel Colo, Thomas Totu, Andre Ulan, Tomi Colo, Carlos Colo and Florencio Tacaqui, they were the leaders and they were giving orders to the people to do operations. They were all commanders. Carlos Tacaqui was a militiaman. On that day he didn't do anything but he was also the commander. He knows Gabriel Colo, *chef do suco* of Abani, his big brother is Carlos Tacaqui and their child is Florencio Tacaqui.

In his previous statement the witness mentioned Gabriel Colo, Andre Ulan, Mateus Taboi, Julio da Costa, Cono Neno, Mateus Neno, and he said there were about four or five people organizing everyone. They were Gabriel Colo, Andre Ulan, Mateus Taboi, and Julio da Costa. At that time he didn't mention Tacaqui because he wasn't there (in East Timor). During the investigation he was going to speak, when he started and mentioned some names, he was going to tell the story; he was trying to tell the story, but was stopped so he just mentioned the names that he did.

On that day Gabriel Colo beat the witness up, and he had a knife to stab him. That was before the killing because he forced the witness to kill people and the witness did not want.

“After everything happened Carlos Tacaqui was going to remove heat from our bodies. It was like black magic. He put water in a container and then he sprayed water to everybody. It was close to daylight, around 4 o'clock in the morning. It was quite a long ceremony and after the sprinkle of the water they all sat down until daylight. Carlos Tacaqui was the one who sprinkled water to us, before the sprinkling water, he was not there and then they went and called him from home and he sprinkled the water. On the day of the killing many people came from Sunkai and Sunkanan and it was dark. I didn't see Tacaqui. The following day I saw him”.

The witness saw Florencio Tacaqui after the killing. They were walking together near the river, near the house in the village – near the house, coming from the river. It was around midday (then he said it was just daylight). That was after Carlos Tacaqui performed the ceremony.

The witness doesn't know where Tacaqui was coming from, (later he said he came from his house after the killing in the morning) because there were many people coming from Sunkanan. They were invited by the *chef de suco* Gabriel Colo to come. This people came from Sumpai, they brought the Petromax lights and they took the lights back.

After that everybody returned to his house. The witness went to his house in Meta, half a kilometre from Passabe, stayed at his house until September 17, when they went to Indonesia.

He doesn't know how the victims were buried.

The house of the witness is far from Florencio Tacaqui's house (the witness said like from the court to the airport). The road (from the crime scene to the witness' house) is through his house. The place where the killing took place is not too far from Tacaqui's house, but from the witness' house, it's quite far.

12. The twelfth witness was Mateus Kusi: he was interviewed on the 6th April 2004.

His contribution to the understanding of the facts was very basic and simple: he was a victim, miraculously escaped the death in Teolassi. In Court he repeated the statement he made before the investigators before the arrest of Tacaqui, whom he didn't know. Accordingly he has never mentioned, in his declarations, the accused.

13. The thirteenth witness was Cosmas Ulan, heard on the 6th April 2004.

The examination of the witness in Court was very short and substantially truncated when the incapacity of the witness emerged to give a plausible justification of the *ex tempore* inclusion amongst the militia leaders listed before the Court as present to the massacre of Teolassi, of Florencio Tacaqui who had not been mentioned in the course of the investigation (interviewed on the 19.12.99, before the arrest of Tacaqui, the witness had mentioned all the 8 militia leaders or commanders whose names repeated in Court, but the accused).

14. The fourteenth witness was Pedro Cono: he was interviewed on the 4th May 2004.

His contribution to the understanding of the facts was very basic and simple: he was a victim who miraculously escaped the death in Teolassi. In Court he repeated the statement he made before the investigators before the arrest of Tacaqui, whom he didn't know. Accordingly he has never mentioned, in his declarations, the accused.

15. The last witness heard on the facts described as the massacre of Teolassi was Domingos Efi, heard on the 4th of May 2004.

On the facts of September, the witness initially affirmed the presence of Florencio Tacaqui but then turned to a different version, stating he didn't see the accused directly: "The moment when they carried out these activities I didn't see with my own eyes, if I had I would have said I had".

Interviewed before the arrest of Tacaqui, on the 18.3.2000, he didn't mention the accused.

The Court now turns to the analysis of the testimonies.

While it is clear and undisputable that the massacre in Teolassi took place in the night between the 9th and the 10th of September 1999, with the modalities outlined by the totality of the witnesses, the Court is confronted with the dilemma of the presence of the accused.

On this specific point it can be asserted that two witnesses are clearly irrelevant since they cannot give any specific information on the accused. Indeed, Mateus Cusi and Pedro Cono, though representing vividly the facts in the statements to the investigator and confirming

them in Court, didn't know the accused personally nor recognize him in any way afterwards. Their testimonies is accordingly insignificant.

The remaining part of the witnesses heard on counts 6 and 7 has substantially mentioned, with a varied shade of certainty, the presence of the accused to the crime scene but, despite this, the Panel is reluctant to concede that the actual presence of Mr. Tacaqui from Imbate to Teolassi at the relevant time has been proven: indeed the overall result of the testimonies is clearly unsatisfactory

The list of witnesses includes in order of presentation Amandio Nesi, Jamerius Lafu, Marcus Lafu, Agostino Afu, Alfredo Paku, Marcus Colo, Sebastian Sunef, Arcanjo Nesi, Josefino Ulan, Marcus Baquim, Abrao Sila, Cosmas Ulan and Domingos Efi.

While it is not possible to set a hard and fast rule to determine the credibility of the witnesses, the Court reckons that it doesn't not take a great amount of discernment to assess the absolute lack of reliability of some of the witnesses brought before the Court to be heard on counts 6 and 7, at least on the account of the participation of Tacaqui.

Take witnesses Amandio Nesi, Mateus Colo, Sebastian Sunef, Josefino Ulan, Marcus Baquim, Abrao Sila, Cosmas Ulan, Domingos Efi, all (apart from the first) heard before the arrest of the accused.

Hearing their testimonies as reading their deposition in Court leaves the listener astonished for the level of unreliability of such versions where the severity of the contradictions or incongruities is only balanced by the apparent naivety of all those who proffer them. All the witnesses but one in this batch were heard by investigators before they arrest of the accused but their declarations at the time, though detailed on the massacre in Teolassi, had not involved the accused whom they "discovered" only at the trial stage. Oddly enough, the only witness in the group who had been interviewed after the 26th January 2001, Amandio Nesi, stated, at least during the first audition in Court, just the opposite, asserting that he didn't see the accused at the crime scene.

Let us concentrate our attention on this witness for a while since his behavior can be taken as an example for many who followed.

Amandio Nesi in the course of the hearing 26 January 2004 retracted the words he gave to the investigators, insisting in what first appeared to be an attempt to defend his previous militia leader. He rigorously and repeatedly stated that the original accusatory version against Tacaqui was born out of fear for the investigators and despite the observation by the Presiding Judge that at the time of declaration (February 2001) he didn't have any reason to fear the investigator, he maintained his position. He explained that his fear didn't arise from the investigator themselves, rather from the self-imposed conviction that, as ex-militia returnees, he and his fellows may have been exposed to the investigations and may have been involved in the same sort of destiny as Tacaqui.

He kept his stand all along the hearing of 26 February, yet he radically shifted his mind when interviewed again in Passabe in March. There, the fierce assertor of the new version vanished and the Panel met another kind of witness, ready to change again the version and prone to come back to the original accusatory statement given to the investigator in 2001; the

new alteration left the Panel dismayed and unable to find the way to open a breach in the wall of inconsistencies that the witness had been building up. Amandio Nesi with ineffable indifference didn't even try to justify the new modification of his remembrances, opposing an unmotivated vagueness to the research of the Panel of a rational explanation of his behavior.

So at the end, we are left with two contrasting versions and the Panel has the onus to assess the credibility of one of the two. What kind of criteria can assist the Panel? Can it be simply stated that the last version matters and that what was said before is rubbish? Obviously not: the credibility of a witness can not be tested on the basis of a "last come- most believed" rule, good to give a formal order but insufficient to assess the merit of the declaration. Rather, the Court notices that the witness emphasized that in Dili and after years from the initial interview, he felt free to state the truth; the Court thinks that this new attitude of the witness, which can be put at the origin of the first change of version, may have dissolved when the witness was heard in Passabe, where the conditions of social pressure were clearly different: the witness didn't have the freedom to speak any more, surrounded, as he was, in the course of the testimony in the Police Station of Passabe, by villagers and eminent members of his community whose expectations he didn't want to fail.

The void stubbornness shown by the witness on the 3rd March in Passabe by refusing to give any rational explanation for the alteration of the version is strikingly contrasted by the candor shown in Dili by the same witness who, opening his deposition before the Court, at the first opportunity, in the broadest possible manner, stated the falsity of his previous declaration to the investigators by admitting that he didn't know and had never known whether Tacaqui was present in Teolassi or not.

In the end, it's hard to say what deserves credibility but the spontaneity of the confession of the untrustworthiness of his own words (he confessed he lied to the investigators), makes of the declaration given on 26 January 2004 a more reliable piece of evidence and a sufficient ground to trust the witness when he says he had not the opportunity to see Tacaqui in Teolassi.

The witness Amandio Nesi, in the opinion of the Court, was only credible on the 26 January 2004 when he gave testimony to confute the accusation he had made to the investigators on the 29th January and 7th February 2001.

Still speaking on the same group of witnesses mentioned above (Mateus Colo, Sebastian Sunef, Josefino Ulan, Marcus Baquim, Abrao Sila, Cosmas Ulan, and Domingos Efi), the Court assesses their depositions as integrally untenable for the reasons which are going to be explained.

In the order in which they were heard:

- Mateus Colo: the sixth witness to be heard on the 5th of February. The Panel was impressed to learn from the witness that he had participated in the march of militiamen and victims from Imbatte to Teolassi with the presence of Tacaqui and then to discover later, in the course of the same interrogation that the witness had stated in a statement of the beginning of 2000 (exactly the 17 March, i.e. only six months after the facts) that he (Mateus Colo) didn't participate to the night march and that, what's more, he didn't mention Florencio Tacaqui.

The two versions offered by Mateus Colo were obviously inconsistent in such degree that only one of the two could be accepted: one can't say that he was present to the crime scene after having stated that he was called only the following day and that at that time when he was called he (and other militiamen) were simply "ordered to take hoe and shovel to open a road" instead of burying bodies. The two stories cannot simply stand together but Mateus Colo, confronted with this crude reality, was unable to say anything to restore credibility to his words.

The Court thinks that the accusation of Mr. Tacaqui by the witness is not credible: heard only six months after the massacre he didn't refer about his (of the witness) presence to the scene of massacre nor on the presence of Mr. Tacaqui (if also if he showed to know him and his family by mentioning in the first statement the father of the accused). The arrest of the accused changed his memory radically.

Which of the two will be the most credible version?

The first, come just months after the facts when the perception of the facts may have not been protuberated by extraneous factors, or the second, given days after the arrest of the accused?

Since no reason whatsoever exists to determine the untrustworthiness of the first version, it is reasonable, in the belief of the Court, to find that the statement given after the arrest of Tacaqui is the untenable one and that the analogous confirmation of it, repeated before the panel, does not have any greater value.

The fact that the arrest of Tacaqui made in some way change the version of the witness is an elucidation of the power of collective suggestion.

- The testimony of Sebastian Sunef, the seventh witness to be heard, represents another example of self-manipulation of the memories or, in other words, how easily the desire of the witness to satisfy the expectation can affect his mind and his ability to recollect facts and to give them a logical shape. Sebastian Sunef, as explained before, didn't mention Mr. Tacaqui in the course of interview released to the investigators at the end of 1999 (his statement is dated 29th December, 1999) and this circumstance is explained by the fact that at that time he didn't know him.

Nevertheless in Court he affirmed that the accused was present to the events he had been describing (i.e. the facts of counts 4 to 7) and alleged that on the basis of an identification of the accused made in Court. Now, this identification was not only weak, wrong and impossible (for the reasons which will be said in short) but in itself is an evident demonstration of how easily suggestions sneak in the mind of similar witnesses.

The identification, we said, was weak: it is clear that, given the scarce intellectual capacity of the witness, with no minimum level of education or habit to memorize or to make use of his intellectual skills if not for very basic concepts, the likelihood that he validly recognized at a distance of more than four years a man whom he didn't know is rather than limited, inexistent.

But, what's more, the identification was impossible and, consequently, wrong: the witness asserted that the man sitting in Court as accused was the same man he had the opportunity to see at the Oecussi Police Station on the day he went to give his testimonies to the investigators (29.12.1999) and whom, at that time, he indicated as one of the perpetrator present in Teolassi. However, the fact is that undisputedly on the 29.12.1999 the accused was not present in Oecussi or in the territory of East Timor since he had fled the country and had not made return before the 26 January 2001.

Accordingly the witness cannot have seen Tacaqui in person detained in Oecussi Police Station on 29 December 1999 and the individual who was shown to him was someone else whose identity is not possible to determine.

Facing this incongruence, the witness tried to assert, despite what he had said before and what emerges also from a plain reading of a statement he made at the end of 1999, that the identification made in Oecussi was conducted on pictures, which were exhibited to him. It was a last ditch and desperate attempt to make things right, rudimental and void way to try and regain credibility that, by contrast, showed the untrustworthiness of the pretended identification.

Similarly, the attempt of the Prosecutor to establish of presence of Tacaqui at the crime scene of Teolassi at the time of the massacre through the words of this witness was affected by the same vice.

- Josefino Ulan is another witness of scarce credibility.

Without repeating what said before, suffice it to say that he pertains to the group of those who not having mentioned Tacaqui when heard before his arrest, came then to court to confirm his presence at Teolassi.

The way in which the confirmation comes is talkative: he pretended to state that while he noticed the accused in the course of that night (between the 9th and the 10th September 1999) because of his curly hair, he only came to know his name only few months later when he asked the name of this individual to a friend of his present at Teolassi as well.

If also we admit the credibility of this method of identification, the witness was not able to justify why, if he had come to know the name of one of the perpetrators, why he didn't mention him to the investigators on the day he was interviewed, when he mentioned the name of several militiamen and militia leaders?

The incapacity by the witness to go beyond the usual formulaic answers ("I mentioned him, if they wrote I don't know; I'm an illiterate; we are children of God, if I saw I say I saw, if I didn't see I say I didn't see) in the search of a plausible reason for not mentioning the accused at the first available occasion, illustrate sufficiently the unreliability of the testimony at least on the issue of the presence of the accused.

- Marcus Baquim likewise belongs to the group of witnesses who remember Tacaqui only at the trail stage and for him the same argument can be put forward. Why before the arrest of Tacaqui nobody noticed him or mentioned him while almost everybody is ready to remember his presence at Teolassi afterwards?

- Abrao Sila's like other witnesses mentioned the accused only after his (of Tacaqui) arrest and not before (when heard by investigators Mr.Sila mentioned many members of Tacaqui's family but not the accused himself as participants to the massacre). Though, his testimony looks more acceptable because Sila didn't mention the involvement of the accused directly in the massacre, rather mentioned his presence at the crime scene only after the massacre had happened. Specifically, hearing directly the witness or reading scrupulously the account he made in Court, it emerged with clarity that the witness stated he came across Tacaqui while he (the witness) was heading home in the morning that followed the massacre and while Tacaqui was going to the place of the massacre at the time when the burial of the bodies was taking place.

On this interpretation of the facts there is no room for mistakes and the Panel appreciate that the same Prosecutor in the written final statement renounced to the different interpretation originally backed (that Tacaqui was seen by the witness at the crime scene immediately after the massacre).

If the facts can be so assessed it's paved the way to the conclusion that the presence of Florencio Tacaqui in Mr.Sila's version is compatible with the admission of Tacaqui himself as recorded in the transcript of his declaration to the investigators, where he admitted to visiting the area of Teolassi but only after the massacre had taken place.

- Cosmas Ulan, again, is one of those witnesses who recollected the presence of Tacaqui only when giving their testimony before the Court; heard only three months after the facts, he listed eight supposed militia leaders or commanders but didn't mention the current accused.

Questioned about why, with a fresh memory, he had not listed Tacaqui, the witness had no reply. The Court, the Prosecutor and the Defence Counsel didn't feel compelled to investigate more the reason of such incongruity and let the witness go.

The Court particularly felt and feels that the testimony was not credible in the part involving the participation of Tacaqui.

- An even clearer failing affects the testimony of Domingos Efi, the last witness on the issue: in Court, after accusing Tacaqui, he confused his version stating he didn't see the accused directly.

If we add that, heard on the 18.3.2000 Mr.Efi had not mentioned the accused, the conclusion can be easily reached that temporary inclusion of Tacaqui in the list of the perpetrators of the massacre was nothing more than an homage to the school of thought which can be summarize in the sentence: "He was a leader so he must have been there".

The testimonies that have been examined up to now may be grouped for their blatant lack of credibility. Seven out of eight of them were heard before the arrest of the accused while the only one heard by investigators after 26.1.2001 (Armando Nesi) came to Court to confess candidly that he accused Tacaqui to shield himself.

Then there is the group of witnesses who came to Court and confirmed what they said to the investigators.

Interestingly enough, the testimonies of these men have a common feature: Januario Lafu, Marcus Afu, Agostino Afu, Alfredo Paku and Arcanjo Nesi confirmed declarations given in the course of the inquiry just days after the arrest of Lorenzo Tacaqui.

More precisely, Agustino Afu was heard three times in the course of the investigations: the first time, few months after the facts, (on the 20th March 2000) he described the events listing several people amongst the perpetrators but not including Florencio Tacaqui; the second and the third time (on the 29th January and the 7th February 2001, respectively) he repeated the narration of the events listing the same names but adding, these times, the name of the accused.

What can be said about the credibility of these five witnesses? Naturally, on the face of their declarations in Court, matching their previous statements, the most straight forward and easiest conclusion for the Panel would be to give full credibility to those witnesses and, accordingly, to make a finding on the actual presence and contribution of the accused to the massacre of Teolassi.

Apparently, this group of five witnesses could constitute a base solid enough for the final finding of criminal responsibility for the accused Tacaqui also for the counts 6 and 7.

But the Panel is not inclined to accept this simple reading of the testimonies and, in order to evaluate the credibility of the witnesses, to accept as given truth the confirmations made in Court of statements given to the investigators.

The modalities of their collection (after the arrest of Tacaqui a landslide of witnesses were found against him; the declarations collected on the 29th of January 2001 appear to be only focused on the accused; in them there's no narration of facts, only the indication of the name of Tacaqui and his participation to the crime of Teolassi; there is an appalling uniformity in some details of the narrations like the ground "soaked with blood of the victims" or the chilling silence allegedly kept by Tacaqui while slitting throats or chopping bodies) give the impression that there was, on the part of the witnesses the self imposed suggestion to include Tacaqui in the list of the perpetrators present to the crime scene.

Reasons may have varied from the fear indicated by Armando Nesi of possible accuse of co-responsibility or for not failing the expectation of the villagers who wanted someone to be held responsible for the terrible facts happened in Teolasi.

However, the impression that the Court draws is of general unreliability of the testimonies on the facts included in counts 6 and 7.

It couldn't be stressed enough that the assessment of the Court does not involve the integrality of the declarations of the witnesses. What lacks in solidity and genuinity is the factual element of the inclusion, in the description of the event, of the presence of Tacaqui.

Too vagueness by some witnesses or excessive precision on the part of other witnesses are, in truth, two sides of the same coin: a story of collective suggestion.

The Court is not ready to state that some one specifically imposed or suggested the witnesses, after the arrest of Tacaqui, to go before the investigators and tell them a specific version; much less the Court hints that this suggestion came from the investigators who received the declarations or from the Prosecutor who directed and instructed the investigators. Though, it can't pass without notice that after the arrest and only after the arrest nobody appeared to have ignored the presence of Tacaqui.

The members of the Panel have experienced, in several occasions in East Timor, how easy is for a witness, to be influenced and to fall victim of erroneous reconstructions of the facts, based on the need to satisfy and bland the interlocutor.

This is what the Panel believes has happened in the present case.

The Panel is convinced that Florencio Tacaqui was not present to the criminal events which took place from the 9th to the 10th of September 1999 in Imbate and then in Teolasi.

The Court understands that it could be argued that his absence from the crime scene is technically irrelevant, once the Court has the proof, as stated before, that Tacaqui was part of the chain of command (if also not the top of the hierarchy) of the militia group in Passabe and that, in some way (as referred by Abrao Sila), he was present to the deliberative session were the action against the villages that more strongly had supported the campaign for independence was decided.

The Court replies, in first place, that the perspective of a criminal participation of this sort has never been in discussion, since the Prosecutor has strived to demonstrate the effective presence of the accused to the crime scene; changing the perspective (something that frankly the Prosecutor has not dared to try) would imply changing the facts at the basis of the charge, which is obviously precluded in this phase.

On the other hand, the Court wants to underline that, in a way, the very absence of Florencio Tacaqui is expressive: by subtracting himself to the last and worst unfolding of the planned criminal action (options including a non voluntary absence are frankly untenable in the given contest) he appears to have distanced himself from the criminal action itself. In the opinion of the Court it is not too daring to conclude that the factual subtraction, as *facta concludentia*, expresses a will to detach the responsibility of the accused from that of the group. And the observation that an unexpressed internal determination can't have the effect of excuse the responsibility of the accused, once his participation to the initial criminal deliberation has been established, because, say, it's too little and too late, is not pertinent in the given contest, were the single will of the accused, who, in thesis, would try to oppose the execution of the plan he had contributed to create, would have been clearly vain.

The last count (the eighth) is of persecution.

By writing the count, the Prosecutor alleges that all the events described in counts 1 to 7 are not only the source of specific, autonomous counts, but they also should be seen, in the whole, as examples of persecution.

This would be mandated by the interpretation of Section 5 Regulation 2000/15 where persecution is qualified as a crime against a group or collectivity, on certain grounds, in relation to another crime included in the jurisdiction of the Special Panels.

Specifically, the mentioned legal provision is as follows:

“... crime against humanity means...: (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels”.

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

The provision creates a strong link between the severe deprivation of fundamental rights and the reason for which the deprivation is caused: the deprivation of fundamental rights only becomes persecution if it is based on a discriminatory cause against the identity of a group or collectivity. It could be said that introducing the clause “by reason of the identity of the group...” an emphasis is put on the essence of the persecution, i.e., the discrimination.

Apart from persecution, a discriminatory element has been recognized as not being necessary for the concept of crime against humanity: if it is true that common experience teaches that the majority of the crimes against humanity are indeed sparked by (and based on some ground of) discriminations, since actions of such scale ordinarily find their origin in some political, racial or religious motivation, but this does not imply that the sources of this kind of criminalization (either at the international or domestic level) require discriminatory elements in the representation of the crime. With the exception of the Statute for the ICTR (in which the expression “on national, political, ethnic, racial or religious grounds” is used to describe the widespread and systematic attack against the civilian population which denotes all crimes against humanity), international and domestic instruments of criminalization of c.a.h. don't require explicitly (and have constantly been interpreted accordingly) discrimination to be present for whichever crimes against humanity, in general.

However, when crimes against humanity are used, like in the present case, as factual elements of persecution, then it appears to be necessary that the single constitutive element, the single crime against humanity is supported by such discriminatory intent. If, as stated, discrimination is the essence of the persecution, it must be present in each single episode that is purported to represent a part of the persecution itself; otherwise the single crime a.h. could be punishable in itself but would be extraneous to the planned persecution.

This must be evident in the present case, where each single count, already a crime by itself, is “coated” by the Prosecutor with a second layer of illegality.

Having said that, the Court observes that the representation of the Prosecutor may be accepted only in part. In the list of seven crimes in the indictment, before the count of persecution, some differences may, under this respect, be noticed.

Specifically, the seven charges relate to facts happened in two clearly distinct times and, correspondently, have different causes.

Counts 1 and 2 refer to facts happened before the popular consultation, in the course of the campaign: both of them can easily be interpreted as facts of persecution and, indeed what else is the deprivation of liberty of the 43 CNRT members in Passabe, if not the attempt to prevent those people from pursuing a political activity in favor of independence, so depriving them of their most basic political right? And the aggression displayed against Jose' Bubun and other CNRT supporters or organizers holding a meeting in the last days of the campaign for independence shouldn't be interpreted as the intent to persecute the opposing side for their political activity? In this respect, the Prosecutor's perspective appears to be correct in that the facts described above were persecutorial, in their essence, since based on the discriminatory determination to deprive the opposing party (or its supporters) of the fundamental political right to campaign in support of its believes.

But when it comes to the interpretation of counts 3 to 7, things change because it is credible that what prompted the furious acts which took place after the popular consultation was another kind of resolution, specifically revenge. Having lost the battle, the discriminatory intent didn't make sense any more: the motivation of the Indonesia-fed militia become to quash the population of those villages which had supported the fighters or had oppose the campaign by the integrationists. The will to punish, rather than discriminate, was then the motive for the cluster of crimes which occurred between the 8th and the 10th September 1999 and are summarized in count 4/7.

In this line of argument, it is easy to draw the conclusion that only counts 1 and 2 can be pictured as episodes of discrimination on political grounds, i.e. persecution. The other two counts for which Tacaqui is held responsible can't be requalified in such manner.

SENTENCING POLICY

The accused has been found guilty of the crimes described in counts 1 and 2 and of a part of the crimes described in counts 3, 4 and 8.

Undoubtedly, the most severe violation of all is the participation to the murders committed in Kiubiselo in the course of the aggression against the village on the 8th September 1999 (count 3). In the course of the attack at least two men were killed. Their names (Augustino Ulan and Victor Punef) were referred by the witness Domingos Colo. On the rest of the victims listed in the indictment, no further confirmation was possible to gather due to the insufficiency of the testimonies.

If also no witness referred the direct commission of a single murder by the accused, nonetheless his direct participation to the action and to the planning of it was recognized and, by this way, the criminal responsibility of Tacaqui affirmed.

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

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

For the commission of one of the murders listed in count 3 (the identity between the two implies there's no need to distinguish or choose between the two), the Panel thinks appropriate to impose a penalty of nine years; in previous cases, the direct execution of murders by the accused in the course of an attack had deserved a longer term of detention, around fifteen or sixteen years. However, in this case, the direct role of Tacaqui in the execution has not been proven and his responsibility is related to his auxiliary role in the militia hierarchy. The occurrence of a second murder deserves, naturally, the duplication of the term.

The circumstances alleged by the Defense Counsel at the end of her written final statement are likely true but they are not enough to induce the Court to a modification of the terms of the conviction. The Court accepts that Tacaqui was all what his Counsel states of him (i.e. a father of a family, the breadwinner for his family, a pious man, a respected teacher of religion) but the figure that emerges from this description does not matches with the image that we draw from the facts collected in the course of the trial. The pious man, the respected member of the community, the zealous teacher turned out to be a pitiless militiaman involved in the most brutal acts of political repression and feud. The first part doesn't balance the second and the tranquil life of the religion teacher of Passabe can not compensate or diminish the retribution due for the crimes for which Tacaqui bears responsibility.

Further criminal acts attributed to the accused (counts 1, 2, 4 and 8) will be punished with the following terms in jail:

- count 1: the deprivation of liberty of the CNRT supporters or sympathizers deserves two years in jail;
- count 2: the attempted murder of Jose' Bubun is punished with the penalty of four years;
- count 4: the serious injuries caused to Mateus Sufa and Josefino Bose in the course of the attack to the village of Kiubiselo get the retribution of three years;
- finally, on count 8: the persecution of the CNRT supporters, described in count 1 and 2 is punished with one more year in jail.

In the end, the sum of the terms of imprisonment imposed to the accused amounts virtually to 28 years in jail (9 + 9 + 2 + 4 + 3 + 1). However, the application of the rule of limitation of Section 65 Indonesian Penal Code imposes a reduction of the sanction.

It is appropriate to underline that the determination of the duration of the prison terms is based on the discretion of the Court; while this doesn't mean arbitrary power, it is obvious that the terms so imposed are only virtually determined by the Panel, since the application of

Section 65 of the Indonesian Penal Code, in this case as in the majority of the other cases tried by the Special Panel, imposes the application of the limitation established in that norm. In other words, once the Panel has agreed upon the application of the conjunction of punishable acts, the rule of limitation of the sum of the terms to one third above the sentence imposed for the most severe of the crimes will follow. It follows as well that there is no practical reason to illustrate at length the reasons which have suggested to the Panel the entity of the terms of imprisonment.

In the present case, naturally, there are good arguments to state the unity of the crimes. The reason for the conjunction (this term is used in the KUHP – the criminal code of Indonesia) is to be found in the uniqueness of the ends for which the crimes were committed, and the identity of the targets. Not a plan, obviously, but a sufficiently identified project of aggression and vexation of the pro independence sympathizers which is enough to support a mental element which can be found, identical and unmodified through all the crimes. The circumstance that the last group of crimes (counts 3-7, facts of 8th/10th September) was born out of a revenge for the result of the referendum doesn't subtract the actions to the unity since the events are to be seen as included, anyway, in the context of the widespread and systematic attack.

In the end, in application of section 65 of the Indonesian criminal code, the maximum sentence for the most severe crime (one of the two murders of count 3) is 9 years. The Panel accordingly, can not impose a term heavier than 12 years.

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

Florencio Tacaqui was arrested on the 26 January 2001 and stayed in jail since then: accordingly, he will end to serve his term in jail on the 25 January 2013.

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

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

Count 1) The accused is found guilty of Crimes against humanity for the severe deprivation of liberty of forty-three CNRT members and independence supporters, committed in Passabe between 18 and 24 April 1999, as a part of a widespread and systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 letter (e) UNTAET Reg.2000/15;

Count 2) The accused is found guilty of crimes against humanity for inhuman act (attempted murder) causing serious injury to the body of Jose Bubun, committed on the 9th August 1999 in Pope sub-village, Abani Village, Passabe sub-district, Oecussi district, as a part of a widespread and systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 letter (k) UNTAET Reg.2000/15;

Count 3) The accused is found guilty of crimes against humanity for the murders of the villagers of Kiubiselo, Oecussi dstrict, victims who will be listed in the motivation, crimes which took place on the 8th September 1999, as a part of a widespread and systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 letter (a) UNTAET Reg.2000/15; for the remaining part of the charge (murders of villagers in Nibin and Tumin, district of Oecussi, allegedly committed on the same day) the accused is found not guilty;

Count 4) The accused is found guilty of crimes against humanity for the inhuman acts causing serious injuries to the bodies of Mateus Sufa and Josefino Bose in the village of Kiubiselo, Oecussi dstrict, crimes committed on the 8th September 1999, as a part of a widespread and systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 letter (k) UNTAET Reg.2000/15; for the remaining part of the charge (similar act against Laurencio Leo Mari in the village of Tumin, district of Oecussi, allegedly committed on the same day) the accused is found not guilty;

Count 5) The accused is found not guilty;

Count 6) The accused is found not guilty;

Count 7) The accused is found not guilty;

Count 8) The accused is found guilty of crimes against humanity for the persecution of CNRT members and supporters of independence in relation to the severe deprivation of liberty of forty-three CNRT members and independence supporters, committed in Passabe between 18 and 24 April 1999 and in relation to the inhuman act (attempted murder) causing serious injury to the body of Jose Bubun, committed on the 9th August 1999 in Pope sub-village, Abani Village, Oecussi district (count 1 and 2 of the indictment); crime of persecution committed as a part of a widespread and systematic attack against a civilian population with knowledge of the attack, pursuant to Section 5.1 letter (h) UNTAET Reg.2000/15. For the remaining part of the charge (persecution in relation to the facts described in the counts 3 to 7) the accused is found not guilty.

2.

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

3.

According to Section 10.3 U.R. 15/2000, section 42.5 UR-30/2000 and Article 33 of Indonesian Penal Code, the deduction of the time spent in pretrial detention by the accused due to an order of an East Timorese Court is deducted from the sentence imposed.

4.

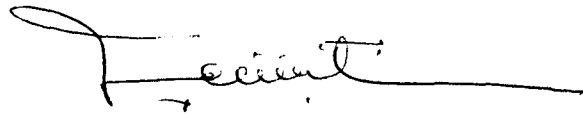
Pursuant to Sections 42.1 and 42.5 of UR-2000/30, the convicted shall spend the duration of the penalty in East Timor. The term will expire on 25 January 2013.

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

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

This decision was rendered and delivered on the 9 December 2004 in the building of the Court of Appeal of Dili by

Judge Antonio Helder Viana do Carmo



Judge Oscar Gomes



Judge Francesco Florit, presiding

