



UNITED NATIONS

NATIONS UNIES

ETTA

East Timorese Transitional Administration
DILI DISTRICT COURT

SPECIAL PANEL FOR SERIOUS CRIMES

Case No. 09/2000
Date: 11 December 2001
Original: English and Bahasa Indonesia

IN THE TRIAL CHAMBER

Before: Judge Marcelo Dolzany da Costa, Presiding
Judge Sylver Ntukamazina
Judge Maria Natércia Gusmão Pereira
Registrar: Mr. João Nauro

THE PROSECUTOR

v.

JONI MARQUES
MANUEL DA COSTA
JOÃO DA COSTA
PAULO DA COSTA
AMÉLIO DA COSTA
HILÁRIO DA SILVA
GONSALO DOS SANTOS
ALARICO FERNANDES
MAUTERSA MONIS
GILBERTO FERNANDES

JUDGMENT

The Office of the Deputy Prosecutor General for Serious Crimes

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I - GLOSSARY OF PLACES, TERMS AND ABBREVIATIONS

The following is a selected glossary of main abbreviations, terms and places used in the text. I = Indonesian word. T = Tetum. P = Portuguese word. Remaining terms are Indonesian military acronyms.

ABRI	Angkatan Bersenjata Republik Indonesia – Indonesian Armed Forces – name changed to TNI on April 1, 1999.
<i>Babinsa</i>	Village guidance officer from the military (I)
BRTT	Barison Rakyat Timor Timur (I) (East Timor People’s Front) – a pro-autonomy group
BTT	Batalyon Territorial (Indonesian Territory Battalion)
<i>Bupati</i>	District Administrator (I)
CNRT	Conselho Nacional da Resistência Timorese (P) (National Council for the Timorese Resistance), the umbrella organization for the pro-independence groups
Coconut Grove	A site next to Ira-Ara
Com	A harbor of a small town about 40 km from Los Palos, a departure port to Kupang (West Timor)
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
Ira-Ara	A sub-village in Lautem district
Los Palos	One of the main cities in East Timor located inland in the eastern most district of East Timor (Lautem) about 224 km from Dili.
Lautem	A small town in Lautem District about 15 km from Los Palos.
Leuro	One of the villages in the Lautem District
Mikrolet	A minibus for passengers transportation in East Timor (I)
Soro Kucil	A sub-village in Leuro
<i>Suco</i>	A Timorese principedom, village inside a district (P).
FALINTIL	Forças Armadas de Libertação Nacional de Timor Leste (P) (Army Front for the Liberation of East Timor)
PCI	Penal Code of Indonesia (<i>see</i> KUHP)
KOSTRAD	Strategic Reserve Command of the Indonesian army (I)
PROVOST	Indonesian Military guard (I)
TNI	Tentara Nasional Indonesia (Indonesia National Military)
<i>Tim Ratih</i>	A people’s unit, trained by the Indonesian military (I)
<i>Team Alfa</i>	A pro-autonomy militia group (I)
KOPASSUS	Special forces troops of Indonesian Army.
Garuda	<i>Eagle</i> , in Indonesian language, the national symbol of Indonesia (I).
745 Base:	A military base in Los Palos for the 745 Battalion. During the United Nations administration (1999-2002) the refurbished facilities are the headquarters of Peacekeeping Forces (PKF) and the Korean Army.
KORAMIL	Sub-district Military Command
KODIM	District Military Command
KODAM	Indonesian regional military command (I). Udayara command base in Bali covered East Timor.
KUHP	Kitab Undang-Undang Hukum Pidana (I) – Penal Code of Indonesia
FRETILIN	Frente Revolucionária do Timor Leste Independente (P) – Front Revolutionary for Independent East Timor)
PCI	Penal Code of Indonesia
UR	Regulation of United Nations Transitional Administration in East Timor (UNTAET)

The trial of Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva, Gonsalo dos Santos, Alarico Fernandes, Mautersa Monis and Gilberto Fernandes (“accused” or “defendants”) before this Special Panel for Serious Crimes of Dili District Court in East Timor (“Special Panel” or “Panel”), commenced on 9 July 2001 and came to a close on 11 December 2001.

Having considered all of the evidence presented to it during the course of the trial, along with the written and oral submissions of the Prosecutor (also “Prosecution”) and the Defence of the accused, the Special Panel

HEREBY RENDERS ITS JUDGMENT.

II. INTRODUCTION

A. The Special Panel for Serious Crimes in East Timor

1. The Special Panels were established, within the Dili District Court, pursuant to Section 10 of UNTAET Regulation no. 2000/11, in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of UR-2000/15.

B. Procedural Background

2. On 11 December 2000, the Public Prosecutor presented before the Dili District Court a written indictment (in English and Indonesian) with charges of crimes against humanity against JONI MARQUES, MANUEL DA COSTA, JOÃO DA COSTA *alias* LEMORAI, PAULO DA COSTA, AMÉLIO DA COSTA, HILÁRIO DA SILVA, GONSALO DOS SANTOS, ALARICO FERNANDES, MAUTERSA MONIS, GILBERTO FERNANDES and SYAFUL ANWAR.
3. Attached to the indictment were also typed and handwritten copies of the following documents, in English and Indonesian versions: (a) The statements of the defendants; (b) list of and the statements of 64 witnesses; (c) description of evidence; and (d) list of 34 witnesses.
4. On 12 January 2001, the Special Panel issued warrants of arrest against all the accused, but remarked that the duration of the detention would be reviewed at the first preliminary hearing.
5. After the preliminary hearing was held on 16 February 2001, the Special Panel confirmed the extension of the detention of Joni Marques, Manuel da Costa, João da Costa, Alarico Fernandes, Paulo da Costa, Amélio da Costa, Gonsalo dos Santos, Mautersa Monis and Gilberto Fernandes. It was ruled that the accused Hilário da Silva be placed under substitute measures. At the same opportunity, the Court granted the request of severance in relation to the accused Syaful Anwar, on a motion submitted by the Public Prosecutor, pursuant to Sect. 27.1(b) UR-2000/30, considering that the warrant of arrest against him would be difficult to follow up, due to his whereabouts being unknown. At the same time, the Court ruled on the issue of the protection of witnesses and victims.
6. The Defense filed an appeal against such extension of detention on the ground that the Special Panel had erred materially in law, in disregard of the order of the Court of Appeal, which had ruled to void the warrant of arrest issued by the Panel on 12 January 2001. The Special Panel, however, emphasized that the extension of the detention was based on the decision of the Court of Appeal to re-assess the situation of the suspects who could be under unlawful arrest. The Court of Appeal had not made a determination on that request.
7. On 6 March 2001, after being granted leave by the Panel at a preliminary hearing, the Public Prosecutor amended the indictment with the purpose of removing the alternative charges and also to make severance of charges against Syaful Anwar, in order to ensure an expeditious trial for the other accuseds.
8. The public defender Siphosami Malunga filed, just one day before the preliminary hearing scheduled for 3 May 2001, an application for its postponement for at least two weeks. The Court accepted the reason that the Public Defenders' Office had to reassign the defense counselors in order to avoid conflict of interest among some accused who were represented by the same defender. The preliminary hearing was adjourned to 17 May 2001.
9. Before that preliminary hearing, on 16 May 2001, the same counselor served to the Court a copy of the application for disqualification of Judge Luca Ferrero. During the preliminary hearing, the Panel deemed that the motion of disqualification should be served to the presidency of the Dili District Court, pursuant to Sect. 20 of UR-2000/11. No provision, according to the law, ordered the suspension of the trial in such circumstances. At the opportunity, the Panel underlined that "postponing the hearing meant an undue and unlawful delay to the proceeding, especially considering that the Defense had had 70 days to file the request to the presidency". Therefore, the request to postpone the case until the decision about the disqualification was overruled. So far, the presidency of the Dili District Court also has not decided on the matter.
10. The Court then set the date of the trial hearing for 3 July 2001.
11. On 4 June 2001, the Court approved the request from the Public Prosecutor to produce the exhibits of weapons and ammunitions seized in this case. The Panel also decided about an oral motion presented by the Defense about rules of evidence. By ruling on those motions, the Court decided to: (a) admit and deem relevant the testimonies listed by the Public Prosecutor in the folders *Case A* and *Case B*, as modified by the submission of 15 May 2001; (b) to admit and deem relevant the two experts reports about crimes against humanity and the one about the crime scene; (c) to admit the original photographs and video and maps; (d) to admit and deem relevant the exhibits consisting of weapons and ammunition; and (e) remind the Public Prosecutor about his duty to make the evidence accessible to the Defense.

12. On 15 June 2001, the Prosecution filed an urgent motion to postpone the trial, considering some logistical matters, including a visit to the crime scene, arrangement for witness management, and the translation of trial proceedings. The Panel decided to give to the defense the opportunity to file a written response on the motion and set a date for a closed session at the previously scheduled trial hearing. On that day, after hearing the arguments of the parties, the Panel, with a new composition¹, decided to set the date of 9 July 2001 for the trial hearing, and deemed it relevant to make a visit to the crime scene after the presentation and hearing of evidence.

13. The evolution of the trial hearings was recorded in audio and video as provided in Sect. 31. (c) of UR-2000/30, held as follows:

9 July 2001 – The Public Prosecutor made his opening statement, but he was not allowed to present some videotape he had produced at the crime scenes. After this opening statement also provided in written form by the Prosecution, the Defense requested to adjourn the deposition of the accused Joni Marques to the next day, due to the necessity that counselors could consult their clients following what had been stated by the Prosecution. The Court granted the request.

10 July 2001 – The Court asked the accused Joni Marques if he had read or someone read for him the indictment, and if he understood the nature of the charges against him. The Defense submitted that his client had read the indictment and still understood the charges against him. He told the Court that the accused was going to deny the charges and to plead not guilty on counts 1, 3, 4 and 5. He would admit the charges and plead guilty on counts 2, 6 and 7, respectively, concerning: the charges of torture of Evaristo Lopes on 21 April 1999; the murder of Alfredo de Araújo (*alias* José Lemorai) and Kalistu Rodrigues near Ira-Ara subvillage on 21 September 1999; and the murders of a group of clergy, and Agus Muliawan and Zion Freitas, in Los Palos subdistrict on 25 September 1999. The Defense asked for the adjournment of the hearing because the accused Joni Marques was not feeling well and the accused had nothing to eat at lunchtime. The Court decided that the statement of the accused Joni Marques could not be considered as an admission of guilt because it did not correspond with the essential facts of the case. It also made a determination concerning the methodology of presentation and hearing of evidence. The hearing was suspended until the prison managers provided regular feeding to the accuseds during the hearings, and to allow the accused Joni Marques to consult a doctor.

11 July 2001- The Court gave the opportunity to the accused João da Costa *alias* Lemorai, Mautersa Monis, and Gilberto Fernandes to make their statements concerning the charges included in count 1 concerning the murder of Evaristo Lopes as a crime against humanity, and count 2 about the torture of the same victim as a crime against humanity. The accused Joni Marques had already made his statement concerning the two charges, and told the Court he had nothing to add. The Court checked whether the accused João da Costa *alias* Lemorai, Mautersa Monis, and Gilberto Fernandes had read or someone had read for them the indictment, and if they understood the nature of the two charges against them in count 1 and count 2 of the indictment. The Court reminded them about the right to be represented by a legal adviser, the right to remain silent, to plead guilty or not guilty. They stated that they had read the two charges included in the indictment, as provided for in Sect. 30.4 of UR-2000/30, and that they understood the charges against them. After that, they made their statements.

The accused João da Costa told the Court that he had participated in the beating and hitting of Evaristo Lopes but he was not involved in the killing of the same victim. “Syaful Anwar is the one who killed him”. He added also that it had not been his intention to beat and to hit the victim. He had been merely obeying the orders from Syaful Anwar.

The accused Mautersa Monis admitted that he joined Team Alfa group, but his intention was to work as a clandestine. He stated that he participated in the torture of Evaristo Lopes. In fact he admitted that he kicked and hit him, but he did not kill the victim. It was not his intention to torture the victim, but he did it because he was threatened by TNI. He was obeying the order from Syaful Anwar.

The accused Gilberto Fernandes stated that he only hit the victim Evaristo Lopes about three times from the back. He said to the Court that he did it because Syaful Anwar ordered him to do so. He admitted also that he saw the victim bleeding a lot. Syaful Anwar was the one who was beating the victim until he died. The Court deemed that this statement could not be considered as an admission of guilty. Therefore, the accused had to be questioned by the Court, the Prosecutor and the Defense Counsel.

Immediately thereafter, the accused Joni Marques was questioned about the first count in accordance with Sect. 30.5 of UR-2000/30.

¹ The Presiding Judge Luca Ferrero left the mission on 20 June 2001 since his contract would expire in the following 10 days. Judge Marcelo da Costa joined the Panel to replace him at the beginning of July.

12 July 2001- The Court continued the questioning and cross-examination of the accused João da Costa, Mautersa Monis and Gilberto Fernandes.

13 July 2001 - The accused Alarico Fernandes, Paulo da Costa, Gonsalo dos Santos and João da Costa *alias* Lemorai made their statements relating the charges included in count 3 (deportation or forcible transfer of population as a crime against humanity) and count 4 (persecution as a crime against humanity) in relation to the attacks on Leuro and other villages. The accused Joni Marques had already made his statement concerning the two charges, and told the Court that he had nothing else to add. The Court checked whether the aforementioned accuseds had read or someone had read for them the indictment, and if they understood the nature of the two charges against them. The Court reminded them also about the right to be represented by a legal adviser, the right to remain silent, to plead guilty or not guilty to the charges, as provided for in Sect. 30.4 of U.R.30/2000. They stated that they had read the indictment and that they understood the charges against them. After that, they made their statements.

The accused Alarico Fernandes told the Court he was not involved in the attacks of Leuro, and that Team Alfa forced people to join the attacks, including himself. He denied being a member of Team Alfa and pleaded not guilty.

The accused Paulo da Costa told the Court that he was an ordinary citizen who did not force anybody to leave his or her village. He stated that he did not know anything about Team Alfa, and pleaded not guilty because he did nothing to participate in the attacks.

The accused Gonsalo dos Santos alleged he was not involved. He stated that he was only an ordinary citizen. He did not know anything about Team Alfa and the deportation or forcible transfer of the civilian population. The Court, the Prosecution and the Defense questioned those aforementioned accuseds.

16 July 2001 - The Court continued with the cross-examination of the accused Paulo da Costa and Gonsalo dos Santos. After that, on the same day, the accused Joni Marques, Alarico Fernandes and Paulo da Costa were asked to make, if they wished to, any statement concerning the charge included in count 5 (murder of Alexio Oliveira). The accused Joni Marques told the Court that he understood the nature of the charge against him. However, he declared he was not going to say anything else since he was not the perpetrator of the murder of Alexio Oliveira. He had no intention or purpose to kill Alexio Oliveira. He pleaded not guilty to the charge.

17 July 2001 – The trial continued with the statement of the accused Paulo da Costa and Gonsalo dos Santos concerning the charge of murder of Alexio Oliveira. The Court reminded them again about the right to remain silent. The accused Paulo da Costa declared that he understood the nature of the charge against him, but he did not know anything about it because he was not present during the murder of the victim. Accordingly, he did not want to make any statement concerning that charge. The accused Gonsalo dos Santos also understood the nature of the charge against him, but preferred not to make any statement since he did not know anything about it. The Court, the Prosecution and the Defense questioned the accused Joni Marques concerning the charge of murder included in count 5 (murder of Alexio Oliveira). Paulo da Costa and Gonsalo dos Santos were not questioned since they did not make any statement concerning that charge.

After that, the Court moved to the statement of the accuseds concerning the count 6 (murder of Alfredo Araújo and Kalistu Rodrigues). The accused Joni Marques once again remarked that he had no further statement to make, after the one he made concerning the same charge on 10 July 2001. The accused Paulo da Costa admitted that he shot Alfredo Araújo because Joni Marques offered him a gun to shoot the victim, but he would not plead guilty to the charge because he was ordered to shoot. Regarding the killing of Kalistu Rodrigues, Paulo stated that the main perpetrator was Joni Marques. The accused Alarico Fernandes also confirmed that he understood the nature of the charge against him. He then stated that he was told to go with the others from Com to Laudem to get vegetables. When they arrived at the scene of the incident, Alfredo Araújo and Kalistu Rodrigues were killed. But he did not participate; he had no bad plan to kill anybody; he had only gone to Ira-Ara to look for vegetables. The Court decided that there was no admission of guilt and continued with the cross-examination of the accused. The Court and the Prosecutor questioned the accused Joni Marques.

18 July 2001 – the Court continued with the cross-examination of the accused Joni Marques, Paulo da Costa and Alarico Fernandes by the Defense Counsel.

31 July 2001 to 2nd August 2001 – the Court heard the witnesses Moises Lopes, Rudi de Jesus, Domingos Ribeiro and Gonsalo da Costa Sanches. They were also questioned by the judges, the Prosecutor and defenders.

3 August 2001 – the Court, some of the accuseds and their legal representatives visited several locations of the crime scenes within the Lautem district. Those were the sites: (a) Tito's shop at Los

Palos Center; (b) former KOPASSUS station (*torture and murder of Evaristo Lopes*); (c) the villages of Souro Kecil, Omokamo and Foema (*deportation and forcible transfer of population and murder of Alexio Oliveira*); (d) village of Ira-Ara (*murder of Alfredo Araújo and Kalistu Rodrigues*); (e) the crime scene of *murders of clergy, Agus Muliawan and Izino Freitas Amaral and others*, on road towards Baucau about one kilometre west of Lautem, passing by the rice warehouse.

7, 8 and 9 August 2001 – the Court continued on the cross-examination of the witness Gonsalo da Costa Sanchez.

13, 14 and 16 August 2001 – the Court heard the testimony of the witnesses Mario Riberio, Salvador Amaral, Valério Valente. On the latter date, the Prosecutor submitted three documents: (a) a new timetable for witnesses in the Los Palos trial; (b) the list of witnesses whose statements were agreed as evidence by the Prosecution and the Defense; (c) the list of the witnesses whose statements the Prosecution no longer wished to rely on. The Defense agreed on those submissions, and submitted a request to the Court to withdraw the statements the Prosecution no longer wished to rely on. The Court granted the request. On the same day, the witness Anselmo Correia was heard and questioned by the Court and the parties.

17, 21 and 22 August 2001: After finishing the cross-examination of the witness Anselmo Correia, the Court heard the witnesses Olivio Lopes, Lucia Pereira and Angelina Soriano and Joaquim Fernandes.

22 August 2001 – the Court continued with the questioning of the witness Joaquim Fernandes. However, this witness was dismissed by the Court on the ground that he was not in the list previously submitted by the Prosecution. Indeed, he had the same name as the person listed in the evidence.

24 August 2001 – due to the judges' and some public defenders' and public prosecutor's annual and sick leaves, the Court suspended the trial and adjourned it to 17 September 2001.

17 September 2001 – considering that one of the judges was not present, the trial hearing was postponed.

20 September 2001 – the Prosecution requested that Joaquim Fernandes be heard as an additional witness. The request was based on a recent statement given by that person before CivPol and on Sect. 24.2 of UR-2000/30. The Defense Counsel, however, objected to such request, stating that the Court had already rejected the application and the Prosecution was trying to "bring back through a backdoor the same request". That evidence would bring prejudice to the Defense, which was not warned that the Prosecutor would present such evidence. It would be an act against the integrity and the credibility of the proceedings. The lack of sufficient time to prepare for the defense also was taken into account. In response, the Prosecution asked the Court to rule on the issue of what the procedure is where the evidence is produced late. In his viewpoint, the Defense could not say that the present evidence would be prejudicial to the accused because it is natural that all statements of evidence from the Prosecution would have a prejudicial impact on the accused. After considering such arguments, the Court decided: *"This Special Panel pointed out, in accordance with its last decision about the witness Joaquim Fernandes, that 'the Court had already decided on the list of witnesses and evidence to be presented by the Public Prosecutor during the trial'. On that occasion, the Court also decided that the witness the Prosecutor is requesting to be heard had not been included on that list. The Prosecutor is now requesting exceptionally to hear that person as additional evidence. The Court is of the opinion that it is in its competence to decide about the necessity to hear an additional witness from the Prosecution as well as from the Defense. Section 33.2 of UR-2000/30 clearly allows this: 'The Court shall call any additional witnesses it wishes to hear or evidence that it wishes to be presented after the parties have completed their submissions'. The time to assess such necessity, however, comes when the presentation of the evidence by the parties is completed. Therefore, in the current case, the Court will assess the necessity to hear the aforementioned witness as additional evidence after the presentation and hearing of all evidence already available to fill any shortcomings in the evidence. In such circumstances, the admission of an additional witness shall be assessed in the interest of reaching the truth. The Public Prosecutor has to submit the statement made by the requested witness to CivPol in order to allow the Court to assess the necessity of such evidence after the parties have completed their submissions."*

24 September 2001 – the Prosecution requested that the Court consider as evidence the statements given by the accused before the investigating judge. The Court decided: *"For the Court, it is true that a statement or confession made by the accused before an investigating judge may be admitted as evidence, if the Court finds that any admission of guilt contained in such a statement is in compliance with provisions of Section 29A. However, the Court re-iterated its decision issued on 25 July 2001 that such challenged statements could not be used to refresh the memory of the accused during their initial statements in this trial. Since those statements had no opportunity to be challenged and considering that all of the accuseds had a better opportunity to be assisted by their legal representatives during the trial and, therefore, sufficiently aware about the nature and the consequences of an admission of guilt,*

the Panel decided to consider as evidence only the statements made by the accused during this trial, including those made during the preliminary hearing”.

At the same session, the Court also dismissed the witness Manuel da Costa, a blood brother of the accused Joni Marques. The Court ruled as follows: *“It is confirmed the close ties between Manuel da Costa and the accused Joni Marques. Indeed, the particulars provided by the person listed as evidence by the Prosecution lead to the conclusion that they are brothers; that is, relatives within the second degree. According to Section 35.1, all persons summoned to testify in criminal cases are required to do so. The Court considers such subsection as a general principle, which finds its exceptions in the subsections 35.2 and 35.3. Such exceptions are divided in two categories: Firstly, in subsection 35.2, the closed relatives are not allowed to testify even if they wanted to do so, in order to protect the impartiality of a testimony. They cannot be witnesses at all, since the law does not provide either any consent of the accused or the possibility that such persons can do so at their own risk. Secondly, in subsection 35.3, the professionals who are listed there can testify only with the consent of the accused. The categories of persons listed in the subsection 35.2 cannot testify at all, even with the consent of the accused; the other ones provided by subsection 35.3 can do so only with the prior consent of the accused. This interpretation is under the light of the presumption of the partiality of the testimonies that could result from close family ties regardless of whether those persons express a wish to testify. Even if they wish to testify, the law does not allow them to do so. If Regulation 2000/30 allowed close relatives to testify, it would also made provisions concerning the proceedings, the contents and assessment of the testimony, similar to that provided for in subsection 35.7 concerning the witnesses mentioned in subsection 35.3. Subsections 35.4 and 35.5 apply to those persons who are not included in the exceptions provided for in subsections 35.2 and 35.3. It means that those witnesses may not be compelled to incriminate themselves, their spouse or partner, their parents, their children, or their relatives within the second degree. The family ties, in this case, do not necessarily include the accused, but other persons who might be alleged to have committed an offence. The witness could testify about the facts, and not necessarily about the involvement of an accused who is his or her close relative. Considering all the aforementioned reasons and according to the interpretation given to subsection 35.2 of UR-2000/30, the Court decides to dismiss Manuel da Costa as a witness to testify in the current charge in which his brother Joni Marques is involved.”*

1st October 2001 – the Public Prosecutor produced exhibits relating to the following charges: (a) torture and murder of Evaristo Lopes; (b) forcible transfer of population in Leuro; (c) murder of Alexio Oliveira; (d) murder of Alfredo Araújo and Kalistu Rodrigues; (e) murder of clergy and Agus Muliawan, Izino Freitas Amaral. The Defence Counsel responded by asking the Court to order the Public Prosecutor to show the relevance of each exhibit related to each accused or to the alleged crime committed one by one. The Prosecutor responded by stating that it was not necessary at that stage to show the relevance of those exhibits one by one. His own conclusions would draw on that when submitting his closing statement.

2 October 2001 — the Court decided that the Prosecution had to prove the connection of each exhibit to the alleged crimes committed and to show what kind of evidence was coming before the Court. *“Such presentation has to be done immediately before the Court closes the presentation and hearing of evidence. On the other hand, the Defence has the right to contradict any allegation of connection between the exhibit and the accused or the crime allegedly committed. During their closing statements the parties make their conclusions based on the evidence already discussed before the Court and contradicted by the opposite party. The Court will then draw its own conclusions and may consider them as evidence in the case if it deems them relevant and as having probative value with regard to the issues in dispute (Sect. 34.1 of UR-30/2000). Therefore, the Court orders the Public Prosecutor to show the connection of each exhibit with the charges and the conduct of the accuseds, one by one. As soon as the presentation is completed, the Defence will be given an opportunity to respond immediately to the submission of the Public Prosecutor”.*

3 October 2001 – the Prosecution requested the Court to hear the additional witnesses, José Pereira, Joaquim Fernandes (senior) and the investigator who recovered a body from a well, which appears to be Alexio Oliveira. The Prosecution requested that such statements be admitted as additional evidence; as well as the witness Filipina dos Santos, wife of the victim Alexio Oliveira.

4 October 2001 – the Prosecutor made a request to rely on and to continue in the cross-examination of the witness Joaquim Fernandes. The Court decided to allow the submission. However, the Public Prosecutor later preferred not to rely on the witness Joaquim Fernandes. The Defense requested to present its case according to section 33.1 of UR-2000/30. The Public Defender Sypho told the Court that the Defense would like to present the case for the defense. The evidence would be the testimonies given by the accuseds under oath. The Court dismissed such request on the ground that UR-2000/30

does not provide that an accused to be sworn and testify in his or her own case. The Defense had no more requests or evidence.

5 October 2001 -- the Court heard the testimonies of the witnesses Wayne Anthony Fee, Filipina dos Santos and Jacinta dos Santos.

8 October 2001 – the Prosecution submitted the list of the live witnesses, the statements and reports agreed as evidence by the Prosecution and the Defense, the list of witnesses whose statements the Prosecution no longer wished to rely upon, and the reports that were admitted as evidence by order of Court. The hearing was postponed to 22 October 2001 for the hearing of closing statements. However, considering that one of the judges was away from Dili to attend a conference in Brazil, the Court decided to adjourn the presentation of closing statements to 30 October 2001.

30 October 2001 – the legal representatives for the accused João da Costa, Manuel da Costa, Paulo da Costa, Amélio ds Costa, Hilário da Silva, Gonsalo dos Santos, Alarico Fernandes, Mautersa Monis, and Gilberto Fernandes sought leave for their clients to address the Court pursuant to Section 30.7 of UNTAET Regulation 2000/30. The Court decided to hear the statements of those accused. After that, the hearing was adjourned to 6 November 2001 for the parties to submit their closing statements.

6, 7 and 8 November 2001 – the Prosecution and the Defense Counsel submitted their closing statements and read them out. After that, the Court gave an opportunity to any of the accuseds to address the Court. The accused Joni Marques, Paulo da Costa, João da Costa alias Lemorai, Amélio da Costa, Gonsalo do Santos and Alarico Fernandes asked to address the Court and made their statements. The Court then closed the session and set the date of 11 December 2001 to announce its judgment.

14. Interpreters into English, Bahasa Indonesia and Tetum languages assisted every act before the Court.

C. The Amended Indictment

15. On 6 March 2001, the Public Prosecutor sought leave to amend the indictment. The Court granted him leave to amend the indictment as follows:

“I. Torture and Murder of Evaristo Lopes, 21 April 1999

By their acts and omissions in relation to events described under C and E I of this indictment **JONI MARQUES, JOÃO DA COSTA alias LEMORAI, MAUTERSA MONIS and GILBERTO FERNANDES** committed:

Count 1: Murder, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(a) of UNTAET Regulation 2000/15

On or about 21 April 1999, in Los Palos Sub-District, Lautem District, Joni Marques, João da Costa alias Lemorai, Mautersa Monis and Gilberto Fernandes did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Evaristo Lopes, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(a) of UNTAET Regulation 2000/15.

Count 2: Torture, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(f) of UNTAET Regulation 2000/15

On or about 21 April 1999 in Los Palos Sub-District, Lautem District, Joni Marques, João da Costa alias Lemorai, Mautersa Monis and Gilberto Fernandes did with intention commit, aid, abet or otherwise assist in inflicting severe pain or suffering upon Evaristo Lopes, a person in

the custody or under the control of the accused, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(f) of UNTAET Regulation 2000/15

Attacks on Leuro and other villages and the deportation and forcible transfer of the civilian population, 8 to 30 September 1999.

By their acts and omissions in relation to events described under C and E II of this indictment **JONI MARQUES, ALARICO FERNANDES, PAULO DA COSTA and GONSALO DOS SANTOS** committed:

Count 3 Deportation or forcible transfer of population, a **CRIME AGAINST HUMANITY** punishable under section 5.1(d) of UNTAET Regulation 2000/15.

On days between the 8th and 30th September 1999 at Leuro and other villages, Los Palos Sub-District, Lautem District, Joni Marques, Alarico Fernandes, Paulo da Costa and Gonsalo dos Santos did, without grounds, commit, aid, abet or otherwise assist in the forcible displacement of persons by expulsion or coercive acts from the area in which they were lawfully present in violation of section 5.1 (d) of UNTAET Regulation 2000/15.

Count 4: Persecution, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(h) of UNTAET Regulation 2000/15

On days between the 8th and 30th September 1999 at Leuro and other villages, Los Palos Sub-District, Lautem District, Joni Marques, Alarico Fernandes, Paulo da Costa and Gonsalo dos Santos did intentionally commit, aid, abet or otherwise assist in the severe deprivation of fundamental rights of persons by reasons of the identity of their group or collectivity in violation of section 5.1(f) of UNTAET Regulation 2000/15

Abduction and Murder of Alexio Oliveira, 11 September 1999

By their acts and omissions in relation to events described under C and E III of this indictment **JONI MARQUES, PAULO DA COSTA and GONSALO DOS SANTOS** committed:

Count 5: Murder, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(a) of UNTAET Regulation 2000/15

On or about 11 September 1999, in Los Palos Sub-District, Lautem District, Joni Marques, Paulo da Costa and Gonsalo dos Santos did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Alexio Oliveira, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(a) of UNTAET Regulation 2000/15.

Murder of Alfredo Araújo alias José Lemorai and Kalistu Rodrigues, 21 September 1999

By their acts and omissions in relation to events described under C and E IV of this indictment **JONI MARQUES, ALARICO FERNANDES and PAULO DA COSTA** committed:

Count 6: Murder, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(a) of UNTAET Regulation 2000/15

On or about 21 September 1999, near Ira-Ara Sub-Village, Parlamento Village, Lautem District, Joni Marques, Alarico Fernandes and Paulo da Costa did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Alfredo de Araújo alias José Lemorai and Kalistu Rodrigues, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(a) of UNTAET Regulation 2000/15.

Murders of a group of clergy, Agus Muliawan and Izno Freitas, 25 September 1999

By their acts and omissions in relation to the events described under C and E V of this indictment, **JONI MARQUES, JOÃO DA COSTA, PAULO DA COSTA, AMÉLIO DA COSTA, MANUEL DA COSTA, HILÁRIO DA SILVA and GONSALO DOS SANTOS** committed:

Count 7: Murder, a **CRIME AGAINST HUMANITY**, punishable under section 5.1(a) of UNTAET Regulation 2000/15

On or about 25 September 1999, in Los Palos Sub-District, Lautem District, Joni Marques, João da Costa alias Lemorai, Paulo da Costa, Amélio da Costa, Manuel da Costa, Hilário da Silva and Gonsalo dos Santos did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Brother Jacinto Xavier, Brother Fernandes dos Santos, Brother Valério da Conceicao, Sister Erminia Cazzaniga, Sister Celeste de Carvalho, Agus Muliawan, Cristovao Rudy Barreto, Titi Sandora Lopes and Izino Freitas Amaral, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of section 5.1(a) of UNTAET Regulation 2000/15.”

III. THE SUBMISSIONS OF THE PARTIES

A. The Prosecution

Factual allegations:

16. The Prosecutor's factual allegations may briefly be set out as follows. In opening statement, the Prosecutor addressed the Court, *verbatim*:

"On the 25th September 1999 nine people were killed on the road outside Lautem. That attack is surely the most notorious of Team Alfa's crimes, but it was not an isolated incident. It was the last in a series of crimes that were committed throughout 1999. On 27th September 1999, two days after those nine people were killed, a minibus carrying members of Team Alfa was itself ambushed. On that day 8 militia men were killed, 6 were wounded but escaped. Four of those 6 men who escaped are in Court today: Hilário da Silva, Alarico Fernandes, Gonsalo dos Santos and Paulo da Costa. The attack upon the Team Alfa minibus was, no doubt, an act of revenge for the events of 25th September. An act of revenge, as East Timor disintegrated further into violence. It was, no doubt, an act, which was considered by some people to be a kind of justice. But, that was not justice. It is not justice, when violence is answered with more violence. Justice comes now, in a new East Timor. Justice in this courtroom. Justice here in the rebuilt surrounding of a peaceful Dili.

What happened on 25th September 1999 drew to a close the calculated and planned actions of the militia group Team Alfa. It was a group committed to resisting the popular support for independence in East Timor. A group who acted with the co-operation and assistance of the Indonesian authorities in Los Palos. Formed in 1989 Team Alfa worked under the direct command of the Indonesian Special Forces Command, KOPASSUS. The Prosecution will present to this court charges in respect of five events. Those five events are marked by the seven charges on the amended indictment. Each of those charges is a Crime Against Humanity. Each of those charges was an offence committed as part of a widespread or systematic attack upon the civilian population of East Timor. The offences for which these accused are responsible, were committed in the knowledge that their actions were part of a widespread or systematic attack.

The charges come out of the following events:

21st April 1999 – Evaristo Lopes was tortured and then murdered in Los Palos

Between 8th and 30th September 1999 – the villages around Leuro were attacked, burnt and the inhabitants forced to leave their homes

11th September 1999 – Alexio Oliveira was murdered at the Battalion 745 Base outside Los Palos

21st September 1999 – Alfredo Araújo and Kalistu Rodrigues were murdered outside the village of Ira-Ara

25th September 1999 – nine people were killed on the road outside Lautem.

Before turning to the charges, I will introduce the evidence upon which the Prosecution relies. The evidence is contained within three Case Files. They are identified as A, B and C. Each Case File has been served in English and in Bahasa Indonesia. Within Case File A are the statements of witnesses. The evidence of those witnesses is divided into:

Evidence of the structure of Team Alfa;

Evidence in support of the charges of torture and murder of Evaristo Lopes;

Evidence in support of the charges of forced transfer and persecution in Leuro villages;

Evidence in support of the charge of murder of Alexio Oliveira;

Evidence in support of the charge of murder of Alfredo Araújo and Kalistu Rodrigues;
Evidence in support of the charges of murder of nine people outside Lautem.

Case File B contains the statements made by the accuseds to CivPol, Serious Crimes Investigators and Investigating Judges. They are separated in the file according to each accused and then in chronological order. The accused are in the order that they appear on the indictment.

Case File C contains:

Reports concerning the situation in East Timor during 1999;
Expert reports on the crime scenes and examination of firearms;
Statements from investigators about the crime scenes.

The Court has been provided with a large map of the district of Lautem. The town of Los Palos is to the south east of the district. The other places with which we will be concerned are Leuro, to the west of Los Palos; the Battalion 745 Base to the north of Los Palos; the port at Com, on the north coast of Lautem district; the village of Ira-Ara, to the West of Com; and the road to the west of the town of Lautem.

WIDESPREAD OR SYSTEMATIC ATTACK AGAINST CIVILIAN POPULATION

To prove the charge of Crimes Against Humanity the Prosecution must, of course, prove that these offences were a part of widespread or systematic attack upon the civilian population.

In this case the Prosecution will do this in two ways.

First, by reference to the facts of this case. They show the conduct of the accuseds to be a part of the activities of Team Alfa, a militia group, which was committed to, attacks upon the civilian population and in particular members of the population who supported independence.

We have evidence of crimes committed in April 1999 (three months after the popular consultation was announced), in early September (shortly after the result of the consultation was announced) and in late September (when INTERFET had already arrived in Dili).

The facts on this Indictment show a systematic attack. It was directed against Evaristo Lopes (FALINTIL supporter). Upon the houses of villagers around Leuro (CNRT members). Upon Alexio Oliveira (CNRT supporter). Alfredo Araújo (FALINTIL supporter), Kalistu Rodrigues (CNRT member and clandestine member of FALINTIL). The clergy (who were considered by Team Alfa to be supporters of independence and disruptive to the campaign of autonomy).

Over the six months, which these facts cover, Team Alfa identified and chose its targets, systematically attacking pro-independence supporters within the civilian population.

Secondly, with reference to the circumstances as they were in East Timor during 1999, the court has five reports which consider this issue. They are contained within Case File C, from pages 1 to 81 (English) pages 1 to 82 (Indonesian). Those reports from various bodies within the United Nations and from the Indonesian Commission on Human Rights each provide evidence as to the circumstances as they were in East Timor during 1999.

In the opinion of the authors of those reports, there was an organized attack upon the population of East Timor. The Indonesian military and civilian authorities in co-operation directed it with militia groups such as Team Alfa.

The activities of Team Alfa, as a militia group, did not occur in isolation. Team Alfa was just a part of the militia campaign. They were part of a campaign carried on across East Timor. That campaign was carried out with the support and co-operation of the Indonesian civilian and military authorities.

Each of these accused, committed the crimes in the full knowledge of Team Alfa's purpose. Could anyone have participated in the actions of a militia group like Team Alfa without knowing that such a group was committed to a campaign of violence against the population?

These men knew, at the time, that the crimes they were committing were part of a wider campaign not just by Team Alfa, not just in Lautem district, but in East Timor as a whole.

Included in Case File C at page 64 (English) and page 71 (Indonesian) is the report of the Indonesian Commission on Human Rights Violations in East Timor (KPP-HAM) dated 31st January 2000. This is the executive summary only. To quote just one passage of that summary, at paragraph 21, the Commission found, upon the evidence they had seen, that:

“...first, there was a strong relationship and linkage between the TNI, Polri, government bureaucracy and the militias. Second, the violence that occurred in East Timor beginning after the announcement of the offer of the two options until the period after the results of the popular consultation were announced was not caused by a civil war but was the result of a systematic campaign of violence.”

It is the part, which these crimes played in that "systematic campaign of violence" which, leads the Prosecutor to bring these charges of Crimes Against Humanity.

(a) Torture and murder of Evaristo Lopes on 21 April 1999

Defendants: Joni Marques, João da Costa, Mautersa Monis and Gilberto Fernandes

17. The Prosecutor submitted that in Los Palos, Team Alfa shared its headquarters with the Indonesian Special Forces Command, generally known as KOPASSUS. That headquarters was up a short track that led from the roundabout in the center of Los Palos town. The building can be seen on the map².
18. Next to the roundabout is Tito's shop. On 21st April 1999, Team Alfa set up a roadblock at the end of the track leading to their headquarters. On that evening, they stopped a car in which Evaristo Lopes was a passenger. Also in the car were Moises Lopes, Rudi de Jesus, and Domingo Ribeiro. That group had received a request for assistance from the local commander of FALINTIL and they were trying to meet him. At about 9PM, the car was stopped at the roadblock. Team Alfa militias who were armed with iron bars and swords manned the roadblock. Included in that group were Joni Marques, João da Costa (*alias* Lemorai) and Mautersa Monis.
19. João da Costa ordered the men to get out of the car. Once the men were out of the car, Evaristo Lopes was struck with an iron bar. Syaful Anwar was the second in command of KOPASSUS in Los Palos. He was sitting in a car watching these events. Syaful Anwar ordered the militia to take Evaristo Lopes to the building shared by KOPASSUS and Team Alfa. At the building, Evaristo Lopes was taken to a room and beaten. He was beaten by members of Team Alfa that included Joni Marques, João da Costa, Gilberto Fernandes and Mautersa Monis. Lopes had his hands and feet tied. He was kicked and hit with iron bars as he sat on the floor. He was questioned about his support for FALINTIL. Evaristo Lopes was an active member of FALINTIL, as his activities that night show. He was repeatedly beaten. Joni Marques and João da Costa cut his hair. João da Costa beat him with a cable.
20. Eventually, whilst João da Costa and another man held Evaristo Lopes, Syaful Anwar cut Lopes's throat and he died. At 2:00AM the following morning, Joni Marques gave an order that the body of Evaristo Lopes be put in a truck. It was taken to a field outside of Los Palos and dumped. Soon afterwards, a man working in his paddy field found the body. It was taken to the hospital at Los Palos and there the body was identified. KOPASSUS maintained security around the hospital whilst the body was there. There were stab wounds to the abdomen and face.
21. A post-mortem was carried out³. The post-mortem report confirms that the body of Evaristo Lopes had the hands and legs tied. His hair was unevenly cut.

(b) Deportation or forcible transfer of the civilian population – 8 September to 30 September 1999

Defendants: Joni Marques, Alarico Fernandes, Paulo da Costa and Gonsalo dos Santos

22. The Public Prosecutor submitted that the village of Leuro is to the west of Los Palos. It has a number of sub-villages including Souro Kecil, Omokano, Cenumato and Foema.
23. On 8th September 1999, members of Team Alfa militia went to the villages around Leuro. On 8th September, at about 9:00AM, the militia arrived. They included Paulo da Costa, Alarico Fernandes and Gonsalo da Santos. Members of the militia said: “You people are supporters of CNRT and you will be killed!” and “You are CNRT and so we have burnt your houses down!”. Some of the militiamen were armed with rifles, swords and machetes.

² Case File C, pages 94 (English) and 93 (Indonesian).

³ Included in Case File A page 110 (English) page 116 (Indonesian)

24. The houses in the village were burnt. Paulo da Costa and Alarico Fernandes were involved in setting fire to houses. The militia had brought kerosene with them. Some of the villagers were beaten and forced out of their homes. The people were threatened and told they must go to Kupang. In the sub-village of Souro Kecil there was an Indonesian Army check post. At the post, Indonesian soldiers were encouraging the militia in what they were doing.
25. On 10th September 1999, in Cenumato, 21 houses were burnt. All of them belonged to members of CNRT. On 11th September, members of Team Alfa militia went again to the villages. Joni Marques led that group. Also in the group were Paulo da Costa and Gonsalo da Santos. There was a red minibus with Cruzero written on the side. Paulo was driving the red minibus. The militia forced villagers to leave their homes and they took them to Los Palos in the minibus.
26. On 12th September 1999, Team Alfa, including Joni Marques attacked the sub-village of Omokano. Thirty-four houses were burnt. On 13th September 1999, Team Alfa, including Joni Marques, attacked the sub-village of Foema. Forty-six houses were burnt.
27. Over the four or five days from 8th September, villagers were taken from their villages in either the red minibus or a large yellow truck. They were taken to the Battalion 745 Base outside Los Palos where they waited for around five days before being taken to Com Harbor. At Com, a large group of people were gathered. They waited there for boats to take them to Kupang. Some of the people did go to Kupang, others in fact were never transported there and returned about three weeks later to their villages.

(c) Murder of Alexio Oliveira on 11 September 1999

Defendants: Joni Marques, Paulo da Costa and Gonsalo dos Santos

28. The Prosecutor submitted that, on 11th September 1999, members of Team Alfa were moving the population from around Leuro to the Battalion 745 Base. Joni Marques was leading the militia group. Paulo da Costa was driving the red minibus. Also present was Gonsalo dos Santos. At about 4:30PM on 11th September, the group got to the village of Foema. There, Alexio Oliveira was sitting with his mother. Joni Marques fired two shots in the air and went to speak to Alexio Oliveira. Joni Marques accused Oliveira of being a CNRT member, which Oliveira denied. Marques ordered him to get into the red minibus. Joni Marques said that he wanted him to come to register.
29. Alexio Oliveira was a member of the pro-independence group. He had shown his wife leaflets and CNRT flags which he had distributed. In the few days before Oliveira's death, Joni Marques had – in the words of his wife Filipina – “treated him like an enemy”. The group continued on the road towards Los Palos and stopped at the village of Sawarika. There, Alexio Oliveira was told by Joni Marques to get his motorcycle. Oliveira left the minibus, but after 15 minutes had not returned. Joni Marques went to find him. Marques fired a gun shot and shortly thereafter rejoined the waiting group with Alexio Oliveira. The motorcycle was taken and ridden by another Team Alfa member. The group continued to the 745 Base, arriving there at about 6.30PM.
30. At the base, Gonsalo dos Santos exchanged his machete for a sword belonging to Manuel [Sávio] da Costa. At around 8:00PM, Alexio Oliveira was taken to some TNI soldiers by a group of men including Joni Marques, Paulo da Costa and Gonsalo dos Santos. Alexio Oliveira was escorted by two TNI soldiers and Gonsalo dos Santos, and Paulo da Costa and another militiaman. They went behind some buildings at the back of the base. All the men except Alexio Oliveira returned twenty-five minutes later. As they walked back through the 745 Base, Gonsalo dos Santos said “Kids, wait a minute, I want to clean my sword because it is full of blood”. Gonsalo dos Santos returned the sword the next day to Manuel Sávio. It had a piece broken from the blade.
31. About two hours after Alexio disappeared, a group including Joni Marques and Gonsalo dos Santos said that Alexio had been killed behind some houses at the base and his body put in a drain.

(d) Murder of Alfredo de Araújo (*alias* José Lemorai) and Kalistu Rodrigues on 21 September 1999

Defendants: Joni Marques, Alarico Fernandes and Paulo da Costa

32. The Prosecutor submitted that a large group of people had gathered at Com waiting for transportation by boat to Kupang. That included the militia group Team Alfa. Com is at the end of a road that runs along the coast from Lautem town. At Lautem town was a rice warehouse. To provide food for the people gathered at Com, regular journeys were made by Team Alfa along that road. At around 8:00AM on 21st September 1999 members of Team Alfa left Com in the red minibus with Cruzero written on the side. They traveled along the road to the village of Ira-Ara. Just outside that village is a Coconut Grove. Local people knew it as being a meeting place for FALINTIL and its supporters knew the Grove. The Team Alfa men split into two groups and entered the Grove. In one group were Felisberto and Alarico Fernandes. (Felisberto was killed six days later in the ambush upon the minibus by FALINTIL). The other group went with Joni Marques; it included Paulo da Costa. Felisberto and Joni both had rifles.

Alfredo Araújo (*alias* José Lemorai) was in the forest looking for food. Felisberto shot him in the leg. Joni Marques then shot him in the head twice, killing him. Felisberto said: “We shot him because he was CNRT”. About 30 minutes later, at around 2:00PM, a group of three men came into the same area. Joni Marques and Felisberto too shot at them. One of the men, Kalistu Rodrigues, was hit in the leg and fell to the ground. Another, Olavio de Jesus, was hit but managed to escape, as did the third man. Paulo da Costa took the rifle of Felisberto and shot Kalistu Rodrigues in the head, killing him.

33. When the body of Alfredo Araújo was found about one week later it was partly decomposed. His father-in-law identified him. The hands and feet were tied and the body appeared to have been beaten. The body of Kalistu Rodrigues was found and identified by his father. Their families buried both bodies.

34. Alfredo Araújo, Kalistu Rodrigues and the two men who escaped were all members of CNRT and supporters of FALINTIL.

(e) Murders of clergy, Agus Muliawan and Izino Freitas Amaral and others

Defendants: Joni Marques, João da Costa, Paulo da Costa, Amélio da Costa, Manuel da Costa, Hilário da Silva and Gonsalo dos Santos

35. According to the Prosecution, on 25th September 1999, Joni Marques led a group of Team Alfa militia from Com to Lautem. They traveled in the red minibus, which was driven by Paulo da Costa. Also in the group were João da Costa, Manuel da Costa, Amélio da Costa, Hilário da Silva, Gonsalo dos Santos and others. Six of the men had SKS rifles including Joni Marques, João da Costa and Manuel da Costa. They passed the rice warehouse in Lautem and continued down the road towards Baucau⁴.

36. About one kilometre outside Lautem, the bus passed two young men who were pushing a cart. Joni Marques told Paulo da Costa to stop the bus. Militiamen got out of the bus and chased the young men. They attempted to kill José Pereira with a machete but he escaped by jumping into the river. João da Costa chased him and threw stones at him, which hit his head. José Pereira survived. Paulo and a man called Horácio caught the other young man Izinho Freitas Amaral. They tied him to a tree. (Horácio was killed two days later when the Team Alfa minibus was attacked).

37. The minibus was parked out of sight and a militiaman was posted on the hill above the road as a lookout and guard. Joni Marques then ordered the other militia to get stones for a roadblock, which was then built across the road. Joni Marques, João da Costa and Manuel da Costa took up positions in the ditch, with their guns aimed at the road.

38. At about 2:30PM, a grey four-wheel drive vehicle approached the roadblock from the direction of Lautem. The vehicle had eight people inside. It stopped at the roadblock. Joni Marques, João da Costa and Manuel da Costa then opened fire, shooting at the front of the vehicle. When it was examined later, 21 bullet holes were found in the vehicle (although, of course, some bullets may have created more than one hole).

39. Joni Marques ordered the other militiamen, who were hiding, to come out. Horácio went to the vehicle and as one of the passengers tried to get out, Horácio struck him with a sword, killing him. The driver remained in his seat as a bullet had killed him. Sister Erminia got out of the vehicle and knelt down by its side to pray.

40. There were three men at the rear of the vehicle who were still alive. Horácio poured gasoline on them and set fire to them. These men ran to the river and were shot at by Joni Marques and João da Costa. Another man who ran was struck with a sword and killed by Horácio. Joni Marques ordered the people in the minibus to push the vehicle into the river. There were bodies inside. Joni Marques then took Sister Erminia and threw her into the river. He shot her twice. Joni Marques then threw a grenade into the river. Horácio took Izino Freitas Amaral, the man tied to the tree, and cut off his right ear before hitting his neck with a sword. He was then pushed into the river too and Joni Marques shot at him.

41. All eight people in the vehicle were killed along with the young man who had been tied to the tree. All the bodies were recovered from the river on 27th September 1999. All of the bodies have been forensically examined⁵. The causes of death were shown to be gun shot wounds, multiple stabs wounds and blunt force injury. The injuries found are consistent with the witnesses' evidence of the attack upon these victims.

Legal arguments

42. Related to the law of the offences, the Prosecutor submitted the following arguments as the legal grounds for the charges of crimes against humanity:

⁴ See plan of the crime scene in Case File C at pages 132 (English) and 127 (Indonesian).

⁵ The reports are contained in case File A at pages 267 to 332 (English) and pages 268 to 323 (Indonesian)

"Elements of the Context Element

The requirement of widespread or systematic attack

In the ICTY *Blaskic* Trials, the Trial Chamber held that

"...the assertion that the "widespread or systematic" character is a constituent element of a crime against humanity is found in Article 3 of the Statute of the ICTR, and Article 7 of the Statute of the International Criminal Court. The Appeals Chamber in the *Tadic* Appeal Judgment ...and Trial Chambers I and II of the ICTR in their Judgments pronounced on 2 September 1998 and 21 May 1999 in the cases *The Prosecutor v. Jean-Paulo Akayesu* and *The Prosecutor v. Clément Kayishema and Obed Ruzindana* respectively all made the widespread or systematic characteristic an essential element of the offence. That being the case, there can be no doubt that inhumane acts constituting a crime against humanity must be part of a systematic or widespread attack against civilians." (*Prosecutor v. Blaskic, Judgement, ICTY Case no. IT-95-14-T, TCch.I, 3 Mar. 2000 ("Blaskic Trial Judgement")*, para. 202.)

Attack

In the decision in the case of *Akayesu*, Judgement of ICTR Trial Chamber I (*Prosecutor v. Akayesu, Judgement, ICTR Case No. ICTR-96-4-T, 2 September 1998, para. 581*) the concept of attack was defined in the following way:

"The concept of 'attack' as a unlawful act of the kind enumerated in Article 3(a) to (l) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner."

The Chambers in *Rutaganda* and *Musema* repeats this definition. (*Prosecutor v. Rutaganda, Judgement, and ICTR Case No ICTR-96-3-T, T.Ch. I, 6 Dec. 1999 ("Rutaganda Trial Judgement")*, para. 70; *Prosecutor v. Musema, Judgement and Sentence, ICTR Case No. ICTR-96-13-T, T.Ch. I, 27 Jan. 2000 ("Musema Trial Judgement")*, para. 205.)

In *Kayishema*, the Trial Chamber clarifies that an attack need not consist of a multiplicity of the same crimes (e.g. murder) but can also consist of an accumulation of different crimes:

"The attack is the event which the enumerated crimes must form. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation." (*Prosecutor v. Kayishema, Judgement, ICTR Case No. ICTR-95-1-T, T.Ch. II, 12 May 1999 ("Kayishema Trial Judgement")*, para. 205.)

Thus, the ad hoc tribunals understand an attack as the multiple commission of acts which fulfill the requirements of the enumerated inhumane acts.

This should be read together with paragraph 3 of the Introduction to Crimes Against Humanity in the Finalized Draft Text of the Elements of Crimes, issued by the Preparatory Commission for the International Criminal Court, for general distribution on 6th July 2000. It reads:

Article 7: Crimes against humanity: Introduction

"Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population.⁶

⁶ A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

Systematic attack

In the case of *Kayishema* (*Trial Judgement, supra*, para. 581.) the ICTR tribunal held that:

“The crimes must be committed as part of a widespread or systematic attack against any civilian population on national political, ethnic, racial or religious grounds. The accused must be aware that their crimes were committed in the context of such an attack. Furthermore, the policy element demands a showing that the crimes were instigated by a government or by an organization or group.”

Similarly, in the case of *Kunarac* the tribunal very recently held that:

“The adjective ‘systematic’ signifies the organized nature of the acts of violence and the improbability of their random occurrence”. (Kunarac Trial Judgement, ICTY Case No. IT-96-23 and IT-96-23/1, T.Ch. II, 22 Feb. 2001, para. 429.)

At the ICTY the court in the case of *Blaskic* adopted a set of four different criteria which must be fulfilled to render an attack systematic:

“- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;

the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;

the preparation and use of significant public or private resources, whether military or other;

the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.” (Blaskic Trial Judgement, ICTY Case No. IT-95-14-T, 3 March 2000, para. 203).

There is one further common element in the various definitions of a systematic attack. It is that provided in the judgment of the ICTR in the case of *Bagilishema*:

“a systematic attack is one carried out pursuant to a preconceived policy or plan.” (Prosecutor v. Bagilishema, Judgement, ICTR Case No. ICTR-95-1A-T, T. Ch.I, 7 June 2001, para. 77)

Widespread attack

With regard to the alternative context, a widespread attack, most of the decisions of the ad hoc tribunals simply focus on the scale of the attack or the number of victims. At the ICTY, the *Tadic* Trial Chamber, defined the widespread attack as referring “to the [large] number of victims” (*Tadic Trial Judgement, supra*, para. 648.)

Similarly, at the ICTR, the tribunal in *Kayishema* held that a widespread attack must be “directed against a multiplicity of victims” (*Kayishema Trial Judgement, supra*, para. 123.)

At the ICTY, the court in *Blaskic* went further by saying that: “A crime may be widespread or committed on a large-scale by ‘the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude’”. *Blaskic Trial Judgement, supra*, para. 206; see also the *Kordic Trial Judgement Chamber, supra*, para. 179).

Thus, it may be concluded that a widespread attack requires simply a large number of victims

Any Population

The element of “any...population” requires that a multiplicity of victims exists and, thus, means exactly the same as the element (widespread or systematic) attack. An isolated single crime which is not part of an attack against a multiplicity of victims does not constitute a crime against humanity. The term “any [...] population” does not add any distinct elements to the requirements of crimes against humanity.

Civilians as victims of crimes against humanity

Crimes against humanity serve as a protection of human rights in general. They are offences which offend human kind. In the case of *Blaskic*, the court held that:

“Crimes against humanity...do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore uniform or not - but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed hors de combat, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.” (Blaskic Trial Judgement, supra, para. 214.)

In *Kayishema* the Trial Chamber made the definition broader. It stated that:

“...under the statute, crimes against humanity may be committed inside or outside the context of an armed conflict. Therefore, the term civilian must be understood within the context of war as well as relative peace...” (Kayishema Trial Judgement, supra, para. 127).

Policy element

The entity behind the policy

The context element of widespread or systematic attack requires that the single or multiplicity of crimes must somehow be linked to state or organizational authority. According to the jurisprudence of the ad hoc tribunals, not only a government but also “any organization or group” can be behind the policy of violence. The ICTY concluded in *Tadic*: “[A]lthough a policy must exist to commit these acts, it need not be the policy of a State.” (*Tadic Trial Judgement, supra, para. 655; confirmed in Kayishema Trial Judgement, supra, para.126; Kupreskic Trial Judgement, supra, para. 551; Blaskic Trial Judgement, supra, para. 205; Bagilishema Trial Judgement, supra, para. 78.*)

The tribunal held in the case of *Kupreskic* that behind the policy “may be part of a governmental policy or of an entity holding *de facto* authority over a territory.” (*Kupreskic Trial Judgement, supra, para. 552*)

It should be noted that the above definition does not include an organization which, while being able to exercise a certain power, is not the *de facto* authority over a territory because there is a higher or more powerful entity which controls it. The relevant authority is rather the entity which exercises the *highest de facto* authority in the territory and can - within limits - control all other holders of power and all individuals. So, a criminal organization in a state which still exercises the power over the territory where the organization is active (for instance through the normal police forces) would not qualify as the entity behind the policy. If such an organization did organize systematic crimes, the state would at least have to tolerate these crimes to render them crimes against humanity. Only if the state become unable to stop these crimes (losing its *de facto* power over the territory) would the criminal organization become the relevant entity to implement the policy.

In summary, the entity behind the policy must be the state or organization which exercises the highest *de facto* authority in a given territory at the relevant time. To the extent that it can – within limits – control all other holders of power and all individuals.

The content of the policy and the form of its adoption

The form of the policy was considered by the ICTR in the case of *Akayesu*. It formulated what had been repeatedly stated by the ad hoc tribunals that: “[t]here is no requirement that this policy must be adopted formally as the policy of a state,” (*Akayesu Trial Judgement, supra, para. 580*)

Nor need the policy or plan "necessarily be declared expressly or even stated clearly and precisely" (*Blaskic Trial Judgement, supra, para. 653*)

(See also Tadic Trial Judgement, supra, para. 653; Rutaganda Trial Judgement, supra, para. 69; Musema Trial Judgement, supra, para. 204; Kupreskic Trial Judgement, supra, para. 551; Blaskic Trial Judgement, supra, para. 204.)

The content of the policy must be to commit crimes against humanity (*Tadic Trial Judgement, supra, para. 653*.) In other words, to commit a multiplicity of the enumerated individual criminal acts against a civilian population.

The policy in the case of a *systematic* attack would be to provide at least some guidance regarding the prospective victims, in order to coordinate the activities of the single perpetrators. A *systematic* attack, would require *active* conduct from the side of the entity behind the policy. However, extensive or repeated activity is not required. What matters is whether the conduct is sufficient to trigger and direct the attack. For example, the identification of possible victims by the authorities and an (implicit or explicit) announcement of impunity would be sufficient (*Kupreskic Trial Judgement supra, para 552*).

In conclusion, both a widespread or a systematic attack require some kind of *link with a state or a de facto power* by means of the policy of that entity.

The individual act and the context element

The individual act as part of the attack

In the case of *Kunarac*, the court stated that "[t]he underlying offence does not need to constitute the attack but only to form a part of the attack." (*Kunarac Trial Judgement, supra, para.417*.)

With regard to the nature of the link between the enumerated inhumane criminal act and the attack the tribunal in *Kayishema* required that "[t]he crimes [...] must form part of [...] an attack". (*Kayishema Trial Judgement, supra, para. 135*.)

The trial chamber in the case of *Kunarac* provided a broader and more helpful definition. It held that:

"It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity."

(*Kunarac Trial Judgement, supra, para. 419*.)

Knowledge of the attack

It is of course fundamental to a crime against humanity that the accused has knowledge of the attack, of which the offense forms a part. Section 5.1 of UNTAET Reg. 2000/15 requires that the perpetrator has "knowledge of the attack".

The mental state required with regard to the context element

With regard to the context element, the perpetrator need not seek to participate in the attack. It was stated in the judgment in *Blaskic* that:

"The accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context." (*Blaskic Trial Judgement, supra, para. 251*.)

The judgments agree that knowledge of the context is sufficient and most even expressly include "constructive knowledge". In the judgement in the case of *Kordic*, the Trial Chamber stated that:

“the perpetrator must have knowledge of the wider context in which his acts occur, i.e., that he must know that his acts are performed in the context of a widespread or systematic attack, does not appear to be controversial any more in the jurisprudence of the International Tribunal. Further, the Appeals Chamber has held that the accused must have known that his acts were related to the attack on a civilian population. There is no apparent requirement in the jurisprudence of either the Trial Chambers or the Appeals Chamber, that the perpetrator must approve of the context in which his acts occur, as well as have knowledge of it. The Trial Chamber finds the following statement, as referred to in Kupreskic and Blaskic, which is taken from the ICTR Kayishema Judgement, persuasive:

[t]he perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. [...] Part of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some sort of policy or plan, is necessary to satisfy the requisite mens rea element of the accused.

(Kordic Trial Judgement, supra, para. 185-187.)

The Appeals Chamber in *Tadic* clarified another issue in relation to the requisite *mens rea* for crimes against humanity. It rejected the view that to constitute a crime against humanity all relevant acts or omissions must be undertaken by the perpetrator on discriminatory grounds. The Appeals Chamber decided that discriminatory intent “is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5(h), concerning various types of persecution.”

The Appeals Chamber also decided that the motives of the accused are not relevant in this context. It rejected the *Tadic* Trial Chamber’s interpretation to the effect that the accused’s acts may not be committed for purely personal motives.

(Also see Tadic Trial Judgement, supra, para. 659; Kayishema Trial Judgement, supra, para. 133; Rutaganda Trial Judgement, supra, para. 171; Kupreskic Trial Judgement, supra, para.557 (quoting Kayishema Trial Judgement, id. 133); Musema Trial Judgement, supra, para. 206; Blaskic Trial Judgement, supra, para. 244; Ruggiu Trial Judgement, supra, para 20; Kunarac Trial Judgement, supra, para. 434)

Similarly in *Kunarac* (*Kunarac Trial Judgement, supra, para.434*), the Trial Chamber ruled that “the perpetrator needs to know that there is an attack on the civilian population and that his acts comprise part of the attack, or at least to take the risk that his act is part of the attack. This, however, does not entail knowledge of the details of the attack.”

It is thus now settled in the jurisprudence of the International Tribunal, that crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions are met; (i) that the crimes must be committed in the context of widespread or systematic crimes against a civilian population, and (ii) that the accused must have *known* that his acts ‘fitted into such a pattern’.

Thus, the prosecutor submits that under customary international law it may be said that, a perpetrator has knowledge of the attack, if he is at least aware of the risk that his conduct, considered objectively, is part of a broader attack.

The required extent of the knowledge regarding the context

Knowledge that the attack exists and the individual criminal act is part of it

The ad hoc tribunals have decided that the perpetrator must know of both the attack and the link which renders the individual criminal act part of the attack. (*Tadic Trial Judgement, supra, para. 659; Kayishema Trial Judgement, supra, para. 133; Rutaganda Trial Judgement, supra, para. 171; Kupreskic Trial Judgement, supra, para.557 (quoting Kayishema Trial Judgement, id. 133); Musema Trial Judgement, supra, para. 206; Blaskic Trial Judgement, supra, para. 244; Ruggiu Trial Judgement, supra, para 20; Kunarac Trial Judgement, supra, para. 434; Kordic Trial Judgement, supra, para. 185.*)

As the *Tadic* Trial Chamber held (*Tadic Trial Judgement, supra, para. 659*):

“[T]he perpetrator must know that there is an attack on the civilian population [and] know that his act fits in with the attack”

The language of this and other rulings suggests that the perpetrator need not have detailed knowledge of the particularities of the attack but simply be aware (of the risk) that an attack exists. This view is confirmed by *Kunarac* which noted that the knowledge requirement does not “entail knowledge of the details of the attack”. (*Kunarac Trial Judgement, supra, para. 434*).

Moreover, the Elements of Crimes of the ICC, provide that no proof is required “that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.” (*General Introduction to the Elements of Art. 7, para. 2.*)

The prosecution submits that the crime need not be perpetrated with knowledge of the details of a widespread or systematic attack (for instance, the number of attacks or the perpetrators or their victims). It is sufficient that the perpetrator knows the facts related to the attack which render his conduct a contribution to the crimes of others. It would be sufficient, for example, if he understands that his act is part of a collective criminal conduct which renders the victims more vulnerable. Or, he may hope that the collective nature of the crimes will provide him with impunity.

The perpetrator must only be aware of the risk that an attack exists and the risk that certain circumstances of the attack mean that his conduct adds to the atmosphere for other crimes. The knowledge of details is not required.

Knowledge of the policy behind the attack

In the case of *Kayishema*, the Trial Chamber required that the “accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan”. (*Kayishema Trial Judgement, supra, para. 134.*)

This requirement has been repeated by virtually all judgments dealing with the matter. (*See Rutaganda Trial Judgement, supra, para; Kupreskic Trial Judgement, supra, para. 556; Musema Trial Judgement, supra, para. 206; Blaskic Trial Judgement, supra, para. 249; Ruggiu Trial Judgement, supra, para. 20; Kordic Trial Judgement, supra, para. 185.*)

The perpetrator must be aware of the risk that a policy exists. However, knowledge of the details of the policy is not required.

Application to the facts in East Timor

In East Timor, during the period with which this court is concerned, there was a widespread and systematic pattern of gross human rights violations. This claim is based, on the one hand, on the five expert reports contained in Case File C.

The Report of The Security Council Mission to Jakarta and Dili Report prepared by UNAMET on 11 September 1999 reads as follows: (*Case File C, pp. 000001-00006, page 000003 para 14 and page 000005, para. 7 and 8*):

“14. Reports by the Secretary-General to the Security Counsel during phase I of the popular consultation described the impunity with which pro-autonomy militias were allowed to carry out violent activity. It was apparent to the Mission through its own observation and through discussion with United Nations staff, that this activity could not have occurred without the involvement of large elements of the Indonesian military and police....

Annex...

The events witnessed in East Timor since 4 September 1999 represent the fulfillment of the worst threats made by the pro-autonomy campaigners and their Indonesian Government supporters. In the guise of a backlash against the vote for independence, what has actually

happened is nothing less than a systematic implementation of a "scorched earth" policy in East Timor, under the direction of the Indonesian military.

Selective execution of students, intellectuals and activists

In addition to the killings reported as part of the relocation programme, there are many reports of deaths in East Timor. In particular, many pro-independence activists and other community leaders, including the clergy, are feared to have been killed in reprisal for their support, real or implied, for the independence option. There are also reports of mass killings in various locations, including Dili and the IDP camp in the church at Suai.

It is clear that these crimes against humanity are part of a "scorched earth" policy. The reduction of East Timor to rubble, aside from teaching the East Timorese a lesson and sabotaging their chances of a successful transition to independence, sends a warning to other potential breakaway regions of Indonesia. But the worst may be yet to come. Much of the population remains very vulnerable to starvation or attack. The pro-independence guerrillas are, as far as we know, still concentrated in certain areas, and the political leadership is concentrated in Dare, quite close to Dili. Food and water shortages are becoming critical, and we cannot rule out further military operations against these populations."

Also in the Report of the High Commissioner for Human Rights on the human rights situation in East Timor dated 23-24 September 1999, (Case File C, pp. 000007-000014, para. 14 and 47):

"14. ... pro-integration militia have erected roadblocks throughout Dili and controlled the streets. According to reports received from UNAMET, militia members were terrorizing and murdering unarmed civilians; burning houses; displacing large numbers of people; as well as intimidating, threatening and attacking personnel of international organizations.

47. There is overwhelming evidence that East Timor has seen a deliberate, vicious and systematic campaign of gross violations of human right."

Likewise, in the Special Rapporteurs Report on the Situation of Human Rights in East Timor dated 8th December 1999 (Case File C, pp. 000015-000029, para. 28, 59, 67 & 71):

"28. The violence which had marked the months preceding the popular consultation on 30 August intensified after the ballot and became increasingly systematic and widespread, particularly following the announcement of the results on 4 September.

59. While most of the atrocities committed in East Timor must clearly be attributed to pro-integration militia elements, the information gathered and testimonies heard by the Special Rapporteurs leave little doubt as to the direct and indirect involvement of TNI and police in supporting, planning, assisting and organizing the pro-integration militia groups.

65. In East Timor defenseless civilians were made victims of planned acts of violence...

71. It is still too early... to assess the full extent of the human rights violations and crimes that were perpetrated before and after the 30 August consultation. What is clear is that they took place in the context of an attack against the East Timorese population that overwhelmingly supported independence from Indonesia. They include murder, torture, sexual violence, forcible transfer of population and other persecution and inhumane acts, including property destruction. These have all been committed on a scale that is widespread or systematic or both."

The Report of the International Commission of Inquiry on East Timor to the Secretary General dated 31st January 2000 found the following (Case File C page 000032 to 000063):

"123. The International Commission of Inquiry has concluded that there were patterns of gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people. Patterns were

also found relating to the destruction of evidence and the involvement of the Indonesian Army (TNI) and the militias in the violations.

124. *The evidence gathered shows that intimidation and terror were systematically used to prevent the people from freely exercising their political choice. Before the popular consultation ballot, intimidation and terror were primarily aimed at pro-integration groups and individuals. In the post-ballot period and after the announcement of the results, the attacks were widespread and took the form of vengeance.*"

135. *Evidence gathered shows that militia groups were responsible for the intimidation and terror experienced by the people of east Timor before and after the popular consultation.*

136. *The evidence further shows that the number of militia groups and their activities increased from January 1999. There is also evidence that the Indonesian Army and the civilian authorities in East Timor and some in Jakarta pursued a policy of engaging the militia to influence the outcome of the popular consultation. The approach pursued was to provide the impression that the East Timorese were fighting amongst themselves.*

137. *There is evidence that the policy of engaging militias was implemented by the KOPASSUS (Special Forces Command of TNI) and other intelligence agencies of the Indonesian army. The policy manifested itself in the form of active recruitment, funding, arming and guidance and of the provision of logistics to support the militias in intimidation and terror attacks.*"

The Indonesian Commission on Human Rights Violations in East Timor (KPP-HAM). Executive Summary Report on the Investigation of Human Rights Violations in East Timor, Jakarta, January 31 2000. (Case File C page 000064 to 000081) states that:

"22. Based on facts, documentation, information and witness testimony, KPP-HAM not only found actions that could be classified as gross human rights violations for which the state is responsible, but also found evidence of crimes that could be classified as crimes of universal jurisdiction. These crimes included systematic and mass murder, extensive destruction, enslavement, forced deportations and displacement and other inhumane acts committed against the civilian population.

...

Systematic and mass murders

23. *Much information and evidence was gathered, proving that extra-judicial acts of violence and murder of a number of people continued with cruelty and brutality. Murders occurred in residential areas, in churches and in places where refugees fled, such as military and police headquarters.*

Torture and ill treatment

24. *In almost every case of violence committed by members of the TNI, Polri and militias, there is proof that the civilian public was subject to torture and ill treatment due to their differing political views. Before the popular consultation, the militias tortured and ill-treated civilians who refused to become militia members. After the announcement of the results of the popular consultation, terror, intimidation and death threats occurred during every attack and assault and destruction of physical infrastructure, including attacks on fleeing refugees.*

Enforced disappearances

25. *Enforced disappearances occurred since the announcement of the two options offer. Citizens with different political views were intimidated, threaten and some disappeared. The militias were responsible for these enforced disappearances. The militias are suspected to have received support from the security apparatus regarding such kidnappings or summary executions.*

Forced displacement of civilians

27. *The information and evidence gathered by KPP-HAM shows two patterns of forced displacement of then population, that is, the displacement that occurred before the popular consultation due to increased violence from newly formed militias and the displacement that occurred after the announcement of the results of the vote when members of the TNI, Polri and militias committed violent acts and forced the population to flee.*

63 *The facts and evidence also show that the civil authorities and military, including the police force, worked in cooperation with the militias to create conditions that supported crimes against humanity and which were carried out by the civil authorities, military, police and the militias.*

Facts in this case

To the findings of these reports, this Special Panel can now add the evidence which it has heard. Consistently witnesses have come to this court room and given evidence about the circumstances as they were during 1999 - about the militia groups which were formed; about the KOPASSUS orders which were given; about the atmosphere of division and suspicion in which the population lived; the targeting of FALINTIL and clandestine members; the methods which FALINTIL and clandestine needed to use to continue their activities such as being forced to employ secret signs and aliases in order to avoid being detected by the Indonesian authorities; and the coalition that existed between KOPASSUS and Team Alfa. These two organizations shared a base and their co-operation dictated and directed Team Alfa's very purpose.

The prosecution submits that the widespread or systematic attack on the civilian population did not start when the results of the election were announced. It was a campaign that had been in place for many years. Team Alfa was a part of that campaign. When that group was formed in 1986 and during the time it operated, it became an integral part of a campaign pursued by the Indonesian authorities in Lautem district and across East Timor. Once the two options of autonomy or independence had been announced, that campaign grew and became more vicious. And Team Alfa played a fundamental part in the events which unfolded during 1999. They carried out their activities with the support of their Indonesian masters, confident that they would be given impunity from punishment. They believed that what they did had the blessing and authority of KOPASSUS, TNI, the police and civil administration.

The crimes alleged in this Indictment were all directed against the civilian population. All the victims were civilians and many of them were believed to be supporters of independence for East Timor. There can be no doubt that the circumstances that existed throughout 1999 in East Timor fulfilled all of the requirements of the 'context element' which I have identified in the law.

Mental Element and Criminal Responsibility

Having dealt with the law as to the context element which applies in any crime against humanity, I will in a moment turn to the individual forms of the crimes which are charged. However, before I do so there is one further area of the law which can be covered that is of general application to all the offences. That is the mental element which the law requires to be proved before a finding of guilt is made.

The mental state required with regard to the individual criminal acts as defined in Sect. 18 of Reg. 15:

Sect. 18.1 Reg. 2000/15 says that:

"A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels only if the material elements are committed with intent and knowledge.

For the purposes of the present Section, a person has "intent" where:

In relation to conduct, that person means to engage in the conduct;

In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. (...)

For the purposes of the present Section, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly".

Sect. 18 incorporates, verbatim, Art. 30 of the ICC Statute. In the general introduction of the Elements of Crimes of the ICC statute, paragraph 3 states that “the existence of intent and knowledge can be inferred from relevant facts and circumstances.”

Section 14.3 of Reg. 15: Individual Criminal Responsibility

Section 14.3 of Reg. 2000/15 sets out the basis for an individual’s criminal responsibility. It reads:

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

commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

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

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

be made in the knowledge of the intention of the group to commit the crime;

in respect of the crime of genocide, directly and publicly incites others to commit genocide;

attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Co-perpetration of a crime

Section 14.3 (a), (c) and (d) have particular relevance to this trial. All of the offences charged have co-accused. In every case, the prosecution alleges that the accused were acting together or with others who are not present before this court. For that reason the Prosecution ask the panel to pay particular attention to the law under those subsections.

The Appeals Chamber in *Tadic* held that co-perpetration is not limited to cases in which different persons perform different elements of the *actus reus* of the crime; for instance, accused A interrogates the victim while accused B inflicts violence on him. Rather co-perpetration extends itself to all essential contributions to the execution of the crime, regardless of whether or not they amount to actually performing one or more of the elements of the *actus reus* of the said crime. The Appeals chamber said:

“... to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act...to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility”

(See Annex 2 para 192).

Accordingly, co-perpetration may also be found in situations in which all co-accused, acting pursuant to a common design, possess the same criminal intention. Provided that all accused voluntarily participated in one aspect of the common design, and that all of them, even if not

personally performing an element of the *actus reus* of the crime intended the result, they must all be considered to have “committed” the crime as co-perpetrators. (*Ibid*, para. 196)

The court in the case of *Kupreskic* has recently applied the theory of co-perpetration to a number of accused. According to the findings of the Chamber related to one of the accused, he:

“acted as co-perpetrator, together with his brother...within the meaning of Article 7(1) of the Statute, because he adhered to a common plan for the execution of the cleansing campaign in the village, which by necessity and subordination to a common plan of action.”

(*Kupreskic Judgement, supra, para. 782*)

Sect. 14.3 (c) : aids, abets or otherwise assists

Aiding, abetting or assisting applies to situations in which the actus reus of the crime has been performed by a person or persons other than the principal perpetrator or co-perpetrator.

The *Tadic* Chamber held that:

“aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present...presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal; act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.

Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.

However, actual physical presence when the crime is committed is not necessary; just as with the defendants who only drove victims to the woods to be killed, an accused can be considered to have participated in the commission of a crime based on the precedent of the Nürnberg war crimes trials if he is found to be "concerned with the killing". However, the acts of the accused must be direct and substantial.

In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.”

(see *Tadic Judgement, paras. 689-692*),

Although mere presence at the scene of a crime is not sufficient to render an accused liable under 14.3 (c), presence during the commission of the crime can constitute “abetting” if it has an encouraging effect on the perpetrators, or gives them moral support or psychological support, even if the accused takes no active part and provides no material assistance. (see *Tadic Judgement above and paras, 678-687; Akayesu Judgement paras 5460548, Celebici Judgement, para 327-328, Furundzija Judgement, paras. 205-209, 232-235*)

The mental element of aiding and abetting is satisfied if the accused knew that his conduct would materially assist, encourage or support the commission of a crime by the group members. It is not necessary that the aider or abettor should know the precise crime that was intended and which in the event was committed. If the accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he will have intended to facilitate the commission of that crime, and will be criminally responsible. (see *Furundzija Judgement, para. 246*)

Further, there is no requirement that the accused share the *mens rea* of the perpetrator in the commission of a crime. This intent can be inferred from all relevant circumstances. (see *Furundzija Judgement, para. 246; Tadic Judgement para. 245; Celebici Judgement, paras. 327-328*)

Aiding and abetting does not require a pre-existing plan or arrangement to engage in the criminal conduct in question. (*Tadic Judgement, para. 677; Celebici Judgement paras. 327-328*)

Sect. 14.3 (d): contributes to the commission of a crime by a group of persons acting with a common purpose

Criminal responsibility under Sect. 14.3(d) includes the contribution of the accused in the common purpose. The accused need not have actually participated in the commission of a crime but may have contributed to the execution of the common plan or purpose. (*Tadic Appeals Judgement, para 227 See Annex 2*)

The Appeals court in the case of *Tadic* defined this form of criminal responsibility in the following way:

"227. In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute...are as follows:

A plurality of persons. They need not be organized in a military, political or administrative structure..

The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape etc) but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

228. By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity of the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk."

The Appeals Judgement in *Tadic* has further clarified the main features of this form of participation, in particular its main differences with the category of co-perpetration. (See *Annex 2*)

"229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common

purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes within the criminal common purpose were likely to be committed), as stated above."

The Individual inhumane acts

Section 5.1. (a) Crime against humanity - murder

I come now to the first of the offenses, crimes against humanity - murder. Sect. 5.1 Reg. 2000/15 must be read together with Sect. 5.2, which defines the inhumane acts.

However, the first inhumane act, "murder" is not defined. For that reason the prosecution submits that the Panel should seek guidance as to the definition of murder outside of the regulation.

First, from the Elements of Crime finalized by the Preparatory Commission of the International Criminal Court.

ICC Statute: Article 7 (1) (a) Elements of Crime against humanity of murder

The perpetrator killed (The term "killed" is interchangeable with the term "caused death") one or more persons.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The definition of murder in the case law of the ICTY and ICTR

The Elements of Crime provided by the Preparatory Committee need to be considered along with the jurisprudence of the ad hoc tribunals. At the tribunals, murder has been defined as the unlawful, intentional killing of a human being. In the judgement in the case of *Akayesu* the court stated that the requisite elements of murder are:

the victim is dead;

the death resulted from an unlawful act or omission of the accused or a subordinate;

at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.

(Akayesu Trial Judgement, supra, para. 589 followed in Rutaganda Trial Judgement, supra, para. 80 and Musema Trial Judgement, supra, para. 215.)

In the case of *Blaskic* the Tribunal considered the decision of the Trial Chamber in *Akayesu*, together with Art. 7(1)(a) of the ICC Statute and Art. 18 of the ILC Code of Crimes against the Peace and Security of Mankind. It noted that in each the offence does not include an element of premeditation for murder as a crime against humanity. (*Blaskic Trial Judgement, supra, para. 216.*)

Section 18: the general *mens rea* requirement for murder

Section 18 of Reg. 2000/15 adopted Art. 30 of the ICC Statute. This provides that to show intent the accused must mean to cause the death of the victim or be aware that it will occur in the ordinary course of events.

That creates a inconsistency with the formulation of the *mens rea* for murder as a crime against humanity in the cases of *Kupreskic*, *Blaskic* and *Kordic* (*Kupreskic Trial Judgement, supra, para 589*) (*Blaskic Trial Judgement supra, para. 152-153, 217*) (*Kordic Trial Judgement, supra para. 236 noting (at foot note 317) Kupreskic Trial Judgement, supra, para 560-561, Blaskic Trial Judgement, supra, para. 217; Akayesu Trial Judgement, supra, para 589*).

In those cases it was held that the necessary *mens rea* is demonstrated when there is an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life. That wider definition provided by the ad hoc tribunals is not consistent with section 18 of Reg 2000/15 and should therefore be disregarded.

Therefore, the prosecutor submits that it is not possible for the panel to convict of murder where the accused had the mere intent to cause grievous bodily harm. Such intent may however constitute other inhumane acts, even where the person was killed.

Conclusion

Murder as a crime against humanity (Sect. 5.1. (a)) means the unlawful, intentional killing of a human being. In addition to the context element, the requisite elements of murder as a crime against humanity are:

the victim is dead.

the death of the victim is the result of the perpetrator's act.

the act must be a substantial cause of the death of the victim.

at the time of the killing the accused must have meant to cause the death of the victim or was aware that it would occur in the ordinary course of events

Whilst this point is being considered, the Prosecution wishes to identify an error in the Indictment as it is currently drafted. In respect of each of the murder counts the indictment includes the words "deliberate intent and premeditation". Following the jurisprudence which I have set out above the Indictment should only read 'with deliberate intent'.

There is no prejudice done to the accused by this error. Their defences could not have been prepared in any different way. The error is only one of the correct expression of the law. It does not change the facts upon which the accused are charged.

Sect. 5.1 (d):Deportation or forcible transfer of population

Sect. 5.1. (d) and 5.2.(c) have exactly the same wording as Art. 7 (1) (e) and 7 (2) (d) of the ICC Statute. The latter provides the first codified definition of deportation or forcible transfer of population.

The ICC Statute defines deportation or forcible transfer of population in Art. 7 (2) (d) as:

"forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law"

Deportation or forcible transfer does not require that the victims be transferred to another state. The Elements of Crimes for Art. 7 (1) (d) states that " 'deported or forcibly transferred' is interchangeable with 'forcibly displaced'" (footnote to Elements of Crimes Art 7(1)(d). The word "displacement", however is found in Art. 17 of the Second Additional Protocol (Protocol II) which contemplates *internal* displacement. (*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609*).

ICC Statute: Elements of deportation or forcible transfer

The Elements of Crimes to Art. 7 (1) (d) regarding deportation or forcible transfer provides:

The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

Such person or persons were lawfully present in the area from which they were so deported or transferred.

The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The first element establishes that the perpetrator need only transfer *one* person.

As to the force which must be applied, a footnote defines the word "forcibly" in the following way:

"The term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."

Conclusion

Deportation or forcible transfer requires that the perpetrator applies force, threat of force or coercion to transfer a person from his chosen area of residence without the requirement that the victims cross an international border. The transfer must be unjustifiable under international law.

Sect. 5.1. (f): Torture

The definition of Torture in Sect. 5.2 (d) of Reg. 15 is taken verbatim from Art. 7 (2) (e) of the ICC Statute:

" 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions"

Torture under Sect. 5.1 (f) requires the infliction of physical or mental pain or suffering which is at least as severe as would be required for other inhumane acts. The victim must be under the control of the perpetrator; for example, he must be in a situation from which he cannot escape.

If the purpose was the execution of a sanction, the requirements of torture are not met provided that the sanction was imposed lawfully and is compatible with general human rights law.

ICC Statute, Art. 7 (10)(f): elements of torture provided in the ICC Statute

The ICC statute sets out the Elements as follows:

The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

Such person or persons were in the custody or under the control of the perpetrator.

Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Before setting out the Elements, the ICC specifically provided that “no specific purpose need be proved for this crime”

(See http://www.un.org/law/icc/statute/elements/english/1_add2e.doc)

Sect. 5.1. (h): Persecution

The crime of persecution is defined in Art. 7 (1) (h) and (2) (g) ICC Statute and Sect. 5.1 (h) and 5.2 (f) of Reg. 2000/15. The latter provisions read:

Sect. 5.1 (h): “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Sect. 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels.”

Sect. 5.2 (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”.

ICC Statute: Article 7 (1)(h) Elements of persecution

The elements of persecution as a crime against humanity are provided in Article 7 (1) (h) of ICC Elements of Crimes, which reads:

The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.⁷

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The ICC Statute as well as Reg. 15 require a connection between the persecutory conduct and “any [enumerated inhumane] act ... or any crime within the jurisdiction of the [respective court]”. It is important to note that the connection required must not relate to another crime against humanity but only to “any act referred to in paragraph 5.1 or any crime within the jurisdiction of the panel.”

Thus, a multiplicity of grave human rights violations (which are not, as such, enumerated among the inhumane acts), like, for instance severe attacks on personal property or widespread arsons, can be transformed into the crime of persecution by a single connected murder or forcible transfer of population.

⁷ It is understood that no additional mental element is necessary for this element other than that inherent in element

A special situation with regard to the connection requirement occurs if the persecutory conduct itself consists in one of the enumerated inhumane acts, for example, a murder committed with discriminatory intent, meaning “against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender grounds”. In such a case the persecutory murder need not be connected to another murder since the connection requirement would be met by the identity of the persecutory act (murder) and the connected crime (murder).

The ICTY held several times that acts enumerated in its Statute can be persecutory acts if committed with discriminatory intent. It has already been noted that, in such cases, the connection requirement is always fulfilled (*Tadic Trial Judgement, supra, para. 700; Kupreskic Trial Judgement, supra, para. 605; Kordic Trial Judgement, supra, para. 202*).

As a consequence, there exist two types of persecution. First, persecution may be an autonomous crime, if it is committed through conduct, which is not enumerated among the inhumane acts, but it is connected with an enumerated inhumane act. Second, persecution can be an aggravated form of an enumerated inhumane act, if the act is committed with discriminatory intent; a further connection to another inhumane act is not required.

Possible forms of persecution

Enumerated inhumane acts as persecution

Clearly, all of the inhumane acts enumerated in Sect. 5.1 of Reg. 15 amount to a severe deprivation of fundamental rights and, thus can constitute persecution.

Severe deprivations of human rights not enumerated as inhumane act

As indicated by the definition of persecution in Sect. 5.2 (f) of Reg. 15 and Art. 7 (2) (g) ICC Statute, any “severe deprivation of fundamental rights” constitutes persecution, if it is committed “by reason of the identity of the group or collectivity”.

Human rights violations as persecution

To constitute a “severe deprivation of fundamental rights” a persecutory conduct must fulfill two requirements. It must be in violation of international human rights law and, simultaneously, be severe.

As to the first requirement some decisions of the ICTY, in particular *Kupreskic*, considered that “gross or blatant denials of fundamental human rights can constitute crimes against humanity.” The Chamber went on to state that “[d]rawing upon the various provisions of [human rights instruments] it proves possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity”. (*Kupreskic Trial Judgement, supra, para. 621 and 627; affirmed by Ruggiu Trial Judgement, supra, para. 21 (quoting Kupreskic, id. para. 627); Kordic Trial Judgement, supra, para. 195; similarly: Tadic Trial Judgement, supra, para. 703*).

This jurisprudence is in full accordance with the purpose of crimes against humanity, which is the protection of human rights, and also with Art. 7 (1) (g) of the ICC Statute. The *Kupreskic* Chamber even refers explicitly to this Article to support its decision. (*Kupreskic Trial Judgement, supra, para. 617*).

The gravity required

As to the second requirement *Kupreskic* clearly states:

“[C]rimes against humanity, far from being trivial crimes, are offences of extreme gravity” and “acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed ‘inhumane’.”

(Kupreskic Trial Judgement, supra, para. 56, para. 622, cf. also 615).

This judgement has been confirmed in *Kordic* (*Kordic Trial Judgement, supra, para. 199*), and is consistent with the opinion of the *Tadic* Trial Chamber that a repeated and constant denial of fundamental rights is required. (*Tadic Trial Judgement, supra, para. 70*)

In this context, it must be noted that both the *Kupreskic* and the *Kordic* decision emphasize that, despite the general usage of "persecution" as denoting a series of acts, also "a single act [e.g. a murder] may constitute persecution" if discriminatory intent exists. (*Kupreskic Trial Judgement, supra, para. 624; Kordic Trial Judgement, supra, para. 199*).

It should be added that a single act can only constitute persecution, if it is, as such, of sufficient gravity. An act which would constitute persecution only if considered together with other similar acts in their cumulative effect cannot be considered a persecution if the other similar acts do not exist. Therefore, in conclusion, three levels of seriousness of discriminatory acts may be distinguished:

acts which are sufficiently serious to constitute persecution on their own even if only one act was committed;

acts which are less serious but which, together with other acts, through their cumulative effect reach the necessary level of gravity; and

acts which even cumulatively are not sufficiently serious to amount to persecution.

The meaning of "identity of the group or collectivity"

The phrase "by reason of the identity of the group or collectivity" of Sect. 5.2 (f) of Reg. 15 suggest that persecution of a group is understood as a multiplicity of individuals which share a common feature. Accordingly, persecution can be committed, for example, by reason of the victim's gender or the victims' common characteristics of their opposition to the government.

Therefore the term "identity of the group or collectivity" must be interpreted in a broad sense, referring to the common feature according to which the victims were singled out by the perpetrators, whether that is " on political, racial, national, ethnic, cultural, religious, gender grounds."

Examples of grave human rights violations (including property violations)

Sect. 5.2 (f) defines persecution as "the intentional and severe deprivation of fundamental rights ...". Some of the possible forms of persecutory acts which have been named by the Tribunals have been summarized by *Kordic*:

"[T]he seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings'; 'murder, imprisonment, and deportation' and such attacks on property as would constitute 'a destruction of the livelihood of a certain population;' and the 'destruction and plunder of property', 'unlawful detention of civilians' and the 'deportation or forcible transfer of civilians,' and physical and mental injury.

(Kordic Trial Judgement, supra, para.198 (footnotes omitted)

The Chamber in *Kordic* said that:

"[W]hen the cumulative effect of such property destruction is the removal of civilians from their homes on discriminatory grounds, the 'wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock' may constitute the crime of persecution".

(Kordic Trial Judgement, supra, para. 205, footnote omitted)

Similarly, *Kupreskic* held that the "comprehensive destruction of homes and property" which "constitutes a destruction of the livelihood of a certain population" may be sufficient to meet the elements of persecution (*Kupreskic Trial Judgement, supra, para. 631; cf. also: Tadic Trial Judgement, supra, para. 707*)

These holdings of the ICTY with regard to property violations are also supported by the consideration that there are two requirements which must be fulfilled in order to regard a certain conduct a persecution: (i) it must be a human rights violation (see notes 93-95) and (ii) it must, alone or cumulatively, be of sufficient gravity (see notes 96-98).

As to the first requirement, there is no doubt that the destruction of homes is a clear violation of international human rights law. The right to property has been acknowledged in virtually all human rights instruments including the Universal Declaration of Human Rights (Art. 17 (1))

(*Universal Declaration of Human Rights, U.N. Doc. A/810 at 71 (1948) available at: www1.umn.edu/humanrts/instreet/b1udhr.htm*)

The right is also guaranteed, for example, in the following instruments:

Art. 1 of the first Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1952, 213 U.N.T.S. 262, available at: www1.umn.edu/humanrts/euro/z20prot1.html;

Art. 21 American Convention on Human Rights of 1969, 1144 U.N.T.S. 123, available at: www1.umn.edu/humanrts/oasinstr/zoas3con.htm;

Art. 14 of the African Charter on Human and Peoples' Rights of 1981, 21 I.L.M. 58 available at: www1.umn.edu/humanrts/instreet/z1afchar.htm;

Art. 25 of the Arab Charter on Human Rights of 1994 (not yet in force), reprinted in: *La Charte Arabe des Droits de l'Homme*, 7 *REVUE UNIVERSELLE DES DROITS DE L'HOMME* 212 (1995) (French translation), available in English at: www1.umn.edu/humanrts/instreet/arabCounsel.html; and most recently

Art. 1 (11) of Annex 6 (Agreement on Human Rights) of the General Framework Agreement for Peace in Bosnia and Herzegovina of 1995, available at: www.ohr.int/gfa/gfa-home.htm.

Thus, at least the property which constitutes a person's home is fully protected under human rights law.

As to the second requirement, it is necessary that such destruction of homes and property, which amounts to the destruction of the livelihood of a population, is of the same gravity as other crimes against humanity. Most crimes against humanity are extremely grave as they regard attacks on life or dignity.

In conclusion, a campaign of destruction of homes, as it occurred in East Timor, would be of sufficient gravity. If such conduct is connected with an enumerated inhumane act it would amount to persecution. Moreover, if the campaign was broad enough it would, in itself, constitute the context element.

The mental elements of persecution

Discriminatory intent

In addition to the general intent with regard to the persecutory act, the crime of persecution requires a special mental element, namely discriminatory intent. The *Kordic* decision clearly that this mental element must be present in every single individual perpetrator. It is not sufficient that only the widespread or systematic attack is based on a discriminatory policy. The tribunal stated that otherwise the distinction between persecution and other enumerated crimes against humanity would vanish and that "[s]uch an approach also would dilute the gravity of persecution as a crime against humanity". (*Kordic Trial Judgement, supra, para. 217*).

In the case of *Blaskic*, the court said that a lack of the gravity of the actus reus of persecution is compensated by the discriminatory intent:

"The Trial Chamber finds ... that the crime of "persecution" encompasses ...also acts which appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community."

(*Blaskic Trial Judgement, supra, para. 233*)

Finally, the nature of the discriminatory intent must be understood as a prohibition to single out a victim on impermissible grounds. The decisive reason to choose a particular victim must have been the impermissible ground. In other words, if the perpetrator had chosen his victim even if the victim did not have the particular characteristic, there is no discriminatory intent. On the other hand, it does not matter if the perpetrator, in addition of the discriminatory intent, also had another intention, for instance the intent to steal.

The intent required for acts which only by their cumulative effect constitute persecution

Certain persecutory acts would not, on their own, be sufficiently serious to amount to persecution, but, through the cumulative effect together with other acts, may reach the necessary gravity. As the perpetrator can understand the gravity of such acts only if he knows about the other acts, the knowledge of these other acts is necessary for them to be culpable for a crime against humanity. Therefore, the perpetrator of such acts must be aware of the other acts which render his own conduct sufficiently grave to amount to persecution.

Conclusion

In summary, a persecution requires a grave human rights violation which may consist in a very serious single act or in a multiplicity of acts which, through their cumulative effect, reach the necessary level of gravity. It is necessary that in connection with the persecutory act or acts one of the enumerated inhumane acts is committed.

The mental element of persecution requires that the perpetrator himself acted with discriminatory intent choosing his victim on grounds impermissible under international law. If the persecutory act reaches the necessary gravity only cumulatively with other conduct, the perpetrator must be aware of this other conduct.

Alternative Counts

Having completed each of the offences charged on this Indictment, the Prosecution wishes to make a few further submissions on the law. First, the law as to alternative counts or verdicts.

The prosecution submits that alternative counts are available to the court. Section 32 of Reg.2000/30 provides that:

"32.4 The accused shall not be convicted of a crime that was not included in the indictment...For the purposes of the present subsection, a crime which is a lesser included offense of an offense which is stated in the indictment shall be deemed to be included in the indictment"

This is consistent with the views of Judge Luca Ferrero, who presided over this case during the Preliminary Hearings. The Indictment in this case had previously included alternative charges. With the approval of the Panel, the Indictment was amended on 6th March 2001 to remove the alternative charges and to better particularize the charges of Crimes Against Humanity. These amendments were made to assist the accused and their representatives in their understating of the charges against them.

The court considered that the alternatives charges were lesser included offenses and therefore did not need stating in the Indictment. Their removal from the Indictment and the better particularization of the counts was intended to assist all parties in understanding what it was that the Prosecution were alleging. Judge Luca Ferrero considered that reasoning to follow the Special Panel's reasoning in other cases, for instance *Prosecutor against Joséph Leki*.

In fact, in this Indictment there is only a lesser included offence for the counts of Crimes Against Humanity – Murder. There is no 'lesser included offence' for Deportation or for Persecution. In the case of Torture, the simple torture offence provided by section 7 Reg 2000/15 is not a lesser included offence because it requires different elements to be proved before a conviction. The greater offence (Crimes Against humanity – Torture) does not include all of the elements which need to be proved in the lesser offence (Torture - section 7).

Section 8 of Reg 2000/15 provides for the crime of murder. It says:

"For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply"

That has been accepted by the Special Panel to be articles 338 and 340 of the Penal Code of Indonesia. The prosecution submit that murder, simple murder, is a lesser included offence of Crimes Against Humanity - Murder. However, as discussed earlier, Crimes Against Humanity - Murder does not include a mental element of 'premeditation'. That would mean that the lesser included offence under the Penal Code of Indonesia would be the offence under Article 338, which requires deliberate intent but not premeditation.

The Prosecution therefore submits, that in relation to counts 2, 5, 6 and 7 each of the accuseds may, if the court decides it is appropriate, be found not guilty on the count of Crimes Against Humanity - Murder, but guilty of the alternative (lesser) charge of murder under the Penal Code of Indonesia Article 338.

Defenses

In section 19 Reg. 2000/15, there are provided grounds upon which criminal responsibility may be excluded. The prosecution submits that on the evidence that we have heard in court and the statements made by the accused, only one of the possible grounds is relevant to the courts consideration. That is duress, which is provided for in section 19.1(d) of Reg 2000/15.

Section 19: Grounds for excluding criminal responsibility

"19.1 A person shall not be criminally responsible if, at the time of that person's conduct:

...

the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

made by other persons;

or

(ii) constituted by other circumstances beyond that person's control.

Duress

ICTY

The ICTY has considered the question of duress in the course of the sentencing appeal in the case of *Erdemovic*. The Accused pleaded guilty, but sought leniency by virtue of mitigating circumstances based on superior orders. He said that had he not obeyed, he would have been killed or severely punished. In the Sentencing Judgement, the Chamber considered the question of duress as a defense to an international crime:

"A review by the United Nations War Crimes Commission of the post-World War Two international military case-law, as reproduced in the 1996 report of the International Law Commission (Supplement No. 10 (A/51/10) p. 93), shows that the post-World War Two military tribunals of nine nations considered the issue of duress as constituting a complete defense. After an analysis of some 2,000 decisions by these military tribunals, the United Nations Commission cited three features which were always present and which it laid down as essential conditions for duress to be accepted as a defense for a violation of international humanitarian law:

"(i) the act charged was done to avoid an immediate danger both serious and irreparable;

(ii) there was no adequate means of escape;

(iii) the remedy was not disproportionate to the evil." (rapport de la Commission du droit international, 1996, p. 96.)

These criteria had already been identified in the *Krupp Case*.

18. The Trial Chamber notes that these military tribunals have on occasion characterized the said criteria in different ways. The variations in the criteria have defined them more precisely. In addition, some of the decisions set forth other criteria and therefore further narrow the scope of that defense.

The absence of moral choice was recognized on several occasions as one of the essential components for considering duress as a complete defense. A soldier may be considered as being deprived of his moral choice in the face of imminent physical danger. This physical threat, understood in the case-law as a danger of death or serious bodily harm, must in some cases also meet the following conditions: it must be "*clear and present*" or else be "*imminent, real, and inevitable*"

These tribunals also took into account the issue of voluntary participation in an enterprise that leaves no doubt as to its end results, in order to determine the individual responsibility of the accused members of the armed forces or paramilitary groups. The rank held by the soldier giving the order and by the one receiving it has also been taken into account in assessing the duress a soldier may be subject to when forced to execute a manifestly illegal order.

(*Erdemovic Sentencing Judgement ICTY IT-96-22, 29 Nov. 1996, paras. 17-18*)

Special Panel

The question of duress has been considered by the Special Panel for Serious Crimes in other cases at Dili District Court. The case which deals with this issue most clearly is *Prosecutor against Joséph Leki* (Judgement 11th June 2001, pages 8 and 9). In fact that judgement came from the three judges on this Panel and so I do not intend to spend time dealing with it. In short, the judgement considered duress together with section 14.3(d) Reg 2000/15. The Panel considered that Leki should have taken steps to avoid the 'specific moment of duress' a long time before the crime was committed. He had joined in with the militia purpose, with knowledge of their criminal intent. He was therefore unable to rely upon the defence of duress.

Following Orders

The issue of duress is closely linked to that of superior orders. Section 21 Reg 2000/15 provides that:

"Section 21: Superior orders and prescription of law. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires."

B. The Defense

The Defense of Joni Marques

1. Factual allegations

Torture and murder of Evaristo Lopes

43. Questioned by the Presiding Judge about the torture of Evaristo Lopes, Joni Marques admitted that he was present at the time when the victim was beaten. However, he remarked that he has only cut the hair of Evaristo Lopes; therefore this act can not be seen as torture. "I can accept the charge for having cut his hair, but this is not torture", alleged Joni Marques. For him, the responsibility for the torture and murder of Lopes was Syaful Anwar, a member of TNI, who had ordered him to do that.
44. Questioned by the Prosecution, he explained that Team Alfa group was formed with the support of TNI in 1995, but he could not give more details because those were "political issues". The KOPASSUS Special Forces provided weapons and training to the members of Team Alfa. The intention was not to attack people and villages, but to act as a guard and to support KOPASSUS. He said that he did not know if the security activities included the task of

bodyguard to the head of the village of Los Palos. "They ordered us and we have to do it". Joni Marques did not say what the other purposes of Team Alfa were, since he was not "a political expert" on the matter. At the time, he was ordered to do the job in the field. He was ordered to carry guns and fight against FALINTIL, but he did not know whether that group supported the independence of East Timor, also a matter that required "political expertise". He knew that "FALINTIL leaders carried guns; we also carried guns, but if they saw me first, they killed me", he put in plain words. He denied that he was the Team Alfa commander. "I was just a normal civilian". Questioned if he received any payment for being a Team Alfa member from 1995 until 1999, he stated that his incomes were provided by his activities as a farmer. He alleged that he "had some coconut plantations".

45. Joni Marques stated that FALINTIL members were not his enemies, since he himself was arrested by Indonesian forces when he also was a member of that group. About other armed groups in East Timor, he said that he had no knowledge about their existence. He confirmed that KOPASSUS and Team Alfa shared the same building as a base in the center of Los Palos village in 1999. "As a Team Alfa member, I had to go there", he stated, but refused to describe it. "The Public Prosecutor must know it more than me".
46. About the facts related to the count, he initially stated that he was at his home on 21 April 1999; therefore he could not see any roadblock. "I can only say that I was not at the place at the time", he declared. "I only saw the victim when he was at the military post. I left my house directly to that post no long after he was brought about one o'clock in the morning". The post was used by Team Alfa commanders and TNI operations. "The first time I saw Evaristo Lopes was at that post. Syaful Anwar was beating him at the building of KOPASSUS and Team Alfa". He confirmed that he and Anwar arrived at that post at the same time, around 6 or 7 o'clock in the evening, but for sure the victim was already there when both of them arrived. "I came in the middle of the night, since it was my time to do the watching duties". There were five persons with Evaristo Lopes: Gilberto Fernandes, Mautersa Monis, João da Costa, TNI lieutenants Ahmad and Syaful Anwar. The victim was standing at this occasion. Anwar started to kick Lopes. Joni Marques initially stated that Anwar was the only one that he could see beating the victim, but later confirmed that he also had seen João da Costa and Mautersa Monis hitting Evaristo Lopes. He claimed that Anwar was the last person he saw beating the victim before he died. "When I went out of the room, they had already tied the victim, but the last action was committed by Syaful Anwar. I only cut his hair". He confirmed that he was outside the room when he heard the screams of the victim. After coming back in, he saw Anwar hitting Evaristo Lopes.
47. Asked about the reason for beating the victim, Joni Marques replied: "The information had been already provided to the Prosecutor". He admitted the possibility that the victim could be a FALINTIL supporter, but also considered that the grounds could be given by KOPASSUS. He challenged the Prosecution at this stage: "If you ask me why I tortured people, I don't know how to answer. I was pretending so that they could not find my true feelings: I was a former clandestine member of FALINTIL. I had to cut the victim's hair because they wanted to raise suspicions on me". For Joni Marques, to cut the victim's hair was an excuse for not being killed by KOPASSUS forces. When the Prosecutor asked him why that stance could be so significant to put out of mind the suspicion against him, Joni Marques briefly emphasized: "You would know it, Public Prosecutor". Marques later also denied having heard anybody questioning the victim about his being a FALINTIL supporter.
48. Joni Marques said that he stayed at the post for 25 minutes. "I walked out after cutting the victim's hair. By the time I heard him screaming and I re-entered the room, the victim fell to the ground after Anwar cut his neck". He confirmed that Lieutenant Ahmad and João da Costa were also inside the room where the victim was lying down. After that, the victim was taken out by order of Lieutenant Ahmad, who said Evaristo Lopes had been killed. Marques confirmed that the Team Alfa members present at the time when Lopes died were the same as those whose names he had previously given to the Court. Joni Marques himself helped to take out the body of the victim.
49. Joni Marques had no opinion about the reason for the killing of Evaristo Lopes. "It was a task of Lieutenant Syaful Anwar".
50. Questioned by his legal counsel, Joni Marques reported that he joined Team Alfa in 1986, at a time where "we could not distinguish what was wrong or right". The leader was Lohuto Yashita; not a Timorese for sure. He added that he started to play a role as a clandestine member of FALINTIL in 1994 because his elder brother had been assassinated by TNI. As a clandestine member, he knew the actions of TNI. He clarified once again that he was not a voluntary member of KOPASSUS, but an active member of Team Alfa. He joined Team Alfa to avoid suspicions of any other group, since he knew they ordered normal citizens or villagers. At that time, he had a contact with FALINTIL, a member named Sena. "I provided bullets and grenades to them; it was a sign of my contact with them". The commander of Team Alfa in East Timor since 1999 was the Timorese José Pereira, presently in West Timor. The second in charge was Sérgio Augusto.
51. About himself, Joni Marques said that he was only an ordinary member. He received military training from KOPASSUS in 1986. Later, in 1993, he was appointed to participate in joint training operations with Australian forces in Bandung, West Java, Indonesia. Other armies involved were from the Philippines, Singapore and United States, but on separate occasions. The main purpose was guerrilla warfare. Marques had to fight against FRETILIN, an armed group in East Timor. As a volunteer member of KOPASSUS, Joni Marques stated that he received no money or salary.

52. About the facts of 21 April 1999, Marques repeated to his counselor that he was not present at the place where the Team Alfa members built a roadblock. He informed the Court again that the first time he saw Evaristo Lopes inside the room at night time, he cut the victim's hair with a samurai sword. At the time, nobody had beaten Evaristo Lopes yet. He then noticed that the victim was full naked, but still alive. After he went out of the room, he heard the victim screaming; he went back in and saw Syaful Anwar punching the victim, who fell down. Anwar also stabbed the victim in the neck. Marques could see the victim's blood on the floor. Once again, he claimed that he had cut the victim's hair to cover up that he was a FALINTIL clandestine member. About the purpose of killing Lopes, Joni Marques said "he had no idea about the intentions of Syaful Anwar", since he could not hear anything from him that night when the incident took place for one or two hours.
53. Questioned by other Defendants' counselors, Joni Marques confirmed that at the time he saw Lieutenant Syaful Anwar, Lieutenant Ahamd, Sérgio Augusto, João da Costa, Mautersa Monis and a militia named Gonsalo, but not the defendant Gonsalo dos Santos, present at the courtroom. Joni Marques clarified that the victim died after Anwar stabbed his neck. About wounds, Marques said that he had no chance to see any injuries in the body of the victim, but noted that some blood came out from the victim's mouth. Marques also could not confirm if only Anwar stabbed the victim: "I do not know; I was in another room when the victim was stabbed".
54. For the other Defendant's counselor, Joni Marques he could not state who was inside the room at the moment Syaful Anwar stabbed the victim. In this case, he never was told anything about the intentions of Syaful Anwar in killing Evaristo Lopes.
55. Finally, Joni Marques repeated to the Court that he did not know anything about politics and apologized for not explaining the purposes of the Team Alfa one by one. As a Team Alfa member, he was supposed to follow the orders from KOPASSUS. Also as a Team Alfa member, he acted as the Bupati's (*district administrator*) bodyguard in Los Palos and, performing such role, he came several times to Dili. About his activities as a clandestine FALINTIL member, Marques said "he only provided bullets". Questioned about the people who had escaped from KOPASSUS forces to the jungles until 1999, he replied that he had never heard about this, but after the popular consultation in 1999, he knew about three fugitives. When asked about the alleged duress in respect of the torture of the victim, Marques stated that he could not escape to the jungle, since everyone in his village were pro- autonomy oriented and his family could be threatened.

Deportation or forcible transfer of population

56. Joni Marques initially stated that all the people in his village were "100% pro-autonomy". His duty was to provide the withdrawal of those people to Kupang, since they were asking to go to West Timor. If the Court had doubts about his intentions, Marques asked the Prosecution to bring the victims to Court to present their testimonies.

Torture and murder of Alexio Oliveira

57. The Public Defender for the Defendant Joni Marques, namely Siposami Malunga, in his oral response to the indictment rejected the accusation that Joni Marques was the principal perpetrator. Therefore, he did not plead guilty to the Prosecutor's charge in relation to the murder of Alexio de Oliveira.
58. In his statement in relation to the murder of Alexio de Oliveira as specified in the indictment, Joni Marques stated that "*I'm not the perpetrator of the murder of Alexio de Oliveira, and I did not participate in aiding/abetting the murder and I had no intent or plan, and I am not guilty*".
59. During further examination, Joni stated that he knew Alexio de Oliveira, who lived in the sub-village of Foema, village of Soro Besar, as a member of CNRT and an independence supporter. He admitted that, on the 11th September 1999, he traveled on a motorcycle with another person called Justino and was accompanied by a red minibus with the writing Cruzeiro on its side driven by Paulo da Costa. The car was used to transport civilians from the village of Leuro to the refugee camp at the 745 Base. When he, Joni Marques, was half way to the sub-village of Foema, the mother of Alexio de Oliveira, namely Jacinta dos Santos, stopped the minibus and asked that they take Alexio so he could meet up with his child and wife who were at the refugee camp.
60. The red minibus with Cruzeiro on its side driven by Paulo da Costa was carrying Alexio de Oliveira and other civilians on 11 September 1999. Joni said: "*I didn't pick him up but Alexio's mother brought him to me and asked me to help Alexio register as a refugee and Alexio's mother didn't want to get on the minibus*". Joni admitted that, before Alexio got into the minibus, he himself pointed his weapon at the head of Alexio and asked him about his involvement with CNRT, because "if he was a member of CNRT why would he need to get into the minibus and become a refugee?". Joni did not want Alexio to get on the minibus because Alexio was a CNRT member and also because in general pro-autonomy supporters do not like CNRT supporters.

61. Joni admitted that he was carrying a gun at that time because the situation was unstable and KOPASSUS had given a gun to Joni. In relation to the purpose of the weapon, Joni said: *"I don't need to explain why I had to carry a gun and why I was given a gun because clearly everyone, including the Prosecutor, knows why"*.
62. After picking up Alexio and when they arrived in a sub-village called Sawarica, the minibus stopped because Alexio requested that he get his motorbike. Joni explained: *"I did not fire a shot at anybody at that time, and after that we continued our journey to Los Palos"*. On arrival at the 745 Base it was dark. At approximately 18:30, Joni did not see where Alexio went. He stated that he did not accompany Alexio to find his family and did not meet up with anybody including the TNI, or speak to anyone about Alexio. *"I did not know where Alexio had been taken or by whom or where he had gone from that evening until the next morning because at the refugee camp there were 3 separate areas"*.
63. At the 745 Base, there were many refugees from many different villages in Los Palos, and Joni only saw Paulo da Costa and Gonsalo dos Santos with their families. Joni said: *"I wanted to help Alexio and I didn't threaten him. I deliberately pointed my gun at his head to fool the others so they weren't suspicious of me and that was only a tactic because I was a clandestine member also"*. Then Joni stated that until the day of his arrest he did not know about the death of Alexio de Oliveira.

Murder of Alfredo Araújo and Kalistu Rodrigues

64. Defense counsel for the accused Joni Marques told the Court that his client would admit this charge and plead guilty. He was part of the group.
65. The accused himself agreed on this and declared before the Court that he had no further statement to make. However, upon later being questioned by the Court, the Prosecutor and the Defense, the accused Joni Marques gave some details. He told the Court that during September 1999 – he did not recall the day – he left Com in the minibus driven by Paulo da Costa, with Felisberto, Eurico and Alarico Fernandes. Himself and Felisberto were carrying guns. Some of their colleagues were carrying machetes. They intended to go to get some coconuts in the coconut plantation in Ira-Ara village. He did not know that the Coconut Grove was the meeting place of FALINTIL members and their supporters. They did not separate into two groups, but were walking around to get food. While he was in the coconut plantation, he heard a gunshot from Felisberto's rifle. After the gunshot he heard Felisberto calling him and went to the place where Felisberto was. The others (Paulo da Costa and Alarico Fernandes) came to the place as well. He mentioned the name of Alfredo Araújo; he recognized him and knew him because he was his former co-prisoner. They had been detained together as supporters of FALINTIL. Alfredo Araújo was injured in his left leg, in the front part under the knee, as demonstrated by the accused Joni Marques on his own leg. He was lying in a shadow still alive. According to the statement of Joni Marques, he did not say anything first, but later he said: *"Joni, why don't you kill me? I have no chance to live!"*. When the victim requested Joni to kill him, Joni told the Court that he did not do it immediately because they suddenly saw three people not far away from the main road coming to them from the forest. They withdrew and pointed their guns at them. Later, after he finished dealing with the three men, Joni Marques came back to the place where Alfredo Araújo was and shot him three times in the head and those shots killed him. After that, he left the dead body there, at the coconut plantation.
66. Concerning the murder of Kalistu Rodrigues, Joni told the Court that they saw three men coming toward them not carrying guns but some spears. He tried to shoot, but his gun jammed and did not work. Felisberto was the one who shot successfully and one man was hit. After that Joni Marques tried to shoot at least 6 times at the other two men who were escaping but he did not know if the shots reached them. *"When the bullets go out you cannot control them any longer"*, Joni told the Court. The victim who fell to the ground was about 30 meters from the place where they were, so they approached him. The man was still alive. Joni had no opportunity to see any injury to the body of the victim. Paulo da Costa came along and asked the gun to shoot the victim, to shoot him dead and finish with him. *"I was the one to give to Paulo the gun,"* said Joni Marques before the Court. *"He took the weapon from me and shot the victim once. I was not there to see on which part of the body"*, he concluded. For him, Paulo da Costa was the one who finally killed Kalistu Rodrigues. He did not order him at that stage.

Murders of Clergy, Agus Muliawan and Izino Freitas Amaral and others

67. Defense counsel for the accused Joni Marques told the Court that his client would admit the charge and plead guilty. But the Defense wanted to make clear that, contrary to the allegation of the Prosecution, Joni Marques was not the commander of Team Alfa. The commander was Sergio Augusto.
68. The accused himself pleaded guilty to the charge set forth in the indictment against him. He told the Court: *"I feel I am guilty"*. He admitted that on 25 September 1999, in Los Palos Sub district, Lautem District, he together with João da Costa *alias* Lemorai, Paulo da Costa, Amélio da Costa, Manuel da Costa, Hilário da Silva, and Gonsalo da Santos did, with deliberate intent and with premeditation, commit, aid, abet or otherwise assist in the murder of Brother Jacinto Xavier, Brother Fernandes do Santos, Brother Fernandes da Conceicao, Sister Emilia Cazzaniga, Sister

Celeste de Carvalho, Agus Muliawan, Cristovao Rudi Bareto, Titi Sandora Lopes and Izino Freitas Amaral, knowing that it was part of a widespread and systematic attack against a civilian population. *"I personally accept it because it was myself who made the operation (...)"*, agreed Joni Marques. In accordance with section 29A.1, the Special Panel sought to verify the validity of guilty plea. To this end, the Panel asked the accused: (a) if he understood the nature and the consequences of the admission of guilt; (b) if his guilty plea was voluntarily made; that is, if he made it freely and knowingly without pressure or promises; (c) if his guilty plea was unequivocal, *i.e.* if he was aware that any line of defense could not refute the said plea.

69. The accused replied in the affirmative to all these questions. He said that his plea was voluntarily made, and after consulting his legal representative. He stated that he understood the nature of the charge against him and the consequences of his admission of guilty, that his plea was unequivocal and that any line of defense could not refute it.
70. Furthermore, the Special Panel was satisfied that the matters referred to in Sect. 29 A.1 of UR-2000/30 were met and found that the guilty plea was based on sufficient facts. It therefore accepted the admission of guilt as stipulated in Sect. 8 of UR-2000/15 and Art. 340 of Penal Code of Indonesia.
71. Later, once his counsellor had read out his closing statement, the Court gave Joni Marques a final opportunity to address it in his own words. The accused stated as follows, *verbatim*:

"I just like to appeal to the honorable Panel. (...) I will simplify my words. It is not necessary for me to talk fluently. Honorable Panel: I request for the other 9 defendants to be acquitted of the incident on 25 September 1999. In relation to the incident of 25 September, I stated before that I was prepared to take responsibility for it, without any excuses, whatsoever. It is not necessary to include them on the case of 25 September because I am prepared to take responsibility for it. I plead to the honorable Panel to take in consideration this matter in relation to the incident of 25 September. I'd also like to add and to request to the honorable Panel to give me the most appropriate punishment here in East Timor and the fairest possible punishment. I don't want to feel despair when the decision comes down in this case. I heard before someone referring to the incident which occurred on 27 September 1999. In relation to this fact, I request the Panel and the Prosecution: If I am to be sentenced, what about my colleagues who died on 27 September? Until now I haven't seen any evidence or any decision or any actions from the Prosecution or the judges to bring justice to those people that destroyed my men on 27 September! Anyway, the fact is that those people are also human beings, just like us; they are not animals; they're human beings. Because we have to remember they're human beings, we don't have to be treated differently. If they knew that they committed the crime against the clergy, that didn't justify the crime against my colleagues and myself. I only request to the Panel to say that I receive the fairest possible decision in this case, so that the international law can be applied in East Timor, a fair law. If I am the one to be convicted, and not those responsible for destroying my people, I know that something is going to happen."

2. Legal arguments

72. Defense Counsel on behalf of Joni Marques addressed the following arguments as the constituent elements for crimes against humanity:

"Mental Element

Section 18 UNTAET Regulation 2000/15

The mental element required to establish criminal responsibility is provided for in Section 18 of UNTAET Regulation 2000/15, which states that:

"18.1 A person shall be criminally responsible for punishment for a crime within the jurisdiction of the panels only if the material elements are committed with intent and knowledge."

According to Section 18.2:

"For the purposes of the present Section, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."

Knowledge is defined in Section 18.3, which provides that:

"For the purposes of the present Section, knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

The International Criminal Tribunal for Rwanda has defined the elements of crimes against humanity in the case of the *Prosecutor vs. Akayesu*⁸ where the Chamber arrived at the following elements of the crime:⁹

the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;

the act must be committed as part of a wide spread or systematic attack;

the act must be committed against members of the civilian population;

the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.

The Act Must Be Committed As Part Of A Widespread Or Systematic Attack

The assertion that the "widespread or systematic" character is a constituent element of a crime against humanity is found in Article 3 of the Statute of the ICTR and Article 7 of the Statute of the International Criminal Court. The Appeals Chamber in the *Tadic* Appeal Judgement rendered consequent to the Judgement of Trial Chamber II of the ICTY dated 7 May 1997 and Trial Chambers I and II of the ICTR in their Judgements pronounced on 2 September 1998 and 21 May 1999 in the cases *The Prosecutor v. Jean-Paulo Akayesu* and *The Prosecutor v. Clément Kayishema and Obed Ruzindana* respectively all made the widespread or systematic characteristic an essential element of the offence.

The alleged acts must be committed as part of a wide spread or systematic attack and not just a random act of violence. The act can be part of a widespread OR systematic attack and does not need to be a part of both.

Definition of widespread

The Prosecutor Versus Jean-Paulo Akayesu Case No. ICTR-96-4-T

The trial Chamber held that:

"579. The Chamber considers that it is a prerequisite that the act must be committed as part of a widespread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both."¹⁰

580. The concept of 'widespread' may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.

581. The concept of 'attack' maybe defined as a unlawful act of the kind enumerated in Article 3(a) to (l) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner."

The Prosecutor Versus Ignace Bagilishema ICTR-95-1A-T

In this case the Trial Chamber reaffirmed as follows:

⁸ Ibid.

⁹ Judgement, 578.

¹⁰ In the original French version of the Statute, these requirements were worded cumulatively: "Dans le cadre d'une adieu generalise et systematic", thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation.

"77. A widespread attack is an attack on a large scale directed against a multiplicity of victims, whereas a systematic attack is one carried out pursuant to a preconceived policy or plan.¹¹ To qualify, the attack must be at least widespread or systematic, but need not be both. Nonetheless, the Chamber notes that the criteria by which one or the other aspects of the attack is established partially overlap. As stated in *Blaskic*:

"The fact still remains however that, in practice, these two criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation. The quantitative criterion is not objectively definable as witnessed by the fact that neither international texts nor international and national case-law set any threshold starting with which a crime against humanity is constituted."¹²

It is, therefore, the Chamber's view that either of the requirements of widespread or systematic will be enough to exclude acts not committed as part of a broader policy or plan. Also, the requirement that the attack must be committed against a "civilian population" presupposes a kind of plan; and the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy. Thus the policy element can be seen to be an inherent feature of the attack, whether the attack be characterised as widespread or systematic.¹³ Further, it is clear from Article 3 of the Statute and recent case law¹⁴ that such a policy may be instigated or directed by any organisation or group, whether or not representing the government of a State."

25. Definition of systematic

Blaskic IT-95-14 "Lasva Valley"- Trial Chamber

The ICTY Trial Chamber held that:

203. The systematic character refers to four elements, which for the purposes of this case may be expressed as follows:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

204. This plan, however, need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events, *inter alia*:

- the general historical circumstances and the overall political background against which the criminal acts are set;
- the establishment and implementation of autonomous political structures at any level of authority in a given territory;
- the general content of a political programme, as it appears in the writings and speeches of its authors;
- media propaganda;
- the establishment and implementation of autonomous military structures;
- the mobilisation of armed forces;

¹¹ For example, the ILC Draft Code of Crimes defines systematic as "meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts." Commentary on Article 18, . 3.

¹² *Blaskic* para. 207.

¹³ Although the Chamber concurs with the statement in *Kupreskic et al*, "that although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a *requirement*, as such, for crimes against humanity", para. 551.

¹⁴ See, for example, *Tadic* (TC) para. 654.

- temporally and geographically repeated and co-ordinated military offensives;
- links between the military hierarchy and the political structure and its political programme
- alterations to the "ethnic" composition of populations;
- discriminatory measures, whether administrative or other (banking restrictions, laissez-passer,...)
- the scale of the acts of violence perpetrated – in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.”

The Policy Element

The Prosecutor Versus Clément Kayishema And Obed Ruzindana Case No. ICTR-95-1-T

124. For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan. Additionally, the requirement that the attack must be committed against a “civilian population” inevitably demands some kind of plan and, the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy.

125. Who or what must instigate the policy? Arguably, customary international law requires a showing that crimes against humanity are committed pursuant to an action or policy of a State. However, it is clear that the ICTR Statute does not demand the involvement of a State. Guidance on this issue may be gained from the ILC who, in the Draft Code of Crimes, stated that crimes against humanity are inhumane acts “instigated or directed by a Government or by any organisation or group.” The ILC explains that this requirement was, intended to exclude the situation in which an individual commits an inhumane act whilst acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or an organisation...The instigation or direction of a Government or any group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of the State.

126. The Trial Chamber concurs with the above view and finds that the Tribunal’s jurisdiction covers both State and non-State actors. As Prefect, Kayishema was a State actor. As a businessman Ruzindana was a non-State actor. To have jurisdiction over either of the accused, the Chamber must be satisfied that their actions were instigated or directed by a Government or by any organisation or group.

Definition of attack:

The Prosecutor versus Jean-Paulo Akayesu Case No. ICTY-96-4-T

The ICTR Trial Chamber held:

“The concept of attack’ maybe defined as a (sic) unlawful act of the kind enumerated in Article 3(a) to (l) of the Statute, like murder, extermination, enslavement, etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner”.

The Act Must Be Directed Against Civilian Population

The ICTY explained at length the definition of “civilian population” in stating as follows in:

Tadic IT-94-1 "Prijedor"-Trial Chamber

“635. The requirement in Article 5 that the enumerated acts be "directed against any civilian population" contains several elements. The inclusion of the word "any" makes it clear that crimes against humanity can be committed against civilians of the same nationality as the

perpetrator or those who are stateless, as well as those of a different nationality. However, the remaining aspects, namely the definition of a "civilian" population and the implications of the term "population", require further examination.

(i) *The meaning of "civilian"*

636. That the prohibited act must be committed against a "civilian" population itself raises two aspects: what must the character of the targeted population be and how is it to be determined whether an individual victim qualifies as a civilian such that acts taken against the person constitute crimes against humanity?

637. The Statute does not provide any guidance regarding the definition of "civilian" nor, for that matter, does the Report of the Secretary-General. The Prosecution in its pre-trial brief argues that the term "civilian" covers "all non-combatants within the meaning of common Article 3 to the [Geneva] Conventions" because of the finding that the language of Common Article 3 reflects "elementary considerations of humanity" which are "applicable under customary international law to any armed conflict". The Defence agrees that "civilians" under Article 5 covers all non-combatants, arguing however that the concept of "non-combatants" is not always clear in application. The Defence notes that particularly in situations such as that in Bosnia and Herzegovina, "where groups are mobilising without necessarily being under the direct control of the central government," there is a "gray area" between combatants and non-combatants. Thus the Defence concludes that the notion of non-combatants may not be sufficiently defined to determine in all cases whether the victims were civilians.

638. Regarding the first aspect, it is clear that the targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population.

639. The second aspect, determining which individual of the targeted population qualify as civilians for purposes of crimes against humanity, is not, however, quite as clear. Common Article 3, the language of which reflects "elementary considerations of humanity" which are "applicable under customary international law to any armed conflict", provides that in an armed conflict "not of an international character" Contracting States are obliged "as a minimum" to comply with the following: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely" Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the Commentary, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term "civilian". They, and particularly Common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in furtherance or as part of an attack directed against a civilian population.

640. In this regard the United Nations War Crimes Commission stated in reference to Article 6(c) of the Nürnberg Charter that "[t]he words 'civilian population' appear to indicate that 'crimes against humanity' are restricted to inhumane acts committed against civilians as opposed to members of the armed forces . . .". In contrast, the Supreme Court of the British zone determined that crimes against humanity were applicable in all cases where the perpetrator and the victim were of the same nationality, regardless of whether the victim was civilian or military. Similarly, the possibility of considering members of the armed forces as potential victims of crimes against humanity was recognized as early as 1946. The Commission of Experts Established Pursuant to Security Council Resolution 780 ("Commission of Experts") observed: "It seems obvious that article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms." The Commission of Experts then provided an example based on the situation in the former Yugoslavia and concluded: "A head of a family who under such circumstances tries to protect his family gun-in-hand does not thereby lose his status as a civilian. Maybe the same

is the case for the sole policeman or local defence guard doing the same, even if they joined hands to try to prevent the cataclysm."

641. Precisely this issue was considered in the case of *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie* (Barbie case). In this case the *Chambre d'accusation* of the Court of Appeal of Lyons ordered that an indictment for crimes against humanity be issued against Klaus Barbie, head of the Gestapo of Lyons during the Second World War, but only for "persecutions against innocent Jews", and held that prosecution was barred by the statute of limitations for crimes committed by Barbie against combatants who were members of the Resistance or whom Barbie thought were members of the Resistance, even if they were Jewish, because these acts could only constitute war crimes and not crimes against humanity. The order of the examining magistrate along the same lines was confirmed by the *Cour d'Assises* and an appeal was lodged. On appeal, the *Cour de Cassation* quashed and annulled the judgment in part, holding that members of the Resistance could be victims of crimes against humanity as long as the necessary intent for crimes against humanity was present. As the court stated, "[n]either the driving force which motivated the victims, nor their possible membership of the Resistance, excludes the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity." Thus, according to the *Cour de Cassation*, not only was the general population considered to be one of a civilian character despite the presence of Resistance members in its midst but members of the Resistance themselves could be considered victims of crimes against humanity if the other requisite elements are met.

642. While instructive, it should be noted that the court in the Barbie case was applying national legislation that declared crimes against humanity not subject to statutory limitation, although the national legislation defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter (law of 26 December 1964; and the fact that a crime against humanity is an international crime was relied upon to deny the accused's appeal on the bases of disguised extradition and an elapsed statute of limitations.

643. Despite the limitations inherent in the use of these various sources, from Common Article 3 to the Barbie case, a wide definition of civilian population, as supported by these sources, is justified. Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity. As noted by Trial Chamber I of the International Tribunal in its Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence in *The Prosecutor v. Mile Mksic, Miroslav Radic, and Veselin Slijivancanin* ("*Vukovar Hospital Decision*"), although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may in certain circumstances be victims of crimes against humanity. In the context of that case patients in a hospital, either civilians or resistance fighters who had laid down their arms, were considered victims of crimes against humanity.

(ii) The meaning of "population"

644. The requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian "population" does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity. Instead the "population" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity. As explained by this Trial Chamber in its Decision on the Form of the Indictment, the inclusion in Article 5 of the requirement that the acts "be 'directed against any civilian population' ensures that what is to be alleged will not be one particular act but, instead, a course of conduct." The purpose of this requirement was clearly articulated by the United Nations War Crimes Commission when it wrote that:

Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.

Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement imported by the Secretary-General and members of the Security Council that the actions be taken on discriminatory grounds.”

Conclusion

Thus the definition of crimes against humanity in customary international as reflected by the Statutes of the Yugoslav and Rwanda Tribunals and the findings of the Trial and Appeals Chamber and more importantly, Section 5 of UNTAET Regulation 2000/15 is beyond question.

It is argued on behalf of Joni Marques that there is no justification for any departure by the Special Panel from these definitions and constituent elements.

THE ENUMERATED ACTS

Section 5.1 of UNTAET Regulation 2000/15 enumerates various acts that constitute crimes against humanity, namely: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts. Section 5 is analogous to Article 3 of the ICTR Statute and Article 5 of the ICTY statute. Both the ICTY and ICTY Chambers have considered these enumerated acts and established the necessary ingredients for proof of each of the enumerated acts.

The Charges Of Murder As Crimes Against Humanity

In the present case, the Accused Johni Marques is charged with 4 counts of murder in violation of Section 5.1(a). Each and every charge of murder against Johni Marques reads as follows:

“The accused.....did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of”

As the charge reads, it is necessary for the prosecution to prove that the accused had committed the act with both *deliberate intent and premeditation*. This is the charge that has been proffered by the Prosecutor and this is the charge that must be proved. Indeed the evidence has been led and witnessed cross-examined on the basis that the evidence sought would establish this level of mens rea. I respectfully submit that whilst the charge as formulated is a departure from the provisions of the law, the Prosecution has exercised its discretion to formulate the charge in this manner. The accused Johni Marques was put on notice that he had to answer to the charge of murder committed with deliberate intent and premeditation and the examination of witnesses on behalf of the accused was undertaken on this premise. The accused is not under any obligation to assist the prosecution in the formulation of a charge against him. In the present case, the charge as formulated is clearly favourable to the accused in that it requires a higher standard of proof by the Prosecution. The Prosecution has placed on itself the burden of proving the very charge proffered by it and this Court should not accept proof of a lower standard than that on which the accused has been charged and answered to.

The issue of the correlation of the *mens rea* for murder with and without the requirement of premeditation has been discussed by the ICTR Trial Chamber albeit arising from different facts. The essence of the addition of premeditation was dealt with at length in the case of the Prosecutor vs. Clément Kayeshema and Obed Ruzindana where it was held that:

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137. Article 3(a) of the English version of the Statute uses the term “murder,” whilst the French version of the Statute uses the term “assassinat. The use of these terms has been the subject of some debate because the mens rea for murder, as it is defined in most common

law jurisdictions, includes but does not require premeditation; whereas, in most civil law systems, premeditation is always required for assassinat. The Akayesu Judgement, which is the only case to have addressed the issue, stated that customary international law dictates that it is the act of murder that constitutes a crime against humanity and not assassinat. In Akayesu, the Chamber held that there were sufficient reasons to assume that the French version of the Statute suffers from an error in translation. The Defence argued, inter alia, that the Akayesu solution of an error in translation was too simple and not convincing as both the French and the English versions of the Statute are originals. According to the Defence, murder was meant to be the equivalent of assassinat. However, the Prosecution argued that premeditation was not a necessary element and suggested that the "unlawful killing of a human being as the result of the perpetrator engaging in conduct which was in reckless disregard for human life" is enough.

138. The Trial Chamber agrees with the Defence. When interpreting a term from one language to another, one may find that there is no equivalent term that corresponds to all the subtleties and nuances. This is particularly true with legal terms that represent jurisprudential concepts. Here, the mens rea for murder in common law overlaps with both meurtre and assassinat (that is, a meurtre aggravé) in civil systems. The drafters chose to use the term assassinat rather than meurtre. As a matter of interpretation, the intention of the drafters should be followed so far as possible and a statute should be given its plain meaning. Since the concepts of murder and assassinat can correspond to one another, in the opinion of this Trial Chamber, there is no need to change the wording of the Statute. Although it may be argued that, under customary international law, it is murder rather than assassinat that constitutes the crime against humanity (a position asserted by the Chamber in the Akayesu Judgement), this court is bound by the wording of the ICTR Statute in particular. It is the ICTR Statute that reflects the intention of the international community for the purposes of trying those charged with violations of international law in Rwanda. Furthermore, the ICTR and ICTY Statutes did not reflect customary international law at the time of drafting. This is evident by the inclusion of the need for an armed conflict in the ICTY Statute and the inclusion of the requirement that the crimes be committed with discriminatory intent in the ICTR Statute. Accordingly, it may be presumed that the drafters intended to use assassinat alongside murder. Indeed, by using assassinat in French, the drafters may have intended that only the higher standards of mens rea for murder will suffice

139. If in doubt, a matter of interpretation should be decided in favour of the accused; in this case, the inclusion of premeditation is favourable to the accused. The Chamber finds, therefore, that murder and assassinat should be considered together in order to ascertain the standard of mens rea intended by the drafters and demanded by the ICTR Statute. When murder is considered along with assassinat the Chamber finds that the standard of mens rea required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.

140. The accused is guilty of murder if the accused, engaging in conduct which is unlawful:
causes the death of another;
by a premeditated act or omission; intending to kill any person or,
Intending to cause grievous bodily harm to any person.

Thus, a premeditated murder that forms part of a widespread or systematic attack, against civilians, on discriminatory grounds will be a crime against humanity. Also included will be extrajudicial killings, that is "unlawful and deliberate killings carried out with the order of a Government or with its complicity or acquiescence."

The relevance of the *Kayishema* case is that it defined murder as including an element of premeditation. The General Prosecutor has in the present case alleged that the accused did "...with deliberate intent and premeditation commit, aid abet or otherwise assist in the murder of." All the murder counts have been formulated in this manner and this is the case, which the Prosecutor has alleged and must prove. Indeed, this is the charge that the accused has been put on notice as being required to defend. It is therefore submitted that the Prosecutor in the present case is required to prove the additional element of premeditation as it is alleged. To do otherwise would be to try the accused for an offence whose elements he had no prior knowledge of.

The Prosecutor versus Jean-Paulo Akayesu Case No. ICTY-96-4-T

The elements of murder were extensively discussed by the Trial Chamber in the Akayesu case, which defines murder as the unlawful, intentional killing of a human being. The requisite elements of murder are:

the victim is dead;

the death resulted from an unlawful act or omission of the accused or a subordinate;

at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.

*Murder must be committed as part of a widespread or systematic attack against a civilian population. The victim must be a member of the civilian population. The victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds.*¹⁵

Jelisic IT-95-10 "Brcko"

34. The ICTY Trial Chamber reaffirmed this definition by holding that¹⁶:

*"The Trial Chamber notes firstly that the English text of the Statute uses the term "murder". The Trial Chamber observes that in line with the Akayesu¹⁷ case of the Tribunal for Rwanda it is appropriate to adopt this as the accepted term in international custom"*¹⁸

The Prosecutor vs. Ignace Bagilishema

35. The Trial Chamber¹⁹ stated that:

"84. In Kayishema and Ruzindana, the Trial Chamber found that:

"murder and assassinat [the word used in the French version of the Statute] should be considered together in order to ascertain the standard of mens rea intended by the drafters and demanded by the ICTR Statute. When murder is considered along with assassinat the Chamber finds that the standard of mens rea required is intentional and premeditated killing. The accused is guilty of murder if the accused, engaging in conduct which is unlawful:

causes the death of another;

by a premeditated act or omission; and

intending to kill any person or,

intending to cause grievous bodily harm to any person"

85. The Chamber concurs with the above description."

The Trial Chamber in the ICTR also expounded the elements of murder in the case of *The Prosecutor vs. Rutaganda*²⁰ where it reaffirmed the definition of murder in the *Akayesu Judgement* (see paragraph 80 –81) as well as in the case of *The Prosecutor vs. Musema*²¹ (see paragraph 215 of the Judgement)

The Defence of Johni Marques urges the Special panel to adopt this definition of murder as a crime against humanity. Crimes against humanity as an offence have become incorporated as part of the law of East Timor with the promulgation of UNTAET Regulation 2000/15. Whilst UNTAET Regulation does not provide a definition for the crime of murder as a crime against humanity, Section 5 of UNTAET Regulation 2000/15 is directly analogous to Article 7 of the Statute of the International Criminal Court, *in pari materia* with Article 3 of the Statute of the ICTY and Article 5 of the ICTR. Most importantly, these provisions all reflect the position of crimes against humanity in customary international law.

¹⁵ *Id.* 590.

¹⁶ At paragraph 51

¹⁷ Judgement, para.16, p.4.

¹⁸ "Meurte" is also used in the Statute of the International Criminal Court (Article 7. (1)(a) and in Article 18 of the Draft Code of Crimes Against the Peace and Security of Mankind, Official Document (hereinafter "Off Doc") United Nations General Assembly (hereinafter "UN", 51st Session, A/51/10 (1996) Suppl. No.10 (hereinafter "Draft Articles of the ILC")

¹⁹ ICTR, 95-1A-T, Judgement

²⁰ ICTR –96-3, Judgement

²¹ ICTR-96-13, Judgement

The Preparatory Commission of the International Criminal Court²² has defined the crime against humanity of murder in its Finalised draft text of Elements of Crimes as follows:

The perpetrator killed²³ one or more persons.

The conduct was committed as part of a widespread or systematic attack directed against the civilian population.

The perpetrator knew that the conduct was part of or intended to be part of a widespread or systematic attack against a civilian population.

Taking into account the fact that the Section 7 of the ICC Statute relating to crimes against humanity is exactly the same as Section 5 of UNTAET Regulation 2000/15 the Defence urges the Special Panel to adopt this definition of murder. Whilst the provisions of the ICC Statute have not yet been applied in practice, it is submitted that the jurisprudence of the International Tribunals is directly applicable in so far as there is a similarity in the wording of the provisions relating to crimes against humanity in the respective Statutes creating the Tribunals. In addition, the application of the decisions/interpretations of the Tribunals is consistent with the provisions, which requires that the Special Panel apply the established principles of international humanitarian law. It is argued that the jurisprudence of international tribunals constitutes established principles or interpretations of international law and is therefore appropriate and applicable.

TORTURE AS A CRIME AGAINST HUMANITY

Joni Marques is also charged with 1 count of torture. The crime against humanity of torture is defined in Section 5.2 (d) as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition is *exactly* the same as the definition of torture in Article 7.2 (e) of the ICC Statute. The Preparatory Commission for the International Court has in its Finalised Draft text of the Elements of Crimes listed the following elements of the crime against humanity of torture:

The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

Such person or persons were in the custody or under the control of the perpetrator

Such pain or suffering did not arise only from, and was not inherent in, or incidental to, lawful sanctions.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population

The perpetrator knew that the conduct was part of or intended to be part of a widespread or systematic attack directed against a civilian population.

It is argued that the Special Panel should adopt these as the elements of the crime of torture. The provisions of Section 5 of UNTAET Regulation 2000/15 are derived from the ICC Statute, in particular Article 7. On that basis, the interpretation relating to the crimes and the purpose of the elements assists the Court in the interpretation and application of Articles 6,7 and 8 of the ICC Statute [sic] The elements should serve the same purpose for the Special Panel. The Defence of Joni Marques concedes that there is no requirement to prove a specific purpose for the crime of torture.

The Prosecutor Versus Jean-Paulo Akayesu Case No. ICTR-96-4-T

The Trial Chamber in the *Akayesu* case also dealt with the issue of torture. Akayesu was also charged with torture as a crime against humanity. The Trial Chamber defined torture as:

²² Report of the Preparatory Commission on the Finalised Draft of Elements of Crimes, 1998.

²³ The term "killed" is interchangeable with the term "caused death"

" . . . any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁴

The Trial Chamber defined the essential elements of torture as follows:²⁵

the perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:

to obtain information or a confession from the victim or a third person;

to punish the victim or a third person for an act committed or suspected of having been committed by either of them;

for the purpose of intimidating or coercing the victim or the third person;

for any reason based on discrimination of any kind.

the perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, official or person acting in an official capacity.

The Trial Chamber found that torture is a crime against humanity if the following further elements are satisfied:²⁶

torture must be perpetrated as part of a widespread or systematic attack;

the attack must be against civilian population;

the attack must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds

It is submitted that whilst (a) and (b) are applicable in the present case, (c) is not, as it is based on a provision of the ICTR Statute which does not exist in our law. UNTAET Regulation does not require the existence of a discriminatory intent as an element of torture. However, it is an additional and necessary requirement that the torture must be perpetrated as part of a widespread or systematic attack and that such attack must be against a civilian and that it must be launched with knowledge of the attack.

The Prosecutor vs. Furundzija IT-95-17/1 "Lasva Valley" Appeals Chamber

The Appeals Chamber of the International Tribunal for Yugoslavia dealt with the crime against humanity of torture in the case of *The Prosecutor vs. Furundzija IT-95-17/1 "Lasva Valley" Appeals Chamber*²⁷ where it considered whether the acts alleged by the prosecutor constituted torture. It was held that:

"3. Whether the Acts Charged in the Amended Indictment Constitute Torture

109. *The Appellant argues that the Prosecutor failed to prove that the acts charged in the Amended Indictment constituted the crime of torture. He submits that the Trial Chamber failed to consider whether the acts of Accused B in the Large Room, for which the Appellant was subsequently convicted as a co-perpetrator, were serious enough to amount to torture. The Prosecutor submits that the findings of the Trial Chamber that torture was committed should not be disturbed on appeal, considering that there was a reasonable factual basis for them.*

110. *Those arguments raised by the Appellant under this heading, which relate to the Appellant's conviction as a co-perpetrator of torture will be dealt with in relation to the next element of this ground.*

²⁴ *Id.* 593 citing Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art.

²⁵ *Id.* 594.

²⁶ *Id.* ¶595.

²⁷ Although this case does not deal with torture specifically as a crime against humanity, the elements explained are applicable in substance. (in my opinion)

111. The Appeals Chamber supports the conclusion of the Trial Chamber that "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention", and takes the view that the definition given in Article 1 reflects customary international law. The Appellant does not dispute this finding by the Trial Chamber. The Trial Chamber correctly identified the following elements of the crime of torture in a situation of armed conflict:

(i) . . . the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition

(ii) this act or omission must be intentional;

(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;

(iv) it must be linked to an armed conflict;

(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g., as a de facto organ of a State or any other authority-wielding entity.

Under this definition, in order to constitute torture, the accused's act or omission must give rise to "severe pain or suffering, whether physical or mental."

The Special Panel is urged to adopt these definitions *mutatis mutandis* in so far as they constitute customary international law. In determining whether the Accused person Joni Marques committed acts of torture, these international standards and applications of law must be upheld.

The Appeals Chamber further discussed the historical development of the prohibition against torture and its status in international law. The relevant excerpt from the judgement is provided below:

B. Torture in International Law

1. International Humanitarian Law

134. Torture in times of armed conflict is specifically prohibited by international treaty law, in particular by the Geneva Conventions of 1949 and the two Additional Protocols of 1977.

135. Under the Statute of the International Tribunal, as interpreted by the Appeals Chamber in the *Tadic Jurisdiction Decision*, these treaty provisions may be applied as such by the International Tribunal if it is proved that at the relevant time all the parties to the conflict were bound by them. In *casu*, Bosnia and Herzegovina ratified the Geneva Conventions of 1949 and both Additional Protocols of 1977 on 31 December 1992. Accordingly, at least common article 3 of the Geneva Conventions of 1949 and article 4 of Additional Protocol II, both of which explicitly prohibit torture, were applicable as minimum fundamental guarantees of treaty law in the territory of Bosnia and Herzegovina at the time relevant to the Indictment. In addition, in 1992, the parties to the conflict in Bosnia and Herzegovina undertook to observe the most important provisions of the Geneva Conventions, including those prohibiting torture. Thus undoubtedly the provisions concerning torture applied qua treaty law in the territory of Bosnia and Herzegovina as between the parties to the conflict.

136. The Trial Chamber also notes that torture was prohibited as a war crime under article 142 of the Penal Code of the Socialist Federal Republic of Yugoslavia, hereafter "SFRY", and that the same violation has been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992.

137. The Trial Chamber does not need to determine whether the Geneva Conventions and the Additional Protocols passed into customary law in their entirety, as was recently held by the Constitutional Court of Colombia, or whether, as seems more plausible, only the most important provisions of these treaties have acquired the status of general international law. In any case, the proposition is warranted that a general prohibition against torture has evolved in customary international law. This prohibition has gradually crystallised from the Lieber Code and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907, read in conjunction with the 'Martens clause' laid down in the Preamble to the same Convention. Torture was not specifically mentioned in the London

Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg, hereafter "London Agreement", but it was one of the acts expressly classified as a crime against humanity under article II (1)(c) of Allied Control Council Law No. 10, hereafter "Control Council Law No.10". As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture in terms.

138. That these treaty provisions have ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the Nicaragua case it held that common article 3 of the 1949 Geneva Conventions, which *inter alia* prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts.

139. It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and - if the requisite conditions are met - qua treaty law, the content of the prohibition being the same.

Furundzija IT-95-17/1 "Lasva Valley" Appeals Chamber

In the *Furundzija Judgement*, the Trial Chamber discussed the definition of torture at great length drawing from the 1984 Torture Convention. It is submitted that whilst the discussion of the Tribunal on this issue is instructive, it must be borne in mind by the Special Panel that the definition of torture according to UNTAET Regulation 2000/15 is in *pari materia* with that found in the Rome ICC Statute. Thus, it is of greater benefit to resort to the elements of the offence as expounded by the Preparatory Commission.

The Definition of Torture

159. International humanitarian law, while outlawing torture in armed conflict, does not provide a definition of the prohibition. Such a definition can instead be found in article 1(1) of the 1984 Torture Convention whereby:

For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

160. This definition was regarded by Trial Chamber I of ICTR, in *Prosecutor v. Jean-Paulo Akayesu*, hereafter "Akayesu", as *sic et simpliciter* applying to any rule of international law on torture, including the relevant provisions of the ICTR Statute. However, attention should be drawn to the fact that article 1 of the Convention explicitly provides that the definition contained therein is "for the purposes of this Convention". It thus seems to limit the purport and contents of that definition to the Convention solely. An extra-conventional effect may however be produced to the extent that the definition at issue codifies, or contributes to developing or crystallising customary international law. Trial Chamber II of the International Tribunal has rightly noted in *Delalic* that indeed the definition of torture contained in the 1984 Torture Convention is broader than, and includes, that laid down in the 1975 Declaration of the United Nations General Assembly and in the 1985 Inter-American Convention, and has

hence concluded that that definition "thus reflects a consensus which the Trial Chamber considers to be representative of customary international law". This Trial Chamber shares such conclusion, although on legal grounds that it shall briefly set out. First of all, there is no gainsaying that the definition laid down in the Torture Convention, although deliberately limited to the Convention, must be regarded as authoritative, inter alia, because it spells out all the necessary elements implicit in international rules on the matter. Secondly, this definition to a very large extent coincides with that contained in the United Nations Declaration on Torture of 9 December 1975, hereafter "Torture Declaration". It should be noted that this Declaration was adopted by the General Assembly by consensus. This fact shows that no member State of the United Nations had any objection to such definition. In other words, all the members of the United Nations concurred in and supported that definition. Thirdly, a substantially similar definition can be found in the Inter-American Convention. Fourthly, the same definition has been applied by the United Nations Special Rapporteur and is in line with the definition suggested or acted upon by such international bodies as the European Court of Human Rights and the Human Rights Committee.

161. The broad convergence of the aforementioned international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.

162. The Trial Chamber considers however that while the definition referred to above applies to any instance of torture, whether in time of peace or of armed conflict, it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts. The Trial Chamber considers that the elements of torture in an armed conflict require that torture:

(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition

(ii) this act or omission must be intentional;

(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;

(iv) it must be linked to an armed conflict;

(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.....

E. How to Distinguish Perpetration of Torture from Aiding and Abetting Torture

250. The definitions and propositions concerning aiding and abetting enunciated above apply equally to rape and to torture, and indeed to all crimes. Nevertheless, the Trial Chamber deems it useful to address the issue of who may be held responsible for torture as a perpetrator and who as an aider and abettor, since in modern times the infliction of torture typically involves a large number of people, each performing his or her individual function, and it is appropriate to elaborate the principles of individual criminal responsibility applicable thereto.

251. Under current international law, individuals must refrain from perpetrating torture or in any way participating in torture.

252. To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also partakes of the purpose behind torture (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practiced, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).

253. These legal propositions, which are based on a logical interpretation of the customary rules on torture, are supported by a teleological construction of these rules. To demonstrate this point, account must be taken of some modern trends in many States practicing torture: they tend to "compartmentalise" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.

254. International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasising the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may be sentenced more severely than others, depending upon the circumstances. In other words, the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable.

257. Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described supra, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes.

Thus to summarise the above:

(i) to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or

intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place."

DEPORTATION OR FORCIBLE TRANSFER AS A CRIME AGAINST HUMANITY

Count 3 of the indictment charges the Accused with the crime against humanity of deportation or forcible transfer of population. According to Section 5.2 (c) of UNTAET Regulation 2000/15,

"Deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."

This definition is *in pari materia* with the definition of the offence in Article 7.2 (d) of the ICC Statute.

The Preparatory Commission in its Finalised Draft text of the Elements of Crimes has defined the elements of deportation or forcible transfer as follows:

The perpetrator deported or forcibly transferred without grounds permitted under, international law, one or more persons to another State or location, by expulsion or other coercive acts. Such person or persons were lawfully present in the area from which they were so deported or transferred.

The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The Prosecutor vs. Radislav Krstic Case No. IT-98-33-T

The Trial Chamber in the case of the *Prosecutor vs. Radislav Krstic*²⁸ held that:

“521. Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State border, whereas forcible transfer relates to displacements within a State.”

The International Law Commission Report, 1996 on Draft Code of Crimes Against

*the Peace and Security of Mankind*²⁹ has in its commentary on the prohibited act of arbitrary deportation or forcible transfer of population under subparagraph (g) of the Draft Code stated that:

“Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State. The term arbitrary is used to exclude the acts when committed for legitimate reasons, such as public health or well being, in a manner consistent with international law. Deportation was included as a crime against humanity in the Nuremberg Charter (Article 6(c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nuremberg Principles (PRINCIPLE VI) and the 1954 draft code (article 2, paragraph 11).

In the case of *The Prosecutor vs., Radislav Krstic*³⁰ the Trial Chamber dealt with the crime of deportation or forcible transfer and considered the distinction between deportation and forcible transfer and held at paragraph 531 that:

“...However, Bosnia- Herzegovina was the only State formerly recognized by the international community at the time of the events. Since the Srebrenica civilians were displaced within the borders of Bosnia- Herzegovina, the forcible displacement may not be characterized as deportation in customary international law.”

PERSECUTION AS A CRIME AGAINST HUMANITY

The accused is also charged with 1 count of the crime against humanity of

Persecution in violation of Section 5.1(h) of UNTAET Regulation 2000/30.

Persecution is defined in section 5.2(f) as follows:

“Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.

Article 7.2 (g) of the ICC Statute also defines the crime against humanity of torture in

²⁸ Case No.IT-98-33-T, Judgement

²⁹ <http://www.un.org/law/ilc/reports/1996>

³⁰ Ibid.

similar terms, that is:

“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 Preparatory Commission³¹ has defined the elements of the crime against humanity of persecution as follows:

“1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined on Article 7, paragraph 3, of the Statute or other grounds that are universally recognized as impermissible under international law.

4. The conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

5. The conduct was committed as part of a widespread and or systematic attack directed against a civilian population.

6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”

The International Law Commission has in its Commentary on the Draft Code of Crimes Against Peace and Security of Mankind stated that:

“11. The fifth prohibited act consists of persecution on political, racial, religious or ethnic grounds under subparagraph (e). The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Article 1 and 55) and the International Covenant on Civil and Political Rights (article 2). The present provision would apply to acts of persecution, which lacked the specific intent required for the crime of genocide under article 17. Persecution on political, racial or religious grounds was included as a crime against humanity in the Nuremberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nuremberg Principles (Principle IV) and the 1954 Draft Code (article) 2, paragraph 11).

It is submitted that these Special Panel apply the principles and consider the authorities cited above in so far as they constitute the position of international law on the various matters.

CRIMINAL RESPONSIBILITY

Forms of Participation

Section 14 UNTAET Regulation 2000/15

Section 14 of UNTAET Regulation 2000/15 provides for the individual criminal responsibility of an accused person. Section 14.3 provides that:

(...)

The International Tribunal for Rwanda has discussed the concept of individual criminal responsibility in a number of cases, which are cited below:

The Prosecutor Versus Jean-Paulo Akayesu Case No. ICTR-96-4-T

The Trial Chamber found in the *Akayesu* case as follows:

472. Article 6(1) provides that:

³¹ Ibid at p. 15.

"A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime".

Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.

473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide⁸⁰. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.

The Trial Chamber went on to discuss in great detail the principles and elements relating to the different forms of participation. The relevant excerpts are cited below. It is submitted that the basis of the findings by the Trial Chamber being Article 6.1 of the Statute of the International Criminal Tribunal for Rwanda, which is in pari materia with Section 14.3 of UNTAET Regulation 2000/15, the definitions are most authoritative. The Trial Chamber has held that:

477. In this respect, the International Criminal Tribunal for the former Yugoslavia found in the Tadic case that:

"a person may only be criminally responsible for conduct where it is determined that he knowingly participated in the commission of an offence" and that "his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident."

*478. This intent can be inferred from a certain number of facts, as concerns genocide, crimes against humanity and war crimes, for instance, from their massive and/or systematic nature or their atrocity, to be considered infra in the judgment, in the Tribunal's findings on the law applicable to each of the three crimes which constitute its *ratione materiae* jurisdiction.*

479. Therefore, as can be seen, the forms of participation referred to in Article 6 (1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge. This greatly differs from Article 6 (3) analyzed here below, which does not necessarily require that the superior acted knowingly to render him criminally liable; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof. In a way, this is liability by omission or abstention.

480. The first form of liability set forth in Article 6 (1) is planning of a crime. Such planning is similar to the notion of complicity in Civil law, or conspiracy under Common law, as stipulated in Article 2 (3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.

481. The second form of liability is 'incitation' (in the French version of the Statute) to commit a crime, reflected in the English version of Article 6 (1) by the word instigated. In English, it seems the words incitement and instigation are synonymous. Furthermore, the word "instigated" or "instigation" is used to refer to incitation in several other instruments. However, in certain legal systems and, under Civil law, in particular, the two concepts are very different. Furthermore, and even assuming that the two words were synonymous, the question would be to know whether instigation under Article 6 (1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide (Article 2 (3)(c) of the Statute) which, in this instance, translates incitation into English as "incitement" and no longer "instigation". Some people are of that opinion. The Chamber also accepts this interpretation.

482. That said, the form of participation through instigation stipulated in Article 6 (1) of the Statute, involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator.

483. By ordering the commission of one of the crimes referred to in Articles 2 to 4 of the Statute, a person also incurs individual criminal responsibility. Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence. In certain legal systems, including that of Rwanda, ordering is a form of complicity through instructions given to the direct perpetrator of an offence. Regarding the position of authority, the Chamber considers that sometimes it can be just a question of fact.

484. Article 6 (1) declares criminally responsible a person who "(...) or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 (...)". Aiding and abetting, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. The issue here is to whether the individual criminal responsibility provided for in Article 6(1) is incurred only where there was aiding and abetting at the same time. The Chamber is of the opinion that either aiding or abetting alone is sufficient to render the perpetrator criminally liable. In both instances, it is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime.

These findings constitute an accurate exposition of the law relating to the different forms of participation and were reiterated in the cases below.

Prosecutor vs. Alfred Musema ICTR-96-13

In the case of the *Prosecutor vs. Alfred Musema ICTR-96-13* the Trial Chamber held that:

The Chamber finds that the aforementioned case law regarding the principle of individual criminal responsibility, as articulated notably in the Akayesu and Rutaganda Judgements, is sufficiently established and is applicable in the instant case.

The Chamber finds that, in many legal systems, aiding and abetting constitute acts of complicity. However, though akin to the constituent elements of complicity, they themselves constitute one of the crimes referred to in Articles 2 to 4 of the Statute, particularly, genocide. The Chamber is consequently of the opinion that when dealing with a person Accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such; whereas, as stated supra, the same requirement is not needed for complicity in genocide. The Chamber finds that in addition to incurring responsibility as a principal offender, the accused may also be liable for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed, or aided and abetted another in the commission of such acts.

The Trial Chamber again discussed the various forms of participation:

117. *The Chamber defines five forms of criminal participation under Article 6(1) as follows:*

118. *The first form of participation, planning of a crime, implies that one or more persons contemplate the commission of a crime at both its preparatory and execution phases.*

119. *The second form of participation, incitement to commit a crime, involves instigating another, directly and publicly, to commit an offence. Instigation is punishable only where it leads to the actual commission of an offence intended by the instigator, except with genocide, where an accused may be held individually criminally liable for incitement to commit genocide under Article 2(3)(c) of the Statute, even where such incitement fails to produce a result.*

120. *The third form of participation, ordering, implies a superior-subordinate relationship between the person giving the order and the one executing it, with the person in a position of authority using such position to persuade another to commit a crime.*

121. *The fourth form of participation in which an accused incurs criminal responsibility is where he actually commits one of the crimes within the jurisdiction *ratione materiae* of the Tribunal.*

122. *The Chamber holds that an accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.*

123. *The fifth and last form of participation where individual criminal responsibility arises under Article 6(1) is "otherwise aid[ing] and abett[ing] in the planning, preparation, or execution of a crime referred to in Articles 2 to 4".*

124. *The Chamber is of the view that aiding and abetting alone may be sufficient to render the accused criminally liable. In both instances, it is not necessary that the person aiding and abetting another to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the crime.*

125. *The Chamber holds that aiding and abetting include all acts of assistance in the form of either physical or moral support; nevertheless, it emphasizes that any act of participation must substantially contribute to the commission of the crime. The aider and abettor assists or facilitates another in the accomplishment of a substantive offence.*

It is submitted by the Defence of Joni Marques that in order to be found guilty of any crime, an accused's actions must fall within any one of the categories of participation. It must be proved that the accused participated in any one of the prescribed forms. Each form of participation has separate *mens rea* and *actus reus* and this must be established by the Prosecution. It is not sufficient for the Prosecution to simply state that an accused simply participated in the commission of the offence without specifying what exactly he did and that his actions fall within one of the prescribed forms of participation or individual criminal responsibility.

My learned friend the Prosecutor will have you believe that any person who at some point or another has or had contact with a victim of a crime is guilty of that crime. This makes nonsense of the legal requirements for the establishment of criminal culpability. Each accused person's actions must be evaluated as against the requisite forms of participation taking into account of course the necessary *actus reus* and *mens rea* requirements for each offence.

It is therefore clear that in this regard that each different form of participation has a different *mens rea* and *actus reus* which must be established by the prosecutor before a finding of guilt can be made on the basis of that form of participation.

Thus for the form of participation relating to the "ordering" of an offence, the requirement is:

that the *actus reus* of the crime is performed by a person or persons other than the accused (the perpetrator(s)), with or without the participation of the accused

the perpetrator(s) acted in the execution of an express or implied order given by the accused to a subordinate or other person over whom the accused was in a position of authority.

The *mens rea* is:

that the accused had all the elements of the *mens rea* of a crime within the jurisdiction of the Court

the accused was aware of the substantial likelihood that the crime would a consequence of carrying out the order.

It is mandatory for the Prosecution to establish all these elements before a court can find an accused guilty on the basis that he ordered the commission of a crime within its jurisdiction. This is the law. On a careful analysis of the facts, it can hardly be said that this form of participation has been sufficiently established by the Prosecutor. In the first count, the alleged murder of Evaristo Lopes, one of the Prosecution witness stated that either Joni Marques or Rahmat gave an order for Evaristo Lopes to be killed. If indeed such an order was given (and of course this is disputed by the defence), by Rahmat, how does that make Joni Marques accountable on the basis of ordering the murder? There is such obvious and glaring doubt on the basis of which it is dangerous and indeed injudicious to hold the accused Joni Marques accountable on this basis. Even if it had been sufficiently established by the prosecution that indeed Joni Marques had given an order for Evaristo Lopes to be killed, the elements of this form of participation would still not be satisfied on account of the requirement for a subordinate/superior relationship between the perpetrator and the accused. The evidence has clearly shown that Syaiful Anwar killed Evaristo Lopes. It is ridiculous to suggest that Syaiful Anwar was a subordinate of Joni Marques and that he took orders from him. Assuming even that it was João Lemurai who killed Evaristo Lopes, there is absolutely no proof that at the time, Joni Marques was in a position of authority over him or any of the

accused, taking into account the presence of two senior ranking members of KOPASSUS. Even on this basis, the Prosecution case is hopeless.

In relation to the form of participation of “*committing*” an offence, the requisite *mens rea* is that the accused had all the elements of the *mens rea* of the crime or was aware of the substantial likelihood that a crime would occur as a result of his or her conduct.

The *actus reus* is that the accused performed all the elements of the *actus reus* of the crime. Whilst this form of participation is generally the easiest to decipher, clearly, its requisite elements are no less stricter. In order to be found guilty or criminally responsible, of committing any of the offences alleged on the basis of this form of participation, Joni Marques must be found to have performed all elements of the *actus reus* and possessed the all the *mens rea* of each offence. This is clearly not the case in the present case.

In order to be found criminally responsible for “*aiding and abetting*” a crime the requisite *actus reus* is that the accused, by his or her conduct, directly and substantially contributed to the commission by another person of the *actus reus* of a crime.

The *mens rea* is that the accused knew that his or her conduct would substantially contribute to the commission by another person of the *actus reus* of a crime, or was aware of the substantial likelihood that this would be a probable consequence of his or her conduct.

On the basis of this form of participation, the question can be posed for example in relation to the alleged murders of Evaristo Lopes and Alexio Oliveira: How did his conduct (being merely present in the room where Evaristo Lopes was beaten), contribute substantially to his murder by Syaiful Anwar? The answer is that it clearly did not. In relation to the murder of Alexio Oliveira the question is: How did Joni Marques by simply arranging for Alexio Oliveira to go to the 745 Base substantially contribute to his murder by as of now unknown persons? Again the answer is - not at all! The Prosecution would have done well to provide evidence of the perpetrators of this offence in order to allow the court to examine whether there was at all any connection between Joni Marques’ conduct and the death of Alexio Oliveira. In the absence of such evidence, it is inconceivable to surmise how the prosecution expects to obtain a conviction in this case.

That said, the Special Panel is urged to apply the careful and meticulous tests enunciated above in relation to each and every count in assessing whether an accused is individually criminally responsible for each of the offences charged. The law demands no less.”

The Defense of Manuel da Costa

Murders of Clergy, Agus Muliawan, and Izino Freitas Amaral and others

1. Factual allegations

73. In his statement to the Court, Manuel da Costa articulated as follows:

74. “About 4:30 in the afternoon, on 25 September 1999, Joni Marques and other colleagues were traveling from Com in the direction of Lautem. When we met, I was in a truck full of rice with my colleagues and three other villagers. Joni Marques forced us to descent. I asked Joni Marques where we were going. He said: ‘*We are going to get some rice at Dolog*’. So we went in the direction of Dolog, but actually we continued and passed that house. We headed to where the incident took place. We saw two young men pushing a cart. We met Joni Marques at that place. He ordered us to get out and chase those two guys. One of them jumped to the river; the other ran in the direction of Lautem. Horácio caught the one who went in the direction of Lautem. The other one jumped to the river; he managed to escape. Then I asked Joni Marques: ‘*Now that we have come to this place, what are we supposed to do here?*’. He said: ‘*Now we wait for the sisters who are to come to Baucau. We wait for them here. When they come, we kill them all!*’ I replied to him: ‘*How are we supposed to kill those people? Do you understand what we have to do? We have to leave East Timor and go to West Timor!*’. Joni Marques responded: ‘*If you don’t follow my command, you’ll die before the sisters die!*’. When he said that, I told him: ‘*You mean now that we’re going to leave East Timor*’. But Joni Marques said: ‘*If there is no ship in Com, where will we go? You can go if you want to die before those sisters!*’. After he said that, I didn’t say anything. Then Joni Marques ordered Horácio and Amélio da Costa to set up the roadblock. After that, I took my position, Joni Marques also took up his position at the right of myself. João da Costa took up his position to the right of Joni Marques. Not long after, a vehicle arrived in front of us and stopped. Joni Marques ordered us to fire the first shots. I aimed my weapon but I didn’t fire a shot. After that Joni Marques fired at the vehicle. My weapon was jammed. Then I aimed my weapon and tried to fire again, but no fire came. Then I fired again, but it was not aimed at any people. Then I fired again at the vehicle. Then Joni Marques gave the order: ‘*Men,*

move forward and burn the vehicle!'. He ordered them to gather five liters of petrol. Before the vehicle was burned, Horácio poured the petrol on the vehicle to set fire to the people who were still alive. And then, two occupants of the vehicle descended still alive: one sister not injured who got out from the left side, and another who came out from the right side. The sister who came out from the left seated and started praying. Then Horácio poured petrol over one of the victims and ignited it. Then the other person who was closer to the sister was stabbed by Horácio in the left side of his body, in the rib. Actually there were four people – not three – coming out from the vehicle. One person got out from the back door of the vehicle and jumped down the water. I don't really know who shot this person. I didn't really see. Then I moved to my original place. Joni Marques ordered João da Costa to push the vehicle into the river. The vehicle was pushed into the water. One female appeared in the water from the vehicle. The woman said: *'Where are you from, you who shot me?'* Joni Marques said: *'We're from the jungle!'* Then she replied: *'Why, you from the jungle, why did you shoot at us?'* Then Joni Marques fired a shot hitting the victim in the chest. The woman died in the water. About the young man that we arrested and tied to a tree, the person who tied him was Horácio, who deceased two days later. I apologize: I am not sure, but, after the woman had been shot, we dragged the bodies of the other victims into the river. Joni Marques ordered to grab the arm of the sister and bring her to the river. Horácio pushed her into the river. Joni Marques fired two shots and she died in the water. Then Joni Marques ordered Horácio to go and get the young man tied up to the tree. He brought him and cut off his ears. Horácio cut his neck and pushed him to the water. Then Joni Marques came and wanted a grenade from me. I asked him: *'Why do you want a grenade? They're already dead!'* Then he said: *'I'll shoot you!'* Then he took the grenade and threw it into the river. Joni Marques ordered Paulo da Costa to get the car so we could go back to Com. We headed to Com. Joni Marques said: *'This is only between us. Don't tell anybody else! If anyone of you tell this story, I'll kill you!'* When I was in Com for several days, I had no intention to kill anybody. I had no intention against the community or the people of Com. I said that because at the time I was at Lautem. Several days after we came to Com, we had a plan to get food and to distribute it to the community in Com. When I went to Lautem, I planned to get rice to the people who were starving there. I had no plan and no intent against the members of the community. That's all."

- 75.** Questioned by the Prosecution, Manuel da Costa confirmed that he joined Team Alfa in 1987. He became platoon commander in 1997. His duty as a Team Alfa member was to follow the orders from KOPASSUS. Every member should be quick with weapons. To fight against FALINTIL was the purpose of Team Alfa, but Manuel da Costa denied having killed any member of that opposite group. He did not know whether João Tavares was the Team Alfa commander, but for sure he was one of the leaders in East Timor. Manuel da Costa received 500,000 rupiah monthly as a Team Alfa platoon commander. Although he confirmed that he was also under the orders of the *Bupati*, Manuel denied that the money came from the said district administrator. He admitted that he himself was pro-autonomy oriented.
- 76.** Asked about *Operation Kenzen*, he explained that it was a task performed by Team Alfa when TNI Lieutenant Syaful Anwar came to pick up the refugees in East Timor since 8 September 1999. "He came to our village to tell us about this operation. He told us: *'You must follow the refugees to go to West Timor'*. So I followed the refugees to the 745 Base camps in Com".
- 77.** About the facts that occurred on 25 September 1999, Manuel da Costa stated that he had not had the chance to see the faces of the nuns; he had only seen the car those people were traveling in. He also denied that two days earlier he had had contact with a journalist who took a nun's photograph. "I didn't hear anyone talking about the fact that the clergy would be en route from Baucau". Then came other details:
- 78.** "Joni Marques asked me to stop the truck. I was in the truck with three Team Alfa members (David Lopes, Ernesto Pereira and Gilberto da Costa) and other villagers, including Hilário da Silva, a community member. João da Costa was not from my platoon. Joni Marques was not the commander, but when he came to Com in September 1999 he became our leader with a higher rank than me. I asked Joni Marques where we were going. He said that they were hungry and they had to get rice from the Dolog warehouse. I didn't know about his intentions. Our truck was full of rice, but I was ordered by Joni Marques to follow him to get more rice. My men and I myself joined the group in the minibus and we went to get rice. Until then I was still thinking we all were going to get rice. I didn't count how many people were in the car. When I got off the truck, I could recognize the people inside: some militia members and others on the top. After we passed in front of the warehouse, Joni Marques ordered Paulo da Costa to keep on going to a place named Raumoco. Since then I did not know any longer about the intention of Joni Marques. I started to think that something was going wrong. Then Joni Marques told Paulo da Costa to stop the car and ordered him to chase two young men who were pushing a cart. I saw Horácio taking that person and now I confirm what I said to the police: Paulo da Costa also was chasing the young men. About the roadblock set up, I never said that I had participated in that. I told the investigating judge only that Horácio and Amélio da Costa were building the roadblock; this does not include me. Everybody else was waiting for Horácio and Amélio to finish building the roadblock. I didn't think anything would happen. I was afraid of Joni Marques. I thought the roadblock was built for something very dangerous. Before building the roadblock, Joni Marques told us: *'We will be waiting for the nuns coming from Los Palos'*. I don't know what Joni Marques' intention was. We'd been forced to take our positions. When the car came, there was no explosion. One of the nuns got off. When I tried to fire, my gun jammed. I released and it jammed again. I was afraid because Joni Marques was more violent than he used to be. I fired two shots. I aimed at the people inside the car, but no person was hit. Horácio was carrying petrol and poured it over the clergy's car. I remember I saw one

dead body inside the car. I don't know how many people Joni Marques killed that day, but I remember that he shot two persons coming out of the car at an approximate distance of 12 meters. I could also watch Joni Marques and Horácio making terrible actions because I was keeping guard around the hills. (...) I didn't assist in pushing the car into the river. Paulo and another four or five colleagues did it. (...) After the incident, I didn't come back to my truck; I went back to Com. There were so many civilians to get rice for, so I didn't need to go back to the warehouse."

79. Manuel confirmed that his SKS rifle had the name *Manuel* written on the handle, but remarked that he was given the rifle by the KOPASSUS commander only on 14 September 1999 and his intention was only to guard the community in the refugees' camp. "The community actually had no security. We, the armed groups, acted as their security, including against attacks from FALINTIL". He also confirmed that he had a grenade on 25 September 1999, but once again remarked: "On that day I had no order from anybody at all to kill anyone".

80. To his counselor, Manuel da Costa replied that there were six people with him in the truck when they met with Joni Marques and his group. About the burning of the vehicle of the clergy, he clarified that Horácio was the one carrying petrol. Asked about the involvement of the co-defendant Paulo da Costa steering the wheels when other men were pushing the car, Manuel da Costa preferred to remain silent, alleging that he had been punched by Paulo da Costa during the lunchtime break between trial hearing sessions³².

81. To other Defendants' legal counselors, Manuel da Costa explained again his duties as platoon commander. Manuel da Costa referred to the hierarchy of Team Alfa in relation to Indonesian authorities:

82. "I could not refuse any command from KOPASSUS because KOPASSUS could raise suspicions on me. Those suspicions were related to the fact that some of my relatives had links with FALINTIL and were still in the jungle. (...) Most of the population in my village was pro-independence. So, they also had suspicions against me because my young brother was a member of FALINTIL. I joined Team Alfa because I was threatened. I was tortured. (...) The weapons we used came from KOPASSUS, not from anywhere else. (...) At the time, if anyone in Team Alfa refused orders from KOPASSUS, KOPASSUS would kill us, since Team Alfa was a spearhead group for KOPASSUS. But it never happened that someone had been killed for refusing such orders. I could not report the torture to the police because the police could not be involved in that at all. KOPASSUS and the Bupati were working together. How could I report that I was threatened?"

83. About the facts on 25 September 1999, Manuel da Costa explained that he and his group were armed to protect their people, not for evil purposes. He explained:

84. "I never knew about the plan to kill the sisters. I came to know only when we gathered at the place and Joni Marques spoke of the plan before the road was blocked. (...) When Joni Marques gave us the order to get rice, I didn't know any plan specifically from him. I really didn't understand Joni Marques' intention. I didn't understand also why weapons were necessary to get rice. (...) On 25 September 1999, it was the only occasion when I went to get rice since the Indonesian troops left the warehouse. We had weapons to provide security for civilian people in escorting food. All the armed men dropped off the truck and joined the group in the minibus. That's why I didn't see any reason: Joni Marques gave the order; we got off and went to get rice. (...) Joni Marques ordered: '*Everyone off!*' Some of the men did not get off and they didn't; they wanted to go home. They had no weapons. I didn't hear them refuse. (...) Joni Marques mentioned only my name at the time. I had to get off. (...) Only armed men got off the truck. The truck was full of rice, so I got off. If the truck was not full, I wouldn't get off. The minibus was empty. I had no premeditation to the events on 25 September 1999. No person rejected or questioned the orders of Joni Marques. (...) '*I would die first*', said Joni Marques if I refused to participate in the killing of the nuns. [*I had a gun at the time*] but Joni Marques would shoot us. There were four armed men at each side, two in the East, and two in the West side. I could not do anything. (...) My weapon was continuously jammed. (...) When Joni Marques threatened me, he was on the main road and before the roadblock had been built. (...) He was not smiling at the time."

85. To other legal representatives, Manuel da Costa again stated that he didn't participate in pushing the vehicle. He also confirmed that he had known Hilário da Silva as an ordinary villager; not as a Team Alfa member.

2. Legal arguments

86. The closing statement on behalf Manuel da Costa, submitted by the Public Defender Cancio Xavier and read out by Public Defender Márcia Sarmiento, approached strictly the evidence. Thereby, it will come properly under the heading *The Defense Case*.

The Defense of João da Costa

1. Factual allegations

³² The Court immediately made the arrangements ordering to the prison manager the protective measures.

Torture and murder of Evaristo Lopes

- 87.** João da Costa, promptly questioned by the Prosecution, clarified that TNI supported Team Alfa by providing them rifles and selecting their members. He himself was selected in 1995, after being captured and tortured by KOPASSUS when he was a FALINTIL member. After joining Team Alfa, he decided not to have any relationship with clandestine members in the jungle:
- 88.** “I was only an ordinary member; our duty was only to be prepared and wait for the instructions given by KOPASSUS to fight against FALINTIL”, explained João da Costa. Once completing the task of working through the week at the post, he could go home. Nevertheless, João da Costa stated that he never fought against FALINTIL. His routine tasks for four years were to guard the post at Laruara; he never went to the forest.
- 89.** João da Costa admitted his involvement in the roadblock on 21 April 1999, his alleged first operation. “I often participated in operations searching for FALINTIL members, but I rarely met face to face with them”, he later admitted. As far as he was aware, there was only one Team Alfa group in Los Palos. Like Joni Marques’ excuse, João “had no idea about the political purposes of the group”. On the night the victim was arrested, he was on duty at the post. He declared that he had received clear orders from TNI Lieutenant Syaful Anwar to arrest Evaristo Lopes at night. About 8:00 PM in the evening, Lopes was taken out from his car. João da Costa knew the victim and could easily recognize Evaristo Lopes, but he remarked that Syaful Anwar was the one who advised them that Lopes was likely to travel on that road that night. “He got down and we did our task”. His comrade Mautersa Monis and Joaquim – who later escaped to Kupang – were also at the roadblock. They captured Evaristo Lopes and took him to the post, where there were many sorts of weapons, including SKS rifles. At the time the victim was forced to descent the car, João da Costa denied having beaten the victim, but pointed out that his colleague Mautersa Monis hit the victim for four times. A few minutes after this answer, João da Costa admitted that he himself and Mautersa Monis beat the victim during the journey from the roadblock to the post. According to him, they used only electrical wire to hit the victim on his back, at approximately 12:00 midnight two hours after he saw Lopes in the roadblock. At the post, João da Costa could see Joni Marques cutting the victim’s hair inside the room in front of the dining room. (A few minutes later, during the same deposition to the Court, João da Costa stated that he did not see Joni Marques in that room with the victim: “I did not see anyone cutting his hair because when I entered the post his hair had been cut already at about 9:00 PM”, he alleged. Later, only Syaful Anwar stayed with the victim. Lopes was sitting down on the floor when João da Costa saw him being tortured by Anwar. However, João da Costa did not know about what Anwar was saying to the victim when he was beating him up. About the reasons for beating the victim, João da Costa stated that he “had no idea whether Lopes was a supporter or clandestine member of FALINTIL. At the post, Syaful Anwar was the only to threaten the victim, whilst the other members kept silent. Even Syaful Anwar was beating him up in a silent way until the last beating when Lopes screamed, fell down and passed away.
- 90.** João da Costa explained that the victim had his hands tied up and his trousers taken off. “Lopes was already naked when I saw him at about 9:00 PM. When he died, he was full naked.”
- 91.** After the victim died, João da Costa said that they were ordered to take the body in order to bury it. About the reasons for the murder, João da Costa declared that only Syaful Anwar could tell the Court.
- 92.** Once again, he stated to his legal counselor that his main duty was to provide security at the Los Palos post and he did not know any operations carried out by Team Alfa group. “I did not know at all what the purpose of Team Alfa was”, he emphasized. In seeming contradiction to this, however, he admitted that he had participated in operations in the jungle to fight against FALINTIL. His surrender was in 1999 to INTERFET forces; not to FALINTIL.
- 93.** João da Costa denied having been aware about the fact that the violence against independence supporters could be part of a widespread or systematic attack. “I never participated in any meeting with the commanders to discuss the strategy for the referendum in 1999”. About the count, once more João da Costa admitted that he had beaten Evaristo Lopes when the victim was brought to the post, not on the road. At the post, he did not witness directly at the time Syaful Anwar cut the victim’s throat. About a person named Gonsalo da Costa, João da Costa clarified that this person was not a member of Team Alfa, but belonged to Tipur Rati group. “That man was there at the post; he was one of the main perpetrators; he was outside the room”, João da Costa claimed. “At the time that I was outside the room, I only heard a screaming when Anwar cut the victim’s throat and killed him. I did not see anybody else stabbing Evaristo Lopes”. João da Costa confirmed again that he only beat up the victim with an electric wire.
- 94.** About the charge against Joni Marques, the defendant João da Costa confirmed that Marques was not present at the roadblock. However, Marques was at the post when Evaristo Lopes was tortured and murdered. “He was there at nighttime, but I did not know whether he had cut the victim’s hair. He was in the room, I saw him when we came out from the back room, not from the front room, where Evaristo Lopes was”. The rooms used by KOPASSUS and Team Alfa were no more than 3 meters from each other.
- 95.** About some members of militia groups, João da Costa mentioned Eurico Guterres, but denied having ever had a face-to-face contact with him. He also denied as well knowing João Tavares. “I knew only the people in Los Palos”. About his feelings when he knew about the murder of Evaristo Lopes, the Defendant stated: “As a human being, we

feel regret, but the victim had already died. That was not our responsibility”. João da Costa added: “I had no idea whether he was a FALINTIL member or not. We had received orders to capture him; not to kill him”.

Murders of clergy, Agus Muliawan and Izino Freitas Amaral and others

96. The accused João da Costa *alias* Lemourai made his statement on 19 July 2001 and admitted his participation in this incident, but denied having had any plan to commit the crime. He admitted responsibility for the murder of one man: “I do not confess to all that, I only confess that I killed one man. The person who was running to the river. I shot that man”. In his additional statement on 23 July 2001, the accused wished to plead guilty: “I mentioned to you that I shot a person. I am honest and I feel guilty. The person that I killed was not by my own wish, my own will, but by Joni Marques’ will”. However, the Court did not consider it as an admission of guilt. The accused did not admit the crime as described in the indictment. He did not admit the whole facts, and that he committed the crime willingly, without any duress or force.
97. João da Costa told the Court that he was asked by Joni Marques to go to Lautem to get rice. They were carrying guns. They met with Commander Manuel da Costa in Lautem. They went past the warehouse in Lautem and passed two young men who were pushing a cart. Joni Marques asked Paulo da Costa to stop the bus. They started chasing these two young men. One of the young men ran up the hill. He was followed and arrested by the men. The other one ran and jumped into the water. He was saved. João da Costa was following the man who jumped into the water when Joni Marques called him back to where he was. Joni ordered him to stand beside him. He stood behind Joni. Then the vehicle carrying the sisters emerged.
98. “Joni Marques was the first to fire a shot and asked Manuel and myself also to shoot. But I did not see if I hit people or not. After that, one of the sisters opened the door to go out. She was totally free from injury. She knelt beside the car, and started to pray. The others were inside the car. Horácio opened the window of the car and stabbed them. I saw him stabbing one person in the car; another person had his head cut off by Horácio. Then Horácio took some petrol, poured the fuel over the victim and set him alight. One person died and the other one ran and fell into the river. “I followed and shot that person. After that, Joni Marques asked us to push the vehicle into the river. After the vehicle was pushed into the water, one of the passengers in the vehicle was still alive. Joni Marques shot him on the head. The sister who came out of the car was still alive. Joni Marques gave an order to a person (I could not distinguish that person) to kill her. Horácio was the one who grabbed the arms of the victim, not because he wanted to, but because Joni Marques ordered him to do it. The young man who had been arrested was still tied up to the tree. Horácio took that person, cut his right ear and hit his neck, before pushing him into the river. Joni Marques shot at him. All the victims were dead. Joni Marques took a grenade from Manuel and threw it into the river. After that, we went into the vehicle and went back to Com”, concluded João da Costa.
99. After counsels’ closing statements in the last session, João da Costa *Lemorai* addressed the Court in the following statement:
100. “In relation to the witness Gonsalo: he also participated in the beating of the victim. Why has he not been arrested, while I have been detained for 2 years? Since I’ve been in Becora, I knew a man whose crime was to have beaten his wife and he was sentenced to one year. A person who was involved in beating a person was not arrested! I request that the witness Gonsalo be brought to Justice”.

2. Legal arguments

101. The closing arguments on behalf João da Costa came as follows, *verbatim*:

“1. The elements of crimes against humanity

According to Section 5 of the UNTAET Reg. No. 2000/15, a “crime against humanity” is one of the conducts mentioned in that provision, carried out as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack.

For someone to be accused of committing a crime against humanity, the existence of the following elements are required, according to what the International Tribunal for former Yugoslavia established in its jurisprudence³³, referring to a similar legal provision:

1st – There must be an attack.

2nd – The acts of the suspect must be part of the attack.

³³ See Tadic Appeals Chamber Judgement, §§ 248-251; Kunara} Trial Chamber Judgement, § 410, and the recent decision (2 November 2001) in the case Miroslav Kvo^ca, Trial Chamber Judgement § 127.

3rd – The attack must be “directed against any civilian population”.

4th – The attack must be “widespread or systematic”.

5th – The suspect must know of the wider context in which his acts occur, and that his acts are part of the attack.

If any of these elements is not proved during the course of the trial, the Court cannot convict any of the accused persons charged with crimes against humanity.

In João da Costa Lemorai’s case, it is more than clear that one of the elements was not proved in Court.

Did João da Costa Lemorai during 1999 know that his conduct was part of a widespread or systematic attack upon the civilian population? Did the prosecution prove that João da Costa Lemorai, at that time – we must not forget, that the relevant time of the knowledge is the time when the conduct took place – was aware of what was happening in the entire East Timorese territory, that an orchestrated campaign of intimidation and violence was being planned, prepared and executed against part of the civilian population?

The critical element of crimes against humanity, in João da Costa Lemorai case, is the 5th, the psychological or mental element. And this is the element that the Prosecution failed to prove.

João da Costa Lemorai was a low rank militia within the Team Alfa organization, with orders mainly to go to the mountains to look for Falentil members and to guard the Base shared between the Team Alfa group and the Kopassus Special Forces in Los Palos. João da Costa Lemorai was not an intelligence member of the Team Alfa structure. João da Costa Lemorai was not a commander of the militia group. João da Costa Lemorai did not attend any kind of meetings with the Kopassus leaders nor receive instructions from them regarding the purposes and objectives to be accomplished by the Team Alfa group. João da Costa Lemorai as a low rank militia had to follow the orders given by the Indonesian commanders.

In conclusion, João da Costa Lemorai did not know that his acts were part of an attack against the civilian population. He did not know the wider context of what was happening in the territory of East Timor at that time. João da Costa Lemorai can not be convicted in any circumstance for having committed a crime against humanity.

2. The specific crimes within the category of crimes against humanity

Within the category of crimes against humanity, João da Costa Lemorai is charged with the specific actions of murder and torture of Evaristo Lopes, and charged with the murder of the clergy group.

In order to clarify the defence of João da Costa Lemorai, we will examine separately each one of the charges.

2.1. The murder of Evaristo Lopes

The General Prosecutor included João da Costa Lemorai in the first count of the Indictment, charging him with murder, a crime against humanity, considering that he participated in the killing of Evaristo Lopes. The Prosecution considered that the conduct of João da Costa Lemorai towards Evaristo Lopes was such that he intended to cause his death and he knew that he was going to be killed. However, the Prosecution must have misunderstood the factual elements; otherwise João da Costa Lemorai would never have been charged with this crime.

For João da Costa Lemorai to be accused and be convicted for the murder, as a crime against humanity, of the victim Evaristo Lopes, the following conditions have to be fulfilled:

1st - João da Costa Lemorai caused the death of Evaristo Lopes.

2nd - His conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3rd - João da Costa Lemorai knew that his conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.

The long roll of witnesses that stood before the Court to testify about the murder of Evaristo Lopes proved that what happened on that day is still unclear. Reading those statements is the best illustration of the thoughts of each witness. Who will the Court trust to establish the

factual elements? Will the Court will trust Moises Lopes, Rudi de Jesus and Domingo Ribeiro that betrayed Evaristo Lopes by handing him over to the Kopassus commanders? Or will it trust the former Team Alfa militia members Gonçalo da Costa Sanchez, Armindo Soares, Mario Ribeiro and Salvador Amaral as members who were present at the crime scene and some of them helped in the beating of Evaristo Lopes? Moreover, what inferences can be drawn from the witnesses' statements if those statements do not match one another?

João da Costa Lemorai admitted that he was present at the roadblock when Evaristo Lopes was captured and taken to the Base, following the Kopassus commander Syaful Anwar's orders, who was also present inside a car watching and controlling the arrest. João da Costa Lemorai also admitted that at the Base he hit Evaristo Lopes with an electric cable.

What the Prosecution did not prove is that by his conduct João da Costa Lemorai aided, abetted or assisted in the murder of Evaristo Lopes. It was clear that who committed the murder was the Kopassus commander Syaful Anwar. But who knew at that time that Syaful Anwar' intention was to kill Evaristo Lopes?

For João da Costa Lemorai to be convicted for aiding, abetting or assisting in the murder of Evaristo Fernandes, it is necessary to prove the *mens rea*, the mental element. According to Section 18 of the UNTAET Reg. No. 2000/15, the conduct of João da Costa Lemorai must have been carried out with intent and knowledge of the killing, despite the fact that the perpetrator was another person. In other words, João da Costa Lemorai must have acted with intention to cause the death and should have been aware that the killing was going to occur in the ordinary course of the events. Only in those circumstances can João da Costa Lemorai be convicted of the murder of Evaristo Lopes. However, the Prosecution failed to prove the mental element. No witness during the hearings showed that Evaristo Lopes was captured in order to be killed. There was no previous similar situation at the Kopassus Base that could be a sign or a precedent capable of showing the intention of the Kopassus commanders regarding Evaristo Lopes. Nothing was brought to Court proving that the Kopasus commanders said to or shared with the members of Team Alfa that they intended to kill Evaristo Lopes.

2.2. The torture of Evaristo Lopes

The second count set forth against João da Costa Lemorai in the Indictment is the torture of Evaristo Lopes as a crime against humanity.

For João da Costa Lemorai to be accused and convicted of torture, as a crime against humanity, of the victim Evaristo Lopes the following conditions must be satisfied:

1st - João da Costa Lemorai inflicted severe physical or mental pain or suffering upon Evaristo Lopes.

2nd - Evaristo Lopes was in the custody or under control of João da Costa Lemorai.

3rd - Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

4th - The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5th - João da Costa Lemorai knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

According to the definition foreseen in Section 5.2 (d) of UNTAET Reg 2000/15, torture means "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent or incidental to, lawful sanctions".

João da Costa Lemorai did not use any weapon or instrument to beat Evaristo Lopes. Recalling his statement João da Costa Lemorai never denied he had beaten Evaristo Lopes, and only used an electric cable. The beating of Evaristo Lopes was ordered and supervised by the Kopassus commanders Syaful Anwar and Rachmad.

Furthermore, Evaristo Lopes was not in the custody or in the control of João da Costa Lemorai. He was in the custody and control of the Kopasus commanders. In accordance with the definition of torture, it is a requisite to convict someone for the crime of torture to have control over that person. This was clearly not the case in respect of João da Costa Lemorai.

2.3. The murder of the clergy group

The last incident in which the Team Alfa was involved as perpetrator in September of 1999 was the brutal and atrocious attack carried out against a car transporting a group of clergy women and men. What happened that day is impossible to forget and hard to describe. And the same can be said about what happened two days later, as revenge, with the ambush organized and executed by the Falentil soldiers against the Team Alfa members. Unfortunately the events of the 27th of September will never be taken before a Court and the ones responsible for them will never be held accountable for their actions. Different criteria for similar situations. However, it is undeniable that the events of 27th September don't change the shocking nature of the crimes committed two days before on 25th of September.

João da Costa Lemorai participated in the roadblock set up to force the car with the clergy group to stop. João da Costa Lemorai told the Court his version of the incident and described his role in the operation commanded by Joni Marques. João da Costa Lemorai freely admitted to have killed one of the men travelling in the jeep.

When making his statement before the Court regarding this count, João da Costa Lemorai tried to plea guilty assuming the facts of the incident. The plea of guilty could not be accepted by the Court because João da Costa Lemorai did not recognize and refused to acknowledge all the elements of crimes against humanity. In other words, João da Costa Lemorai tried to plea guilty of murder, as foreseen in the Penal Code of Indonesia, but could not plea guilty of crimes against humanity.

In this count, when considering the individual responsibility of the other accuseds, the Court cannot ignore the plea of guilty made by Joni Marques that was accepted by the Court. In that plea of guilty, Joni Marques admitted that he planned alone the ambush and that at the road he gave all the orders to the men travelling with him in the red minibus. Joni Marques, as he admitted before this panel, is the principal perpetrator, the main person responsible. And that fact must be taken into consideration in assessing the responsibility of the other men involved, including João da Costa Lemorai.

3. Conclusion

3.1. The murder and torture of Evaristo Lopes

In conclusion, and taking into consideration all the facts brought before the Court by the accuseds' statements and the witnesses' testimony, João da Costa Lemorai cannot be convicted of any crime against humanity since the mental element of those crimes is absent in this case. In relation to the murder of Evaristo Lopes, João da Costa Lemorai must be acquitted since he did not participate in the murder; nor did he know that his actions were part of a scheme prepared by Kopassus to kill Evaristo Lopes. Finally, the only conduct that can be attributed to João da Costa Lemorai is the beating of Evaristo Lopes at the Base. So, if the law is to be applicable in a correct and strict mode, João da Costa Lemorai can only be convicted in this incident for the crime of maltreatment of Evaristo Lopes as foreseen in the Penal Code of Indonesia (KUHP).

The Defence of João da Costa Lemorai requests the Special Panel for Serious Crimes of the Dili District Court, taking into account the evidence brought to Court:

To acquit João da Costa Lemorai on the first count of murder of Evaristo Lopes;

To consider the beating of Evaristo Lopes by João da Costa Lemorai as a crime of maltreatment in the terms of the Penal Code of Indonesia, and consequently to acquit João da Costa Lemorai of the charge of torture.

3.2. The murder of the clergy group

In conclusion, João da Costa Lemorai did not commit any crime against humanity, considering all the elements of such category of crimes that must be proved in Court by the Prosecution. The mental element demanded by law is lacking in João da Costa Lemorai's conduct, and the Prosecution failed to prove it simply because such knowledge does not exist. João da Costa Lemorai participated in the ambush, and his role was freely explained in Court and corroborated by the other co-accuseds. João da Costa Lemorai tried in Court to plea guilty for his direct responsibility in the death of one of the victims. And we cannot forget that João da Costa Lemorai saved the life of José Pereira by telling him to escape when he jumped to the river.

The Defence of João da Costa Lemorai requests the Special Panel for Serious Crimes of the Dili District Court, taking into account the evidence brought to Court:

- To consider the circumstances in which the crime was committed, the global responsibility accepted by Joni Marques in the plea of guilty, and the willingness of João da Costa Lemorai in telling the court of his involvement, when deciding the sentence to be imposed.

The Defense of Paulo da Costa

1. Factual allegations

Deportation or forcible transfer of the civilian population

- 102.** In his initial statement, Paulo da Costa confirmed that Joni Marques and other Team Alfa members led people from the village of Leuro. However, he remarked that he himself was not a Team Alfa member, but an ordinary citizen. "I have not forced anybody to leave the village. I could not force them".
- 103.** Paulo da Costa suffered the loss of his left arm on 27 September 1999 - two days after the attack against the group of clergy. To the Prosecution, Paulo confirmed that the red minibus he used to drive had the name *Cruzeiro* written on both sides. TNI members at the 745 Base gave him the car, since he also was repairing it. He had driven the car regularly since 8 September 1999, after the Consultation Day. He stated that in the next three weeks he used the minibus for carrying refugees from the 745 Base to the Com Harbour. He refused to acknowledge that Team Alfa members were using the same car: "I did not know any Team Alfa member and their purposes". However, he admitted that he had heard about the name Team Alfa before 1999, but he could not say when the group had been created: "I was in Dili at the time".
- 104.** Paulo also stated that he knew Joni Marques because they were from the same village, but now as a Team Alfa member. "Joni Marques came to me and ordered me to take the families from Leuro. The reason was that some of the refugees were being driven there. Joni was in charge of all the people.
- 105.** Concerning the attacks on Leuro, he knew some of the victims. Two of them were members of his family. Paulo reported that people in his village were pro-autonomy. During the operation, he could see only the smoke; not the houses burning. "At the time, I was waiting to talk to the refugees. Everyone knew that all of the refugees would take the car". Paulo said that at the time only his minibus was carrying the refugees.
- 106.** Paulo da Costa also stated that on the journey from the 745 Base to Leuro the passengers were Horácio and Livio. Joni Marques traveled on his motobyke.
- 107.** During the attacks, Paulo said that he saw only Team Alfa member Sérgio carrying a gun, but later he added that Oliveira and Joni Marques also carried guns. After the attack, he took the refugees to the 745 Base three or four times. Two days later, on 10 September, they left the base to Com to take a ship to Kupang, West Timor. He remarked that TNI soldiers were in charge of taking the refugees to Com. He himself wanted to go to Kupang since he was pro-autonomy.
- 108.** For his counselor, Paulo da Costa clarified that he was not armed during these events and did not force anyone. "I was an ordinary citizen only", he emphasized.
- 109.** To the rest of the counselors, Paulo da Costa re-iterated that he was only a driver; not a Team Alfa member. "Team Alfa members gave an order; therefore I had to go to take the people", he explained. Those orders came from Joni Marques and Felisberto Sávio. He also went to the villages of Foema to pick up his relatives and also refugees. Once again, he pointed out that the order came from Felisberto Sávio and Joni Marques. "They forced me to drive the car, they forced me to pick up the people!". Paulo da Costa remarked that it was not his wish to go to Kupang, but a wish of Team Alfa since pro-autonomy had been defeated in the popular consultation. He was to go there because he was pro-autonomy. Asked once again whether he was a Team Alfa member, Paulo da Costa replied: "Call the people from my village and ask them about that!".
- 110.** Paulo da Costa added that he had not seen Gonsalo dos Santos during those attacks.
- 111.** To the Court, he stressed again that he had never been a Team Alfa member: "I was only a driver. They hired me, but they didn't pay me. They forced me to pick up the people. If I refused to do it, they would kill me". Asked about his occupation before being hired as a driver, Paulo da Costa said that he used to look for fish and re-sell it to people. About the orders to pick up people in the villages, he said that they were followed up once or twice. During the month of September 1999, he admitted that he drove the car at least for three days. About how he was forced by Team Alfa, Paulo da Costa stated that all the commanders had been hunting for him since 1992. Joni Marques came to him and threatened him if he refused to join Team Alfa. Asked why he had said that he was forced to participate in the attacks in 1999, despite having been forced to join in 1992, Paulo explained that the commanders started looking for him in 1992, but he joined in 1999 only. "They came again in 1999, then I joined. If didn't join, they would have taken me away since in my village people supported Team Alfa". Asked about his knowledge of Team Alfa members, Paulo da Costa replied that "there were many of them", but he could not say precisely how many there were or their

names. He could not count how many Team Alfa members there were at the 745 Base when he went to fix the car, but there were certainly a large number.

Murder of Alexio Oliveira

112. In his early statement, Paulo da Costa was terse: *“I don’t know because at that time I wasn’t at the scene of the crime and there is nothing I wish to say”*.

Murder of Alfredo de Araújo and Kalistu Rodrigues

113. The accused Paulo da Costa firstly told the Court that on 21st September 1999 they went to pick up some people to go to the coconut plantation to get some food. When they arrived there, they got out of the car and walked separately. Soon after, they heard some shots and some people screaming. They decided to go and find out where the screaming was coming from. When they reached that place, they saw a man lying down injured. They were advised by Alarico to bring him to Com for medical care. Paulo da Costa told them that there was a doctor at that place. Then Joni Marques told them that he should be killed because he was a member of CNRT. He then later shot him three times.

114. When questioned by the Court, the Prosecution and the Defense Counsel, the accused Paulo da Costa stated that he was ordered by Felisberto and Joni Marques to drive the minibus to Ira-Ara “to take vegetables and not to kill people”. He went there with Joni Marques, Felisberto Sávio, Alarico Fernandes and Eurico. He said later that Carlito Viegas, Amélio da Costa and Horácio were also in the minibus.

115. About the murder of Kalistu Rodrigues, the accused Paulo da Costa admitted that he was involved in that incident and he is the one who caused the death of the victim. But Eurico was also one of the perpetrators and he requested the Court to consider his involvement before any judgment in the case. He told the Court that after Alfredo Araújo was injured, they saw three people going forward. There were some shots fired by Felisberto and Joni Marques. One person fell to the ground and two others escaped. After that, the accused Paulo da Costa approached the victim and saw that he had a broken leg. Joni Marques offered him his gun to shoot the victim. Paulo da Costa responded by saying that the victim was already dead. For this reason, Joni Marques told him: *“Just shoot him again in case he is still alive!”*. He then shot the victim. He denied having asked Joni Marques to give him the weapon. After all this was over, they decided to go back, and when they reached Com, they departed to their respective places. Paulo da Costa stood by his statement that he had no intent to kill the victim. He did it because he was ordered by Joni Marques. He told the Court that by doing so, it was a way to avoid being suspected of being a supporter of CNRT.

116. When the Defense Counsel questioned him on what might happen if he did not shoot the victim, he replied: *“If I did not kill that person, maybe he, Joni Marques, could shoot me.”* Then came the following interview:

117. Defense Counselor: *“How was Joni Marques going to shoot you if you were holding his gun?”*

118. Paulo da Costa: *“If I did not shoot that person maybe Joni could shoot me.”*

119. Defense Counselor: *“When you had his gun in your hands, were you still afraid that Joni Marques would kill you?”*

120. Paulo da Costa: *“(…) If I did not shoot, maybe Joni could take the weapon. (…) Felisberto was also standing there at that time (…) but he did not threaten me”*.

Murders of clergy, Agus Muliawan and Izino Freitas Amaral and others

121. Paulo da Costa’s first statement on that charge came to the Court as follows, *verbatim*:

122. “At approximately on the morning of 25 September 1999, we went from Com in five vehicles. We were taking rice from Lautem. We took the rice and then, at 1:00 in the afternoon, I was tired and decided to take a rest. Not long after 1:00 PM, I had something to eat. At about 2:00 PM, Joni Marques came and called me. I responded: ‘Where are we going?’. He replied: ‘We’re going to get some rice from Lautem’. I said to him: ‘I am tired, so not this afternoon if we have to go there’. So I took the keys of the vehicle and started the engine. In the vehicle there were Joni Marques, João da Costa, one another person of Team Alfa (whose name I don’t know), also Horácio, and Amélio and Gonsalo. After that, we left heading for Lautem. Before we got to Dolog [*the Government-owned rice supplier warehouse*] in Lautem, we came across a truck. That truck had the name *Haulan Jaya*. The truck was under the control of Joni Marques, carrying Manuel da Costa. Joni Marques got out of my vehicle and stopped the other vehicle. Joni Marques ordered Manuel da Costa and his three members to get out of the truck. Manuel da Costa asked Joni Marques: ‘Where are you going?’. Joni Marques replied: ‘We’re going to get some rice at Dolog.’ Since we had to go to Dolog, we turned the vehicle. During the journey, Joni said to me: ‘Keep going! We’ll turn around up there!’ Before I turned the

vehicle around, we met two young men. They were pushing a cart. One of them jumped in the direction of the river; the other one ran up the hill. Not long after, Joni Marques ordered my colleagues to set up a roadblock. At the time, a white vehicle emerged. Before the vehicle stopped, Manuel da Costa and Joni Marques took the respective positions. Then Joni Marques called João da Costa. João da Costa was standing beside Joni Marques. Then the vehicle came. The driver waved his arms. Joni Marques fired a shot. The vehicle was shot. Not long after, a sister opened the door of the vehicle and took up a position near to the gutter. Not long after, Horácio opened the door of the vehicle and two males fell unto the ground. Horácio took up his sword and cut off their necks. Horácio killed two people. One of the persons ran and tried to escape. Then Joni Marques ran up to that person and shot him to death. After that, Joni Marques ordered my colleagues, including myself, to push the vehicle into the water. Not long after that, a female emerged from the vehicle still alive. She was yelling out: *'Do you know me or not?'* Joni Marques said: *'Where are you from?'* The female replied: *'I am pro-autonomy!'* After that, Joni Marques said: *'I'm FALINTIL; I'm not pro-autonomy!'*. And then he shot her in the head. Before the sister was killed, I said to him: *'She is a sister, don't kill her!'*. But Joni Marques replied: *'Kill them all; they're all CNRT!'*. Joni Marques ordered Horácio to grab the sister and pushed her into the river. When she ran into the river, Joni Marques shot her in the head. After the sister had died, Horácio came back to the young man tied up to the tree. Before he was killed, Horácio cut off his left ear. Then he was pushed into the water and Joni Marques shot him dead. Joni Marques took a grenade from Manuel da Costa; pulled out the pin and dropped it into the water. When the incident occurred in Lautem, I was in Com Harbor. Before we came to the scene of the crime we had no intent to kill any sisters. When Joni Marques ordered me, I was told we were going to buy rice in Lautem. What I know is that I had no intention to kill the victims. I pushed the vehicle into the river. Joni Marques forced me: *'If you don't push the vehicle, I will kill you all!'* My only intention was to get rice to distribute to the people of the villages."

- 123.** Questioned by the Prosecution, Paulo da Costa confirmed that he was driving the minibus with the intention to pick up rice. The rice was free (since it was provided by the Indonesian authorities) and was to feed the refugees at Com Harbor. He did not know the purpose or responsibilities of Team Alfa in collecting the rice. About the existence of weapons in the car during the journey, Paulo da Costa replied that he did not notice any. "I myself had no weapons at the time". About other purposes of Joni Marques in telling him to drive to Lautem to get rice, Paulo clarified that it was the first time Marques had asked him to do so. Marques had a gun, so Paulo felt forced to follow him. The alleged duress came with the order: *'Mr. Paulo, we have to go to get some rice in Lautem!'*. Paulo stated that he felt forced through these words, not through the weapon used by Joni Marques. Questioned again why he did not refuse the order, since four days before he had been in another journey with Joni Marques that resulted in the killing of two people, Paulo da Costa replied: "It was something I cannot tell you".
- 124.** After refusing to admit to being a Team Alfa member or assistant, Paulo da Costa explained that it was not his own wish to do that: "I was forced by Team Alfa". When he left Com, Paulo da Costa confirmed that Joni Marques and João da Costa were carrying guns. During the journey, they came across the truck that Manuel da Costa and other three Team Alfa members were in, all of them also carrying guns. They got off and joined the group in the minibus. Paulo da Costa did not remember the exact number of persons in the bus, but around 14 people. At least three of them were carrying guns: Joni Marques, Manuel da Costa and João da Costa. Concerning grenades, he said he could not see any inside the car. At that time when Manuel da Costa and his men joined the group, Paulo da Costa stated that he still believed they were going to collect rice. He challenged the statement given to the police about his intention: "At the time, if we didn't tell that to the police, there would be no chance to arrest Joni Marques". He also denied having said to the police that he had a picture of the nuns: "I didn't make any statement concerning an intention to kill clergy!".
- 125.** About the incident, Paulo da Costa once again stated that Joni Marques ordered him to stop the vehicle to catch two young men. He denied having captured one of them. After having his memory refreshed from the interview by the police, Paulo said that he had nothing to say in response to this matter. Horácio tied up the chased boy to a tree. Paulo da Costa did not admit to having assisted in building the roadblock: "On 25 September 1999, the only thing I did was to push the car into the river". Questioned about the purpose of the roadblock, he advised the Prosecutor to interview Joni Marques and ask him about his intention. Even after the roadblock was set up, Paulo stated that he still believed the purpose was to get rice.
- 126.** At this stage, Paulo da Costa refused to continue his cross-examination. To answer the questions "would not make the people alive again", he alleged. However, he agreed later that Joni Marques had ordered him. Therefore, he could not go back to Com before the incident was over as had been his previous intention. He continued to deny having poured gasoline over two of the victims. He rejected a previous statement given to the police as a result of a mis-translation.
- 127.** About pushing the car, Paulo da Costa stated that he did not check whether someone was still alive inside the vehicle or not.
- 128.** Questioned about his awareness of assisting Team Alfa during that incident, Paulo da Costa replied that he "was not surprised nor shocked" about what happened. "I was afraid; I am only scared of God!". He admitted having driven the same vehicle two days later "because I was ordered by Joni Marques again".

- 129.** To his counselor, Paulo da Costa described that his fear came from the fact that Joni Marques was carrying weapons. When they were pushing the car, Marques yelled: *'If you don't push the car, I'll finish you all!'*
- 130.** Once challenged by Joni Marques' legal counselor, Paulo da Costa refused to admit a previous statement given to the police. He clarified that the only person to chase the young men was Horácio. He, Paulo da Costa had only pushed the car.
- 131.** The Court also asked him for some clarification. Paulo da Costa added that they did not get any rice that day because they kept moving towards Com after the incident. As a driver, he could say that the regular capacity of a minibus is 12 passengers, but, that day, there were about 13 people. Yet, it was possible to load the car with rice, since some of the passengers could travel on the top of the vehicle.

2. Legal arguments

- 132.** The Defense on behalf of Paulo da Costa had a general background in common with the Defense of Alarico Fernandes, since the same counselor assisted both of them during the trial. This is the most meaningful passage:

"(...) We all know that during the Indonesian occupation in East Timor, the Timorese had no freedom of consciousness or expression and for making decisions. Beyond all the fatal consequences of that rule, the Timorese, in general, lacked access to schooling. Therefore, inside this courtroom, we are in front of people who have no intellectual background and learning. Thus, they had no ability to make a proper assessment about the eventual consequences of their mistakes.

Similarly, these people did not have the pre-requisites to afford a deep analysis or to say "no" upon receiving an order from people they considered more experienced and in relation to whom they had only one feeling – fear.

Consequently, in such context, a basic feeling of the need for survival arises and over-rides other human values that exist at a time of peace and ordinariness.

In this trial, it is very clear that the Indonesian forces took advantage of that lack of knowledge and that need to survive on the part of the Timorese people in order to force them to carry out their orders: namely, offences against their own people.

It has been very obvious throughout this trial that the Timorese were absolutely unaware about the acts perpetrated during 1999.

My clients became unknowingly involved in the facts of this case. They were forced since the ruling officials in East Timor exploited them at that time.

For the aforementioned reasons, it may be deduced that the major responsibility for all the crimes perpetrated lies with the Indonesian officials in charge of the administration, politics and military in this country. They were the decision-makers in respect of all the plans and strategies of the crimes perpetrated during the Indonesian rule with the aim of perpetuating their regime, regardless of the well-known fatal consequences."

The Defense of Amélio da Costa

1. Factual allegations

Murders of clergy, Agus Muliawan and Izino Freitas Amaral and others

- 133.** The accused Amélio da Costa pleaded not guilty to this charge. He never had any intent or desire to carry out any murder. For him, it is possible that Joni Marques had sought to include them and had formulated the plan previously. He himself did not understand the purpose of those murders. He stated he was an ordinary citizen who had no intention to kill brothers and sisters. He did not take part in the murder of the clergy. However, he admitted that he participated in the operation without knowing its real purpose:
- 134.** "I was with several of my colleagues and three members of Team Alfa. We were heading to Lautem with the intent of getting rice. When we approached the building in Lautem, we came across a truck. The truck was carrying rice. Then Joni Marques stopped the vehicle, and called out to Manuel da Costa and his 3 members. After the former got out with his three members, Manuel asked where they would be going. Joni Marques answered: *'We are going to get rice from Dolog'* (a rice supplier body of the Government). Then we headed off in the vehicle. Before we arrived at Dolog, the vehicle stopped. Joni Marques told Paulo to keep on going, to continue. After a moment, we met two

young men who were pushing a cart. The vehicle stopped and the two young men fled. One of them jumped into the river. The other one ran across the hill. The person who jumped into the river was able to escape. The one who ran up the hill was captured by Horácio, who tied him up to a small tree. After that, Joni Marques ordered a road block to be set up. Afterwards, Horácio, Manuel da Costa and João da Costa took up their positions. Then Joni Marques took up his position 5 meters behind them. Not longer after, a vehicle emerged which was driven by a member of the clergy. Joni Marques fired a shot. I was not sure whether it hit its target. Next, Paulo and João opened fire. After the firing stopped, Joni Marques asked us to approach the car. As we were approaching the car, a sister went out the vehicle. She took a position of sitting above a gutter. Then Horácio opened one of the back doors of the vehicle. He took some petrol and threw it to the vehicle. One of the victims ran out of the car. He ran away and jumped into the river. Horácio stabbed one of the victims in the car on the left side in the vicinity of the ribs. João *Lemorai* shot three times at the victim who ran to the river. I did not know whether the shots hit the victim or not. But I heard the sound of the three shots. After that, Joni Marques ordered us to push the car into the river. Once the vehicle was pushed, a woman was screaming in the river. She enquired: ‘*Who are you and why did you fire on us? We are also pro autonomy!*’”. Joni Marques replied: ‘*We are members of a FALINTIL unit*’. Then he fired a shot in the direction of that female. She was subsequently silent and no sound was heard. Then Joni Marques ordered Horácio to go to the sister kneeling on the gutter. Horácio grabbed the arms of the nun. Joni said: ‘*We have to kill, we have to finish off all these people!*’. Then Horácio took a ring off the sister's finger and pushed her into the river. Joni Marques fired a shot in her direction. I am not sure about how many shots, but I think it was 2 or 3 shots. After that Joni Marques ordered Horácio to go to the young man tied up to the tree. At that time, I was standing with several of my colleagues behind Joni Marques. My colleagues were Gonsalo do Santos, Hilário da Silva, Octavio da Silva and João (the latter is not present here at the moment). Horácio brought the young man whose ear he had already cut off. Before that person was pushed into the river, Horácio slashed his neck. However, the victim was still alive; thus Joni Marques fired two shots in the direction of the victim. After that, Joni asked for a grenade from Manuel and threw it into the river towards the victim. After that, we went back to Com in the car driven by Paulo da Costa. Half way back Joni warned: ‘*You are not allowed to tell anybody about this. If you do, I will kill your families!*’. We continued our journey to Com Harbor.”

- 135.** Amélio da Costa also emphasized that he was not a member of Team Alfa, but a member of *PAM Swakarsa*, a group whose purpose was to give protection to the voters. The aim was not particularly to shelter pro autonomy voters, but for voters in the popular consultation as a whole. The aim was to make sure that villagers could anticipate any conflict between pro-autonomy and pro-independence groups. Every village had 30 youth members.

2. Legal arguments

- 136.** The Public Defender Márcia Sarmiento submitted the following arguments on behalf of her client, reading out previous remarks produced by her colleague counselor Cancio Xavier. Since the content is entirely grounded on the evidence, the content will properly quoted under the heading *The Defense Case*.

The Defense of Hilário da Silva

1. Factual allegations

Murders of clergy, Agus Muliawan and Izino Freitas Amaral and others

- 137.** The Defendant Hilário da Silva told the Court he is just an ordinary citizen. Relating to the murder of the clergy, he said that, while at Com Harbor, all the people said that they had to go to Lautem with Team Alfa to get food.
- 138.** "So I went with other people in 5 vehicles to get rice. On the way back, we came across the vehicle in which Paulo was as well as Joni. It was a big vehicle with writing on it. When we met the other vehicle, two other people and me got out. We were told to go back to warehouse. At the time I was on the top of the vehicle. We passed the warehouse and headed to the scene of the crime. We did not know where we were going. Manuel told us to go. When we arrived there, two young men were pushing a cart. Team Alfa told them not to run away. I mean *Team Alfa* as 7 people in the car, from which I knew two of them: Joni and Manuel. One of the two young people ran to the river. João Lemorai told him not to run and fired a shot. The other young man ran in the other direction and was shot by Horácio. After that, Joni Marques and Manuel tied him up to the tree.
- 139.** “It was all members of Team Alfa who set up the roadblock. They were ready and waiting for the vehicle. Not long after, we could hear the sound of the vehicle and the civilians running away. Three of us ran away about 100 meters. They started firing and some of the persons in the car were shot dead. They kept firing and a sister opened the door of the car. She went to sit on the edge of the gutter. The person who remained inside the car was pulled to the

ground and petrol was poured on him or her. They were burnt and one of them ran in the direction of the river and jump into the water. The journalists were up the hill. Horácio ran out and caught them on the back. The car was pushed into the water and a female emerged from the car. Joni shot the person in the head and she died in the water.

140. “There was an order to grab the sister who was kneeling by the gutter. Horácio grabbed the sister, took her ring off and pushed her into the water. Then Joni shot her dead. There was still the other young man. Horácio brought him to the water. Then Joni Marques threw a grenade into the water. After that, Paulo went to the vehicle and Lemorai said to me: *‘If you tell that to any of your friends I will kill you!’*. Manuel was really angry and retorted to Joni Marques saying: *‘God belongs to all of us. Why kill the sisters?’*. The three members of Team Alfa went into the vehicle (Manuel should know them, I do not know them), and we ourselves got into the vehicle and went back to the warehouse”.
141. When questioned by the Prosecutor, Hilário da Silva reiterated that he was not a Team Alfa member. He did not even know in 1999 what Team Alfa meant or which men from his village belonged to the militia group. He only knew some people in his village belonging to BTT. But the accused later agreed to point out who among the other Defendants were Team Alfa members. He pointed out Gilberto da Costa and Joni Marques as Team Alfa members. Gonsalo dos Santos belonged to BTT. Other Team Alfa members were Mario, Carlito, Alexia, Carolino, Sérgio, Júlio, José and another person also named Júlio.
142. Hilário da Silva “did not know either what CNRT meant or whether or not CNRT and pro-autonomy groups were different things”. For him, “whether or not people were autonomy or CNRT, they kept it for them in their hearts. I didn’t know whether Indonesian military supported CNRT or the autonomy group”.
143. But Hilário da Silva acknowledged that he saw at 745 Base CNRT members being arrested.
144. After being at 745 Base, Hilário went to Com. At Com, he stayed with the members of the community. “In Com there were so many people that I could not count them. Joni Marques and Gilberto from my village were at Com. But I don’t know if Team Alfa members gathered at any particular place. I had no food at Com. We were going to have food at Kupang. Therefore I went to get rice out of Com on 25 September 1999.”
145. Hilário described once again some of the events of 25 September:
146. “Our job was to put the rice inside the car. I stayed at the warehouse. I remember that we met a nun at the warehouse”.
147. The accused did not acknowledge the two statements he gave to CivPol on 16 April 2000 in which he said he “met the clergy at the warehouse and that the priests were coming to Lautem”. Hilário da Silva explained:
148. “At the time, the interpreter at the police station was using Indonesian language, so I could not understand. Both those statements were conducted in Indonesian. I really do not understand Indonesian very well. I speak Fata-Luko dialect. At the warehouse, I didn’t see Joni Marques speaking to Manuel da Costa, since Joni was not there. We met Joni near the warehouse. At the time Manuel told us that the sisters had taken pictures of all of us. He said that also to his men. I don’t know why I said to the investigator that Manuel indeed was the one who told Joni Marques about that fact.”
149. “On the truck full of rice and people I knew Manuel, Alves and the driver. I did not count how many of them had guns, but there were a lot. Maybe twenty or more civilians or villagers were on the truck, but they had no guns. I knew the red minibus that I saw in the opposite direction when I was on the truck from Com to Lautem. Joni Marques came in that minibus. Everyone had an Indonesian flag; the minibus had one on it. The people on the truck and in the minibus, including myself, also had a pro-autonomy banner. (...) In the minibus I knew the brothers Paulo and Amélio. My truck stopped when the minibus approached. I was not the driver, so I don’t know the reason, but for sure Joni ordered the truck to stop. I didn’t hear the words he said. (...) I don’t know how many people were in the car, since my job was not to count them. (...) Joni Marques ordered Manuel to get in the minibus. I was one of the civilians on the truck. It was Manuel, not Joni, who ordered us to get off. (...) When I left, many people also got off the truck. When I went into the minibus I saw seven Team Alfa people, including two of them from my village of Leuro. (...) Some of them were on the top; others inside the minibus. I don’t know the number, but for sure there were seven civilians. Therefore, there were 13 persons in the car.”
150. On the way to the crime scene, the accused continued:
151. “...All of Team Alfa had a gun. The only place to get rice was at and beside the warehouse. The minibus did not stop at the warehouse. I did not know where they were going anymore. I didn’t hear where the minibus where going to since the intention was to get rice. (...) We continued until the place where the nuns were killed about 2 km from the warehouse. At the place, we saw two young men pushing a cart. Joni ordered them to stop. I could hear that because I was on the top. A Team Alfa member fired a shot. One of the two young men jumped into the water. Horácio and Paulo chased the boy. I don’t know if Lemorai also chased the young men.”
152. The accused admitted that Team Alfa members made the roadblock. “They called the civilians, including myself, to help to make the roadblock. I placed a piece of wood but I did not know the purpose. We knew that Team

Alfa was to kill FALINTIL. Some people were killed in the jungle. It was not in my mind that Team Alfa, by setting up that roadblock, was intending to kill FALINTIL members.” (...)

- 153.** “After the roadblock was made, three men took position to shoot. The sound of a vehicle was heard. We still did not know which vehicle was coming. (...) I was about 100 meters away and could see the vehicle when the shootings started. I was on top, hiding behind the bushes down road of Baucau. I could see as well when the vehicle stopped. I was looking down from the top, on the side of the road. I could see the vehicle being shot. After the shots, Joni Marques said to all of us: *‘Mother fuckers, come here and push the car!’*. So we went across the road to push the car. It could be about two or three minutes from the time of the shootings until Joni Marques gave that order. I estimate that because I had no watch. I could not run away in the meantime, since I have a wife and kids. (...) I saw two bodies inside the car. It was a big car, so everyone had to push it, including myself. The driver of the sisters was dead. (...) The vehicle was pointing to the river and therefore it was pushed sideways. Nobody had to turn it in the direction of the river. I didn’t see anybody steering it. As I said, the driver was already dead and the car was very close to the river”.
- 154.** Hilário da Silva refused to agree that he had gone again with Team Alfa members two days after that incident. “I never went with them any longer. I don’t know if I was on the minibus on the ambush day. I don’t recognise the statement I gave before Civpol about that. I was not asked about that before the police”.
- 155.** During his cross-examination, Hilário da Silva stated:
- 156.** “When the group approached the river, the two young men that they had seen before ran. One went up to the hill and the other jumped into the river. I could hear Manuel saying to the boys: *‘Don’t run or I’ll shoot you!’*. One of Manuel’s men fired a shot in the air. Horácio and Paulo chased the boy who escaped to the river. João da Costa told the boy to go straight home; he didn’t fire at the kid.”
- 157.** Unlike what Hilário da Silva had stated one week before to the Court, he claimed that João da Costa didn’t cry out to the boy *‘Don’t run away or I’ll shoot you!’*. It was other Team Alfa member who did it. Immediately, Hilário da Silva rephrased:
- 158.** “João da Costa said that, but he didn’t fire a shot. He said: *‘If you run, I’ll fire. Don’t run away!’*. The person stayed in the river. Then he said: *‘Go home!’*. One of Team Alfa members fired a shot in the direction of the other, saying *‘Don’t run or I’ll shoot you!’*. He didn’t fire his weapon; but then Lemorai said: *‘Ok! Get out, go home!’* (...) What I said was that Lemorai didn’t shoot him; he only made a threat. The other Team Alfa fired a shot in the air. João da Costa didn’t kill that person; that’s what I meant. (...) The civilians who helped João da Costa in building the roadblock were Paulo da Costa, Amélio da Costa, João Soares, Octavio da Costa, Gonsalo dos Santos, and myself. It was João da Costa, not Joni Marques, who threatened us by saying: *‘Follow me or I’ll kill you!’* (...) The one person who I knew and who was ambushed on September 25 was Agus. He had children; he was with the nuns. (...) When I went to Los Palos, Sister Erminia asked me about the whereabouts of Joni Marques. Then I was detained until they arrested Joni Marques. (...) I knew the nuns from the church. I didn’t know the nuns were on the way on that day. We would not wait to kill the nuns; the nuns were not the enemies. We were ordered by Team Alfa to set up the roadblock. Among those members I can give the names Joni Marques, Manuel da Costa and João da Costa. (...) They got the rocks; they put the rocks on the road. I didn’t hear anything. It was the first time I was at their company. Manuel da Costa yelled that the car was approaching 100 meters away. (...) I could hear when Manuel da Costa said that he had some string to tie the young man. I could hear that because I was on the top of the vehicle. I got off and I was standing near them. I dropped off and heard the dialogue about the string. He took the shoelaces from his pockets. [When Team Alfa arrived at the place] I was about 100 meters away and I could hear what had been discussed between the 3 people on the road. (...) The vehicle stopped. The door opened and Team Alfa members got out. The shot came after they got off the vehicle. I was about 30 meters from João da Costa at the time he chased the boy. I could hear no argument involving João da Costa when he returned.”
- 159.** Finally questioned by the Court, Hilário da Silva summarized:
- 160.** “Team Alfa members were not capable of killing civilians before. What happened on 25 September was the first time I had seen it. I had never seen anything like that before. I returned to Com Harbor. I was shocked. It was the first time anybody was shooting in front of me. I could not erase the fact from my memory. I was told not to tell anybody, but I am still able to remember. I reported that to INTERFET when I came back to my village and when INTERFET got to Los Palos. (...) On 27 September, when I went out again with Team Alfa members, it was a different group of Team Alfa; not those in the killings. There was a need for food; we went to Lautem to get some rice; so we went with a group of civilians. We were ambushed. On 27 September, like on 25 September, our destination was to get rice. On 25 September, we got no rice because of the killing of the sisters. People were starving, so on 27 September, a different Team Alfa group with some innocent civilian, like me, were attacked. On 25 September, we went to the warehouse, but there was no rice. On the 27th, somebody said: *‘Come on, let’s get some rice!’*. The killing of the nuns was still a top-secret matter. I was afraid of Joni Marques and I kept secret. (...) When we arrived, everyone had died. We were caught by INTERFET. INTERFET asked: *‘Who shot you?’*. I replied: *‘I don’t know’*. We were arrested by INTERFET. I received medication. On the 28th, I took a ship to Dili. Octavio had died. (...) [About the woman I knew that died in the attack against the nuns] I can state that I know her family. (...)

We were ambushed on September 27. The 12 civilians that were ambushed on that day were: Felisberto Sávio, Paulo da Costa, Amélio da costa, Gonsalo, Alarico, João Soares, Octavio, Livio, Lourenco, Horácio, Victor and myself. Livio and Lourenco didn't participate in the events of 25th September. Paulo da Costa was driving on both those dates. (...) There were about five Team Alfa members carrying weapons, as well as Felisberto. There were six weapons carried by Felisberto Sávio, José Valente, Rui, João, Salvador and Júlio”.

161. Asked about the responsibility for the ambush on September 27, Hilário da Silva declared:

162. “It was Mautersa who fired the shots; he shot the civilians. He was outside the car, shooting the car. He had run off to the jungle and he came back to ambush us. I saw Mautersa. When we came back to Los Palos, Mautersa Monis said: *‘Who killed the nuns? I feel that innocent people were killed!’*. He said that three members had run off to the jungle. (...) I went twice to get rice – on 25 and 27 September. We didn't have any food. (...) I didn't kill anybody. I am a civilian. Human beings need food to live. I was prepared to get some food. I would die for food. One person cannot survive without food; rice was to sustain my life. If I didn't go, I'd be dead now.”

2. Legal arguments

163. The Defense on behalf of Hilário da Silva addressed straightly the evidence produced during the trial. Thereby, its content will properly come under the heading *The Defense case*.

The Defense of Gonsalo dos Santos

1. Factual allegations

Forcible transfer or deportation of civilian population and persecution

164. Gonsalo dos Santos initially talked about his particulars. He was born in the village of Leuro. He also stated that he was just an ordinary citizen; not a Team Alfa member. He said that all the questions related to Team Alfa activities should be addressed to the Defendant Joni Marques. The only Team Alfa members he could recognize were Joni Marques and Felisberto Sávio.

165. After consulting his counselor for five minutes, Gonsalo dos Santos refused to report about Team Alfa activities. He said that he had no idea whether Team Alfa was a violent group or not. “I am not and have never been a Team Alfa member, so I don't know anything about Team Alfa”.

166. About the withdrawal of the people from Leuro, Gonsalo dos Santos stated that the villagers decided to go to Kupang, since the whole population was pro-autonomy oriented. In September 1999, villagers were led to 745 Base in Los Palos. “I also escaped. I went to save my life”, he emphasized. “I went there because of the threats made by Joni Marques and Felisberto Sávio”. Gonsalo refused to go ahead in his statement and reply about the manner in which such threats were made against him. Furthermore, he refused to be cross-examined by his counselor and other representatives. However, after some questions raised by the Prosecution, he agreed to continue his statement.

167. Gonsalo dos Santos reported that he traveled in a rubbish truck driven by an unknown person whose commander was an Indonesian soldier. In the truck were Felisberto Sávio and his many Team Alfa members. “He threatened us to go with the refugees by saying: *‘If you refuse to follow us, I'll tie your hands and hand you all over to TNI or CNRT!’*.”

168. Gonsalo dos Santos avoided answering questions about burning houses. “I don't know because I was not involved and I spent two nights on guard. When I came back to my village, I picked up my family and went to the 745 post. I don't remember the day because I am an illiterate person and we all were very tense at the time”.

169. Asked about some villagers who were attacked in Leuro, Gonsalo dos Santos could remember Antonio Soriano, the head of the village at the time. However, he did not know about José da Costa Nunes whose house was burnt during the attack (“I don't know him and I didn't know whether his house was burnt and I was not there when such incident took place. I was not involved in any single act for burning the villagers' houses”). About the Team Alfa member Carolino Portela, Gonsalo could remember him at the time he was at the 745 Base, but could not say if this militiaman was participating in the attacks on that day, not even if he was carrying a gun or not. “It was a very tense day. I could not notice anything”, he claimed.

170. The co-defendant Paulo da Costa was known by Gonsalo dos Santos because “both were at the refugees camp at the same time in the 745 Base in Los Palos”. He denied having have traveled with Paulo da Costa in the red minibus. However, he clarified later: “I only traveled in this car with Paulo on the day I went to 745 Base. On 11 September 1999, we went together because Joni Marques, Paulo da Costa and Amélio da Costa forced us to leave our villages. I did not participate in any operation to force the people to go to Com. Instead of that, I was forced by Joni Marques and his other Team Alfa members to go to Kupang. I was a part of the community. I had to leave my village

with my wife and my children". Gonsalo dos Santos stated that Joni Marques and Felis berto Sávio used to threaten the villagers by saying: *'If the autonomy wins, the Indonesian flag will stay; but if we get defeated, there will be a blood bath!'*.

171. Questioned by Joni Marques' legal counsel about the alleged threat, Gonsalo dos Santos stated: "If I didn't follow his orders, my hands would be tied and I would be handed over either to CNRT or TNI". He denied being a clandestine member of the pro-independence group. Once again, he rejected the charge of having participated on 11 September 1999 in the attacks against Leuro, Foema and Omokano.

Murder of Alexio Oliveira

172. Gonsalo dos Santos declined to address the Court on this matter since he rejected the charge and pleaded not guilty to the murder of Alexio Oliveira.

Murders of clergy, Agus Muliawan and Izino Freitas Amaral and others

173. These were the Gonsalo dos Santos' initial words:

174. "I don't agree with this. I am not guilty because I am not a member of Team Alfa. I was ordered. On 25 September 1999, Joni Marques ordered us in the afternoon (I cannot remember the precise hour as I had no watch at the time). Joni Marques came before my colleagues and myself and called me: *'Come on with me to get rice from Lautem'*. When we were halfway from Com to Lautem, we came across the truck. He ordered all to stop the vehicle. Then he called on Manuel da Costa and his three members with two civilians. Then Manuel da Costa asked Joni Marques: *'Where are you going?'*. Joni Marques stated: *'You, Manuel and your three members have to come with me to escort rice from Lautem!'*. Paulo da Costa drove the vehicle we were in to Lautem. When we got there, we didn't park there. Joni Marques ordered Paulo to continue our journey towards a bridge. There were two young people pushing a cart from the sub-village of Fahulo, taking rice to Lautem. Joni Marques said to Paulo da Costa: *'Stop the vehicle and immediately capture those two children!'*. So we stopped. One of those two children jumped into the river. The other one ran off in the direction of Lautem up to the hill. Then Horácio José pursued and captured that person. About the other guy who jumped into the water, Joni Marques threw something at him. It was not just me, but all of my colleagues who joined in and threw something. That child was able to escape. The Team Alfa members were not able to capture him. The other child was tied up by Horácio José. I don't know where he got the string from. Then Joni Marques ordered all of us to block the main road. Then he gave an order to João da Costa to kill the other kid who was next to the river. Then João da Costa let the kid go. When he came back, Joni Marques asked João da Costa *alias* Lemorai: *'Have you killed that kid?'*. João da Costa answered: *'I've killed him!'*. Joni Marques then asked: *'You said that you killed him, but I didn't hear the sound of your weapon...'*. João da Costa said: *'I killed him with my sword'*. Then Joni Marques ordered that all of the men there (it meant all of us) to hide. All of us hid somewhere above. Amélio and myself were behind Joni Marques; 5 meters behind Joni Marques. Then, they took up their positions behind a small wall. Suddenly the vehicle emerged. Then they opened fire, but I didn't see who fired the shots. Horácio took out his sword. The firing stopped. Then Horácio José stabbed a nun who was still alive inside the vehicle. Then he ran to the backside and opened the back door. Two men got out on the road. At the same time, a sister was descending from the vehicle. The sister sat on the top of a gutter. She had a rosary in her hands. Then, when she was there praying with the rosary in her hands, Horácio poured petrol over the two men whom I mentioned before and burned them. One of them ran left. Then Horácio took out his sword and chopped the person who had ran in the vicinity of the ribs. Then Joni Marques shot the person who was still lying in front of him. That person jumped to the water. João da Costa also shot at him. I don't know exactly how many shots he fired exactly. After that, Joni Marques ordered all of us there. He said: *'Come on! Push the vehicle into the river!'*. Then we pushed the vehicle. A woman who was still alive emerged from the vehicle. She yelled out: *'Who are you? Who attacked us? I am also pro-autonomy!'*. Joni Marques responded: *'I am a FALINTIL supporter!'*. Then he fired his bullets at the woman. I didn't see which part of her was hit. After that, he ordered Horácio José to get the sister who was on the top of the gutter. Horácio José pulled the arm of the sister. Horácio took the ring off the sister's finger as well as the rosary. Then he stabbed her in the vicinity of the ribs. Then the sister fell into the river. Joni Marques fired from behind. Then Joni Marques ordered Horácio to go and get the boy that he had caught previously. When Horácio José brought him back, his left ear was cut off. He was told to walk on a water dike. Then he, Horácio, cut the boy's neck from behind. After that, there was a body in the gutter. Horácio grabbed the legs of the body and dragged it into the water. Joni Marques took the grenade off Manuel da Costa. When he took out the grenade from Manuel da Costa's clothes, Manuel da Costa, grabbing Joni Marques' hand, said: *'These people are all dead! That's enough, that people are all dead. So we don't need to shoot a grenade!'*. Joni Marques said: *'If you are a supporter of these people, I'll smash your legs!'*. Manuel da Costa let go of Joni Marques' hands. He took the grenade and threw it into the water. Then Joni Marques ordered Paulo da Costa. Paulo got the vehicle. Then we went back to Com. When we were on the middle of going back, the vehicle had some engine difficulties and broke down in the middle of the road. Joni Marques said to us: *'In relation to what we have just done, all of you are ordered to come with me. When we get back to Com Harbor, not one of you is allowed to reveal the secret. If you tell somebody, I'll kill your wives and children and you'll have the consequences!'*"

175. Gonsalo dos Santos emphasized to the Court:
176. “I am not guilty. I had no intention, no plan to block and to kill the sisters. Every day Joni Marques gave order to young men to go in that vehicle and get rice from Lautem. I went there to distribute food to the people staying at Com Harbor. My mistake was to throw some stones at the kid we were talking about. I threw stone at him. I had no intention to kill anybody.
177. Questioned by the Prosecution, Gonsalo dos Santos declared himself as a refugee at Com Harbor when Team Alfa gathered the villagers that were supposed to go Kupang. At the time, the food in Com was obtained from a warehouse since TNI had left East Timor. TNI was split in two groups at the time: BTT (*Battalion Territorialis Tentara*) and TNI. TNI was in charge in Com Harbor. About 22 September 1999, Team Alfa left all the people at Com starving, so the refugees had to organize vehicles to get rice in Lautem. On or about 25 September 1999, Joni Marques gathered the group to collect rice at the warehouse in Lautem. He ordered young men at Com, including Gonsalo dos Santos. “I had gone once before 25 September to Lautem to get rice, in the company of Joni Marques and Felisberto Sávio. On those opportunities, the men of Joni Marques or Team Alfa members escorted us. On my second journey to Lautem on 25 September, when I arrived at Com, Joni Marques said to me: ‘*Come with me, we’ll be making a trip to get rice*’. I traveled on top of a red minibus labeled with the name *Cruzeiro*. Also with me were my colleagues Amélio da Costa and Octavio da Costa. Three members of Team Alfa had guns: Joni Marques, Manuel da Costa and João da Costa. A third member named Horácio José *alias* Rimoco had a sword. Paulo da Costa was the driver. There were three SKS rifles: one with Joni Marques, the other with João da Costa and the third carried by other member of Team Alfa whose identity I don’t know.”
178. Immediately, Gonsalo dos Santos remarked that it was not the second time he had traveled on that minibus to collect rice. “For sure, September 25 was the first time I made a journey with Joni Marques, but it was the third time I was traveling on the minibus *Cruzeiro* for the same purpose. The first time I went to take my family from the village to take them to Com. The second time was to get rice in the warehouse in Lautem. The third occasion was on 25 September 1999. During that later journey, we were all wearing red bands on our head. Everybody was, except Joni Marques. The unstable conditions in East Timor required us to wear the red bands. If we didn’t wear them, we could be labeled as CNRT members or supporters. Pro-autonomy supporters could kill us. I never saw anyone being killed for not wearing red bands. On the road Com – Lautem, Joni Marques told Paulo da Costa to stop the minibus. There was a truck that Manuel da Costa was travelling in from the warehouse in Lautem to Com Harbor. We met in a place named Lerrialfa. Joni Marques talked to them very briefly. After that, Manuel da Costa and his three men and two civilians got off the truck and came onto the minibus. I don’t know the armed men’s names, but there were also two civilians – Hilário da Silva and João Soares. After that, I don’t know what they said in the vehicle because I was on the top. Joni Marques ordered Manuel da Costa to get off the truck: ‘*You, Manuel da Costa and your three members have to come with me to Lautem!*’. He pointed his finger to Manuel da Costa and told him: ‘*You, Manuel, provide the escort to get rice in Lautem!*’. I don’t know about any order given to those two civilians, but for them it would be no sacrifice, since they wanted some rice for themselves. I don’t know whether the two civilians were going back home or they would be given some rice in the vehicle or not, because I was traveling in a different vehicle. For sure it would not be any sacrifice for them, since we were all from Com Harbor and we had to provide rice for our families and the food would be sufficient for two weeks only. Personally, I felt that the command was to go and get rice from Lautem, exactly what we were going to do. About the armed men in the truck, there were many people at the time that could provide escort. I could not recognize them as Team Alfa members. I could not see whether there were any other armed men remaining in the truck after Manuel da Costa and his three men with guns joined us in the minibus. I was still in the belief that we were going to get rice, even after the four armed men joined to make the journey. Joni Marques was in charge; he was the commander, the one who knew the purpose. I was an ordinary civilian; I could not know anything. Then we arrived at Lautem warehouse. The driver was Paulo da Costa. He just stopped for 5 seconds and continued the journey. Inside the vehicle, they were speaking quite loudly. From the top, I could hear Joni Marques speaking loudly to Paulo da Costa: ‘*Continue!*’. The vehicle stopped for only 5 seconds. But I didn’t hear him saying where to go. When we saw the two young men pushing the cart, Joni Marques ordered Paulo da Costa to stop the vehicle. He yelled out: ‘*Stop the vehicle and catch them! Grab the two young guys*’. I heard a shot but I don’t know who fired. One of those young men jumped into the water and the other went up to the hills towards the rice warehouse. I saw Horácio José *Rimoco* chasing the guy who went up the hills. He took the young boy and tied him up to a tree. I want to correct what I said before the police about Amélio da Costa. He, Amélio, didn’t chase the guy who went in the direction of the river. The interpreter was incorrect. I didn’t say that to the police about Amélio. About the boy who went into the river, Joni Marques raised his gun to shoot him, but he didn’t fire. I don’t know why Joni Marques didn’t fire at him. I was ordered by Joni Marques to throw stones at the boy from a distance I estimate at about 60 meters. The boy was lucky as Joni Marques didn’t fire and I only threw stones. If I had not thrown stones, Manuel da Costa could have fired at him. I didn’t see whether my other friends also threw stones at that boy. That is why I want to correct. I said last week in my initial statements and to the CivPol about the roadblock being setting up. The translation was inaccurate. Joni Marques gave the order to set up the blockade”.
179. Few minutes later, Gonsalo dos Santos admitted that he was not the one who threw stones at the kid. “I confess: I was not the one who threw the stones. But I don’t want to mention anybody’s name. I threw stones because, at first, the boy was sitting on the other side of the river. I estimated the distance. Joni Marques ordered four people

from Team Alfa to take their positions. When they went to take their positions, the child ran off. I threw stones at him because he would be killed by gunshots, so he could escape. There was no tree around the river; it was dry season”.

180. Asked about his ability to stop Joni Marques’ plan, Gonsalo dos Santos replied by questioning the Prosecutor: “How could I tell him not to fire at the boy? Joni Marques had his own members. It was impossible to persuade him!” But I confirm that I said to CivPol: it is true that I heard some of my colleagues telling Joni Marques not to shoot because the boy had no weapon. I heard those words, but I’ve forgotten who said that.”

181. About the roadblock, Gonsalo dos Santos said that Joni Marques ordered his men to take their positions: two in the direction of Lautem, and two facing Dili. Every single person had to build the roadblock. This included João da Costa and Manuel da Costa. I had no idea what the roadblock was for. For 28 years there had been a war in East Timor and I never participated at any undesirable act. I was ordered, but I did not know the purpose. I don’t know what were the “undesirable events”. I just wanted to collect rice, but I was ordered to set up a roadblock! I didn’t think about what I was doing when setting up the roadblock. I was still unaware about Joni Marques’ intentions. Then Joni Marques ordered Manuel da Costa and all the young men to take their positions on the road. I was behind them with Amélio da Costa. At that moment, I didn’t think about what was going to happen and about their intention. I didn’t hear Joni Marques’ plan. I didn’t think about who we were waiting for. They took up their positions and pointed the guns. I didn’t know who was coming and who was going to be attacked. After the shooting had stopped at the vehicle, the men moved forward to where the vehicle was. Manuel da Costa said that it was myself with Amélio da Costa who came to where the car was, but in fact it was Horácio José who poured petrol over the two people who came out from the car. The car did not have petrol poured on it. The car was not burned. Horácio burned two people. I deny having said to the CivPol in October 2000 that I saw Paulo da Costa also burning the vehicle and pouring petrol over the people. The person who recorded my interview at the police made a mistake. The person who poured petrol was Horácio. That’s what I said to CivPol. I saw Paulo da Costa opening the door in the place where the nuns were sitting together. There was only a can of petrol. Horácio was carrying petrol and pouring it on the people. Paulo da Costa opened the door and the nuns got out. As he opened the door, the sisters got out of the car. At the time, I was standing behind Joni Marques. In relation to the roadblock, there were three people close to the barrier: Joni Marques, João da Costa and Manuel da Costa. I was standing behind them. After the people in the car had been killed, Joni Marques ordered: ‘*You mother fuckers, push this car into the river!*’. So I helped to push the car with four Team Alfa members and Joni Marques himself. The vehicle was not pushed straight into the river. It was pushed into the river bank first, since it was still on the road. It was not necessary for someone to steer the vehicle. The driver was already dead, so we just pushed it. Nobody else steered the vehicle. When CivPol questioned me about who was driving the vehicle we were traveling in, I said Paulo da Costa was; not the vehicle of the nuns. If Paulo da Costa were steering the vehicle of the nuns, he would be dead now. The vehicle was pushed to the river from the cliff at its right side first. I saw it rolling down the bank of the river. The car was in the direction of the the river. I pushed not because I wanted to, but because Joni Marques ordered me. Any order of Joni Marques could not be refused. Whoever refused would be dead. I never saw anyone refusing such orders and being dead. At the time people were more tense and violent. How could I refuse? I am only an ordinary citizen! Inside the vehicle there was still a female alive. She emerged from the vehicle in the water. She yelled out: ‘*Who are you attacking us? I am pro-autonomy also?*’ Joni Marques replied: ‘*I am not a pro-autonomy, I am FALINTIL!*’. After the vehicle had been pushed into the water, Joni Marques threw a grenade. Before throwing the grenade into the water, he ordered Horácio *Rinoco* to go and get the nun who was sitting by the gutter. Horácio took a ring off her finger and the rosary hanging from her hands; then he chopped her in the vicinity of her ribs. Joni Marques fired two shots from behind. After that, Joni Marques took the grenade from Manuel da Costa and threw it into the river. Finally, he ordered Paulo da Costa to get the minibus and we went back to Com”.

182. About his own intentions, Gonsalo dos Santos excused himself:

183. “I said that my mistake was to chase that kid who jumped into the river. That is true. The young child didn’t die. The person at whom we threw the rocks didn’t die. If a person had died, then the Prosecutor could say that I did make a mistake, but I saved that person’s life. I don’t think I made a mistake by building the roadblock because the young guy survived. There was not a deliberate act. It was under the command of Joni Marques.

184. After relating the events that occurred on 25 September 1999, Gonsalo dos Santos reported:

185. “Two days later, we went again to get rice in the same minibus. Among the people that were with me on 25 September, I remember that Horácio José, Paulo da Costa, Hilário da Silva and Amélio da Costa also made that journey”.

186. Questioned about the other passengers on that last journey, Gonsalo dos Santos asked leave for the Court to submit a request about the events of 27 September:

187. “The Prosecution wants to talk about those events, but I have an objection. I was a victim; I was shot; I was wounded, but I am still alive! I didn’t know who attacked us, not a single person’s name. So, the Prosecutor has to be careful when he raises such happenings. I was shot on the 27th. On 28 September, INTERFET took me from Com Harbor to Dili for medical cares. On 12 October, I was taken to the mission where the nuns were. Until then, I had no

reports about the facts on the 25th, but I heard nuns saying that it was a FALINTIL attack. They said that I was among *'the ones who attacked the nuns and those who were later attacked by FALINTIL (...)'*."

188. After this statement, Gonsalo dos Santos challenged the Court:

189. "If the United Nations is really neutral, it should also acknowledge that there were groups fighting each other in East Timor. Whoever the people were who committed the acts against us on 27 September, they will have to be investigated and also prosecuted".

190. After being advised by the Presiding Judge about the duties of the Prosecution Service and the jurisdiction of the Special Panel, Gonsalo dos Santos continued his statement about the facts that occurred on 27 September 1999:

191. "I had the intention to get rice from the warehouse in Lautem. On 25 September, we didn't have any rice. At the command of the former head of the village Felisberto Sávio, every young man who wanted some rice had to join him. He ordered: *'Come with me to get rice in Lautem warehouse!'*. Then came the attack on the road. It happened all suddenly."

192. To his counselor's question, Gonsalo dos Santos replied:

193. "I would have felt guilty if it was my own desire and intent to block the road. But this was the command of Joni Marques. By participating in such building, I could not know about the purposes or intentions of Joni Marques. I am only an ordinary civilian. I never heard such purposes. All I knew was that the purpose and the intention was to get rice. I never heard Joni Marques telling other men about his intention to ambush a car with nuns and brothers. He was quite some distance away from me that time. When we arrived at the scene of the crime, only Joni Marques was there. Then he ordered all of us together to set up the roadblock. He only ordered the roadblock; he didn't say anything else. I heard with my own ear Joni Marques ordering all the men to set up the roadblock. [About the guy who jumped into the water], João da Costa at the time was standing behind me. But I had no opportunity to see him firing at the boy because there were bushes around the river. I remember the dialog between Joni Marques and João da Costa. Since Joni Marques couldn't see him before, João da Costa let the boy escape. João da Costa said to the boy: *'Go home!'*. João da Costa came back and Joni Marques asked him: *'Did you kill that kid?'*. After João da Costa replied *'yes'*, Joni Marques asked again: *'How did you kill him?'*. João da Costa replied: *'I didn't hear the sound of your weapon!'*. Then João da Costa explained: *'I stabbed him with my sword; I didn't shoot him!'*. João da Costa didn't kill that boy. Instead, he allowed him to escape. At the moment before I entered the minibus to Com, after the killing of the nuns, I didn't hear João da Costa saying anything or threatening the civilians. But I heard Joni Marques, during the trip, ordering us to keep the secret about that incident. In relation to my ability to refuse, I was unable to resist because Joni Marques had killed a nun, who we consider as a representative of God. I had no weapons, no sword. At the time, if I didn't participate in pushing the vehicle I would be killed. I didn't refuse because I was afraid, but because I had no weapons. Joni Marques is a very angry man, so it's difficult to refuse his orders. I am an ordinary civilian. Even his members had to follow his commands."

194. Questioned by Joni Marques' legal counsel, Gonsalo dos Santos detailed the reasons why he had no ability to refuse such orders:

195. "We came to the rice warehouse in Lautem under orders from Joni Marques to collect rice and to distribute it to the starving people; not to kill nuns. I was not one of his men. I was not part of his group. I didn't know about the actions to follow his commanders. What he said to his men and how these men responded to his command I don't know. I'm an ordinary civilian. These were the people who were following his orders; not me. I am an ordinary civilian. I did not go to get rice for myself, but also for the rest of my family that went with me to Com Harbor. They were starving, so I was too. Felisberto Sávio and Joni Marques used to order the young men to get rice. I wanted to get rice. We all were in the hands of Joni Marques. I wanted to get rice because I was starving. I was ordered not to get rice for myself, but for everyone who was starving in Com. It was not possible to go without an order; it had to be an order. At the time, there was both positive and negative orders. I was not able to refuse any order from Joni Marques. [About pushing the car into the water], Joni Marques didn't force me; he ordered all the young men, these men sitting in this courtroom, to push the vehicle. I understand the difference between to force and to order someone. To force is pointing a weapon at a person's head or stomach; this is to force. To order was like what Joni Marques was doing; for example, when he yelled out *'Mother fuckers, push the car into the water!'* Joni Marques was capable of killing people and nuns, the representatives of God!. Of course, he could kill me, a simple civilian! What could I do to resist such an order?. It is correct that Joni Marques didn't kill any Team Alfa member or civilian that day, but there were four main perpetrators: one is dead, and three are seated here right now in this courtroom. Joni Marques didn't threaten me. I don't know whether any of the members of Team Alfa didn't want to follow his orders. Since his own members, who also carried guns (João da Costa and Manuel da Costa), didn't refuse to follow him, how could I resist his command? It's not my business if anybody refused his orders, since I was not a member of Team Alfa. It's their business. I was not one of the main perpetrators. When the road was blocked, it was an order of Joni Marques. I know the young men participated in the roadblock because Joni Marques ordered them. After we blocked the road, Joni ordered all young men to hide. I heard no more words. I don't know if Joni Marques forced Manuel da Costa or if Manuel da Costa forced anyone. Before things happened, Joni Marques said *'Go hide, men!'*. I went to hide about five meters away. I witnessed the killing of the nuns with my own eyes. I was about 5 or 6 meters behind

Joni Marques. I saw Horácio slashing the people still alive, pouring gasoline and burning them. I saw three people shooting at the same time, so I cannot determine which bullet hit the victims. After the people died, Joni Marques said, as I told you before, *'Mother fuckers, come here! Push the car!'*. Later I could hear when Joni Marques asked Manuel da Costa for a grenade to throw into the river. Manuel grabbed Joni Marques' arm and restrained his hands. Joni Marques asked him: *'Do you support these people?'*. Manuel replied: *'I am not a supporter, but there is no need for a bomb'*. After that, Joni threatened him: *'If you don't give me this grenade, I'll crash your legs!'*. I could hear this dialog from a distance about 2 or 3 meters. Besides Manuel da Costa, I didn't hear any other person resisting Joni Marques' orders, so I cannot comment on this matter. I also heard, from the same distance, when Joni Marques ordered Horácio to go and get the boy who had been tied up to the tree."

196. About his previous knowledge about Joni Marques, Gonsalo dos Santos stated that both of them came from the same village. "I knew him. About his position, I don't know. Since I was a small child I had not been involved in any militia group, so I am not a Team Alfa member. I don't know why Joni Marques specifically came to me on 25 September 1999 at Com Harbor. There was no other reason except to go and collect rice. He didn't come just for me. All of the young men wanted to go and get rice in Lautem; not only from the village of Leuro but also from other villages. Joni Marques didn't say any other words except *'Come and get rice; you'll be given a lot of rice!'*. I couldn't run away at any point during the incident when I found out that I was not going to get rice anymore. How could I escape? My family (parents, wife, kids) were in Com Harbor. Don't you think that my wife and my kids could be killed? I could not stop 'what was happening', to stop the blocking, the killing of the nuns. How I was able to stop Joni Marques? I didn't have any weapon. The other people had guns. How could I stop people with guns? At the time, consider me as a woman. Here in the courtroom I can say: *"This person is Joni Marques"*. At the time he was *"Commander Joni Marques"*. On the way back to Com, I heard Joni Marques saying: *'Yes, my young men, listen! In relation to what we have done, don't let anybody know this secret, not even for your wife; otherwise I'll kill you and them'*. About the guy who was released in the river, I don't know whether João da Costa resisted Joni Marques' order. I don't know what was going on in his mind. I didn't have weapons. He, João da Costa, had a weapon. Joni Marques ordered João da Costa to *'kill that kid now; throw him into the river'*. But, in fact, when Joni Marques ordered João da Costa, he followed the command. He had no reaction. He was quiet and pursued the kid as Joni Marques ordered. I didn't hear João da Costa questioning Joni Marques about the reason for killing that child. I don't know if João da Costa knew or was related to that child as well. I didn't hear Joni Marques threatening to kill anybody in Team Alfa or villagers, except the threat to Manuel da Costa in relation to the grenade. In relation to me, I immediately pushed the car. I didn't hear any threat, but I heard orders. A threat is different from an order. If he wanted to threaten me, he would point a gun on my head. I didn't hear Joni Marques saying: *"If you don't do it, I will kill you!"*. I said that Joni Marques gave orders; not threats. When Joni Marques talked to Manuel da Costa about the grenade, he didn't point his weapon at the stomach or the head of Manuel da Costa. He only said that he could crash Manuel da Costa's legs. I didn't see Joni Marques pointing any weapon at Manuel da Costa. I didn't have a chance to see Manuel da Costa's face, if he was ugly or afraid. But Manuel da Costa resisted Joni Marques' request to get the grenade. Manuel da Costa believed that the people were already dead, so there were only corpses.

197. To Manuel da Costa's counselor, Gonsalo da Costa stated that he didn't know about the jamming of the weapon of Manuel da Costa:

198. "I saw and I heard when the three people fired their guns, but I don't know who fired first".

199. To Paulo da Costa's and Amélio da Costa's legal counsel, Gonsalo dos Santos agreed that refusing an order given by Joni Marques to wear a red and white head band could indicate that a person could be a CNRT or independence supporter. However, he could not answer whether such a refusal could be a reason for pro-autonomy militia to kill people. "I didn't know what was CNRT. I was just an ordinary man who was trying to get food for my family!"

200. Finally, questioned by the Court, Gonsalo dos Santos mentioned that the main perpetrators still alive are Joni Marques, João da Costa and Manuel da Costa. He based his opinion for considering them as the perpetrators because "it was not the stones that blew up and caused the death of the nuns".

201. Asked about the circumstances in which Joni Marques came to him and his friends to order them to collect rice, Gonsalo dos Santos explained that Joni Marques said nothing else but *'follow me to get rice in Lautem!'* Joni was in the company of Paulo da Costa and João da Costa. He didn't yell out, "but spoke in a very slow and loud voice". He added:

202. "At the time I was at Com Harbor with my family, I was with Octavio da Costa, who had his wife and kids. Hilário da Silva's parents were also there. I was sitting inside our compound waiting for lunch. It was a hot roof sheltered shed. I don't know exactly how many families were there waiting for a ship, but there were hundreds of people in only one room. I don't know if anybody else could hear Joni Marques' voice. He ordered me, so I followed the order. I didn't see his arrival. He just arrived in front of where I was standing. At the time, the people at Com were starving. Joni Marques and Felisberto Sávio were giving food to the old and young people at Com Harbor."

203. About calling Joni Marques before as *'Commander'*, Gonsalo dos Santos emphasized:

- 204.** “I was not one of his men, but I called him ‘*commander*’. If he called me up, I had to follow his command. I was not afraid of this man at all. But, in the prevailing circumstance at the time of instability, I wanted to find a word to call him appropriately; a word that would not make him upset with me.”
- 205.** Gonsalo dos Santos also clarified that he was standing behind Joni Marques at the moment the nuns were getting out the vehicle. He also remembered the time when one of them ran out on the road and sat by a gutter. They were wearing their usual clergywo man white-dressings.

2. Legal arguments

- 206.** The Defense on behalf of Gonsalo dos Santos directly approached the evidence. Its substantial contents are quoted under the heading *The Defense Case*.

The Defense of Alarico Fernandes

1. Factual allegations

Deportation or forcible transfer of the civilian population

- 207.** Alarico Fernandes denied being a Team Alfa member:
- 208.** “I was an ordinary villager in Leuro when Joni Marques and his group came and said to us, villagers: ‘*This place belongs to us*’.”
- 209.** Alarico Fernandes listed as members of Team Alfa: Joni Marques, José Oliveira, Carolino Portela, Mario Ribeiro, Horácio Gusmão, Carolino Maurala, Juliano Fernandes, Gilberto Fernandes, José Alcara, Júlio Fernandes and other men whose surname he could not remember (Alex, Alves, Sérgio, Ronaldo, Justino, Livio, Mateus, Kol and Júlio). The former leader of the village was known as *Alegria*. At the time, Joni Marques and his Team Alfa members, carrying 11 rifles SKS, threatened us: ‘*Anyone who supports CNRT will have their houses burnt and also will be killed!*’. They forced the villagers to follow the refugees to Kupang.
- 210.** About Joni Marques, Alarico Fernandes explained that they were born in the same village of Leuro. However, he met Joni Marques for the first time when they were burning the houses. He knew that Joni was the leader of Team Alfa.
- 211.** About Team Alfa, Fernandes stated that it was a very well-known group around Los Palos. He knew their purposes was to “threaten the villagers, otherwise they would kill everyone who supported CNRT”. The head of village had not only to support them; he had to follow them. About other actions taken by Team Alfa, Alarico Fernandes confirmed that they burned houses. He replied: “I myself burned two houses; I was forced by Carolino Portela. He gave me the matches. I burned the house of José Murta and Anselmo Correia Pinto. Some houses belonged to the head of village, who was supporting CNRT. When we burned those houses, most of them were occupied by CNRT supporters. Carolino used to say: ‘*Those houses belong to the government; Xanana will replace them!*’.”
- 212.** Asked about the manner in which he was forced, Fernandes stated that Portela questioned him about his brother-in-law, who was the head of the village. Since his brother-in-law was not at the village, Portela ordered him to follow Team Alfa. His brother-in-law had escaped.
- 213.** Alarico Fernandes said that he was given only a machete.
- 214.** After being forced to join the group, Alarico Fernandes stated that he was led to the military 745 Base as a refugee. “I was not a Team Alfa member”, he repeated several times. Even so, he admitted to having participated in several journeys in a red minibus driven by Paulo da Costa. “Team Alfa members carried weapons; we, villagers, had only machetes. Joni Marques forced us to get off from the vehicle and to burn the houses. I remember that one day I burned the houses of Abdul and Apoena. During the burning, Joni Marques was standing by my side”. Alarico clarified that the group returned to the 745 Base after each operation. Those operations were carried out sometimes on two or three days. He later explained to the legal counselor about the outcome of some operations: two houses in Omokano, two places in Leuro, and six other places, all of them on the same day.
- 215.** During the attacks in Leuro, Alarico recalled that Gonsalo dos Santos was participating in the operation, but he did not see him “when the houses were burning”.
- 216.** He clarified to his counselor that he was an ordinary farmer before joining the group. Therefore, he already used machetes as a tool, like the rest of the community.

Murder of Alfredo Araújo and Kalistu Rodrigues on 21st September 1999

217. The accused Alarico Fernandes admitted that on 21st September 1999, they were at Com waiting for a ship, when Joni Marques and Felisberto told them to go to look for vegetables. They then got into the car and went to Ira-Ara. They were Joni Marques, Felisberto Sávio, Paulo da Costa, Carlito Viegas, Eurico, Amélio da Costa and himself. When they reached Ira-Ara, they got off the car and went across the Coconut Grove. They spread out looking for chili and cassava leaves. When they reached the Coconut Grove, Felisberto Sávio asked him to go up the coconut tree which he did. When he got up the coconut tree, he looked down and noticed that Joni Marques and Felisberto Sávio were not there any more. While he was getting down the coconut tree, he heard a shot and once down the tree he heard Felisberto Sávio calling out for Joni Marques. Then Joni Marques replied: ‘*What is going on?*’. From behind Felisberto Sávio said “*I shot a guy you were previously detained with at the Commando place*”. Joni Marques responded by running. Alarico followed soon and heard Felisberto Sávio saying to Joni Marques: ‘*I shot the guy*’. Joni Marques asked the victim: ‘*Do you know me?*’. The victim replied: ‘*Yes, I know you*’. ‘*What my name is?*’. ‘*Joni Marques*’. Joni Marques replied: ‘*We just met*’. Then Alarico said to Joni Marques that Felisberto had just hit him in his leg so they could go and see if there was a doctor around. But Joni Marques said that he had to kill that man. In the meantime, they saw people who were running away. Felisberto Sávio and Joni Marques fired at them; one fell down and others escaped. The man who fell down was still alive. Then Joni asked: ‘*Who wants to shoot?*’. Paulo da Costa said: ‘*Give it to me, I will shoot him*’.

2. Legal arguments

218. As above-mentioned, the Defense on behalf of Alarico Fernandes had the same initial approach referred to Paulo da Costa, since assisted by the same counselor.

The Defense of Mautersa Monis

1. Factual allegations

Torture and murder of Evaristo Lopes

219. Mautersa Monis reported that he joined Team Alfa because he was a clandestine member of FALINTIL and he did not want his community to raise suspicions against him, and he could collect some information for his colleagues. TNI had a plan to establish a militia group and called up the population in the villages. He went further:

220. “I registered my name and joined them. I did not join for food; food was important, but we had no wages, no ranks. It was a TNI secret to establish Team Alfa. I understood that Team Alfa was to assist other groups in each village or in towns. My opinion is that they had a plan: to search for FALINTIL members in the forest and support autonomy in East Timor. I knew that when I joined in 1999. TNI and KOPASSUS supplied Team Alfa with training, ammunitions and provisions. KOPASSUS gave us orders to kill FALINTIL members. But I never killed anybody in the jungle”.

221. About the death of Evaristo Lopes, Mautersa Monis said that he had no idea about the intention of Syaful Anwar to kill him:

222. “He told us: ‘*Come on, let’s go!*’. Anwar did not tell us what to do; he did not say anything. We just went to the main road at 8.00 o’clock in the evening. I was not carrying weapons, but Syaful gave me an iron bar. I hit the victim four times on the back. If I refused to join in, Anwar would kill me. I was the first one to beat Evaristo Lopes”.

223. Mautersa Monis stated that after Lopes was taken to the post, he did not participate in the torture inside the room. He heard a scream from a long way away at 1.00 o’clock in the morning when he was with his cousin in the TV room in front of the room where the victim was with Anwar.

224. Monis finally left Team Alfa on the same day of the incident – 21 April 1999 – and took his weapon to FALINTIL. He said that this weapon had been stored in his house since March. He explained: “I felt terrible and I decided to avoid the group”.

225. About Joni Marques, he stated: “I never saw him at all on the night the victim was taken to the room”.

2. Legal arguments

226. The Defense on behalf of Mautersa Monis addressed straightly the evidence produced during the trial. Thereby, its content will properly come under the heading ***The Defense case***.

The Defense of Gilberto Fernandes

1. Factual allegations

The torture and murder of Evaristo Lopes

- 227.** Gilberto Fernandes stated that he had joined Team Alfa for three months not to carry weapons; just as a cook: “I was a cook, so they paid me Rp75,000 monthly to cook in the Los Palos base”.
- 228.** He said he knew nothing about Team Alfa purposes and training by KOPASSUS forces or what happened at the base when Evaristo Lopes was murdered. Some minutes later, he admitted that he had seen João da Costa holding the victim and leading him to the dining room. Moreover, he admitted that he himself was in this room where Syaful Anwar and João da Costa were also present.
- 229.** “I hit Evaristo Lopes three times in the head. I beat him using my hands. After I hit him, I left the room. I saw João da Costa beating him with an electric cable. I also saw Joni Marques cutting the victim’s hair when I went out. I never saw Evaristo Lopes anymore after that night. I don’t know how he died; nobody spoke to me about it. I don’t know why Anwar ordered him to be beaten up. I slept until the morning”.
- 230.** Gilberto Fernandes denied having attended the meetings about the plans of Team Alfa, and received orders or instructions to fight against independence supporters.
- 231.** Questioned by Joni Marques’ defense counselor, Gilberto Fernandes stated that Joni Marques did not do anything except cutting the victim’s hair. After that, Syaful Anwar started beating the victim. “I did not see Joni Marques beating the victim that day”.
- 232.** Finally, Gilberto Fernandes replied to the Court that he had not seen the dead body of the victim. He also alleged having been forced by Anwar to beat the victim. At about the time he saw Marques cutting the victim's hair, Fernandes clarified “I beat the victim first; then Joni Marques cut his hair”.

2. Legal arguments

- 233.** The following closing statements were submitted on behalf of Gilberto Fernandes:

“1. The elements of crimes against humanity

According to Section 5 of the UNTAET Reg. No. 2000/15, a “crime against humanity” is one of the conducts mentioned in that provision, carried out as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack.

For someone to be accused of committing a crime against humanity, the existence of the following essential elements is required, according to what the International Tribunal for former Yugoslavia established in its jurisprudence³⁴:

1st – There must be an attack.

2nd – The acts of the suspect must be part of the attack.

3rd – The attack must be “directed against any civilian population”.

4th – The attack must be “widespread or systematic”.

5th – The suspect must know of the wider context in which his acts occur, and that his acts are part of the attack.

If any of these elements are not proved in Court, it is not possible to convict any person accused of having committed a crime against humanity.

In Gilberto Fernandes’ case, it is more than clear that one of the elements was not proved.

Did Gilberto Fernandes in April of 1999 know that his conduct was part of a widespread or systematic attack upon the civilian population? Did the Prosecution prove that Gilberto Fernandes, at that time – we must not forget, that the relevant time of the knowledge is the time when the conduct took place – was aware of what was happening in the entire East Timorese territory, that an orchestrated campaign of intimidation and violence was being

³⁴ See Tadic Appeals Chamber Judgement, §§ 248-251; Kunara} Trial Chamber Judgement, § 410, and the recent decision (2 November 2001) in the case Miroslav Kvo^ca, Trial Chamber Judgement § 127.

planned, prepared and executed against part of the civilian population? What kind of information was given to Gilberto Fernandes by the Indonesian military commanders, and in April 1999 what was his knowledge of the mass campaign of terror? The evidence brought to Court by the Prosecution can not answer any of these questions? He must have known is not a satisfactory and lawful answer to convict Gilberto Fernandes. One should not forget the hierarchical position of Gilberto in the Team Alfa structure.

The critical element of crimes against humanity, in Gilberto Fernandes' case, is the 5th, the psychological or mental element. And this is the element that the prosecution failed to prove.

Gilberto Fernandes was a low rank militia within the Team Alfa organization, with orders mainly to guard the Base in Los Palos and specially to cook. Gilberto Fernandes was not an intelligence member of the Team Alfa structure. Gilberto Fernandes was not a commander of the militia group. Gilberto Fernandes did not attend any kind of meetings with the Kopassus leaders; nor receive instructions from them regarding the purposes and objectives to be accomplished by the Team Alfa group.

In conclusion, Gilberto Fernandes did not know that his acts were part of an attack against the civilian population. He did not know the wider context of what was happening in the territory of East Timor at that time. Gilberto Fernandes cannot be convicted in any circumstance for any crime against humanity.

2. The specific crimes within the category of crimes against humanity

Within the category of crimes against humanity, Gilberto Fernandes is charged with the specific acts of murder and torture.

In order to clarify the defence of Gilberto Fernandes, we will examine separately each one of the charges.

2.1. The murder of Evaristo Lopes

The General Prosecutor included Gilberto Fernandes in the first count of the Indictment, charging him of murder, a crime against humanity, considering that he participated in the killing of Evaristo Lopes. The Prosecution considered that the conduct of Gilberto Fernandes towards Evaristo Lopes was such that he intended to cause his death and he knew that he was going to be killed. However, the Prosecution misapprehend the factual elements. Otherwise Gilberto Fernandes would never be charged with this crime.

For Gilberto Fernandes to be accused and convicted of the murder, as a crime against humanity, of the victim Evaristo Lopes, the following conditions must be satisfied:

1st - Gilberto Fernandes caused the death of Evaristo Lopes.

2nd - His conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3rd - Gilberto Fernandes knew that his conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.

The long roll of witnesses that stand before the Court to testify about the murder of Evaristo Lopes proved that what happened that day is still unclear. Reading those statements is the best illustration of the thoughts of each witness. Who will the Court trust? Can the Court trust in Moises Lopes, Rudi de Jesus and Domingo Ribeiro who betrayed Evaristo Lopes by handing him over to the Kopassus commanders? Or will it trust Gonçalo da Costa Sanchez, Armindo Soares, Mario Ribeiro and Salvador Amaral, since as former militia members they were present at the crime scene and some of them helped in the beating of Evaristo Lopes? Moreover, the statements of the witnesses in Court do not match one another.

Gilberto Fernandes admitted that he went to the roadblock and escorted Evaristo Lopes back to the Base, following the Kopassus commander Syaful Anwar's orders. Gilberto Fernandes also admitted that at the Base he hit Evaristo Lopes three times with his hand.

What the Prosecution did not prove is that by his conduct Gilberto Fernandes aided, abetted or assisted in the murder of Evaristo Lopes. It was clear that the person who committed the murder was the Kopassus commander Syaful Anwar. But who knew at that time that Syaful Anwar's intention was to kill Evaristo Lopes?

For Gilberto Fernandes to be convicted of aiding, abetting or assisting in the murder of Evaristo Fernandes, it is necessary to prove the *mens rea*, the mental element. According to Section 18 of the UNTAET Reg. No. 2000/15, the conduct of Gilberto Fernandes must have been carried out with intent and knowledge of the killing, despite the fact that the perpetrator was another person. In other words, Gilberto Fernandes must have acted with intention to cause the death and should have been aware that the killing was going to occur in the ordinary course of events. Only in those circumstances can Gilberto Fernandes be convicted of the murder of Evaristo Lopes. However, the Prosecution failed to prove the mental element. No witness during the hearings showed that Evaristo Lopes was captured to be killed. There was no previous similar situation that occurred in the Kopasus Base that could have signalled the intention of the Kopasus commanders regarding Evaristo Lopes. Was it usual to take and arrest at the Base Falintil supporters and kill them after torturing? Is there any other case prior to Evaristo Lopes with comparable consequence that can be invoked to establish a pattern of conduct? And, moreover, nothing was brought to Court proving that the Kopassus commanders said to the members of Team Alfa that they intended to kill Evaristo Lopes.

2.2. The torture of Evaristo Lopes

The second count set forth against Gilberto Fernandes in the Indictment is the torture of Evaristo Lopes as a crime against humanity.

For Gilberto Fernandes to be accused and convicted of the torture, as a crime against humanity, of the victim Evaristo Lopes, the following conditions must be satisfied:

1st – Gilberto Fernandes inflicted severe physical or mental pain or suffering upon Evaristo Lopes.

2nd - Evaristo Lopes was in the custody or under control of the Gilberto Fernandes.

3rd - Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

4th - The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5th - Gilberto Fernandes knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

According to the definition foreseen in Section 5.2 (d) of UNTAET Reg 2000/15, torture means the “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent or incidental to, lawful sanctions”.

Gilberto Fernandes did not use any weapon or instrument to beat Evaristo Lopes. Recalling his statement, Gilberto Fernandes never denied he had beaten Evaristo Lopes three times with his bare hands. The beating of Evaristo Lopes was ordered and supervised by the Kopassus commanders Syaful Anwar and Rachmad.

Furthermore, Evaristo Lopes was not in the custody or in the control of Gilberto Fernandes. He was in the custody and control of the Kopassus commanders. In accordance with the definition of torture, it is a requisite to convict someone for the crime of torture to have the control over that person. This was clearly not the case with respect to Gilberto Fernandes.

3. Conclusion

Gilberto Fernandes is linked only to the first incident described in the Indictment, the torture and murder of Evaristo Lopes. This incident took place in April 1999. Gilberto Fernandes did not engage in any other criminal act carried out by the militia group Team Alfa. Gilberto Fernandes is not being charged with respect to any of the other incidents described in the Indictment and attributed to the Team Alfa group.

In conclusion, and taking in consideration all the facts brought before Court by the accused statements and the witnesses' testimony, Gilberto Fernandes cannot be convicted for any crime against humanity, since the mental element of those crimes is absent in this case. In relation to the murder of Evaristo Lopes, Gilberto Fernandes must be acquitted since he did

not participate in the murder; nor did he know that his actions were part of a scheme prepared by Kopassus to kill Evaristo Lopes. Finally, the only conduct that can be attributed to Gilberto Fernandes is the beating of Evaristo Lopes. So Gilberto Fernandes can only be convicted for the crime of maltreatment as foreseen in the Penal Code of Indonesia (KUHP).

The Defence of Gilberto Fernandes requests the Special Panel for Serious Crimes of the Dili District Court, taking into account the evidence brought to Court:

To acquit Gilberto Fernandes on the first count of murder of Evaristo Lopes;

- To consider the beating of Evaristo Lopes by Gilberto Fernandes as a crime of maltreatment in terms of the Penal Code of Indonesia, and consequently to acquit Gilberto Fernandes from the charge of torture.”

IV. EVIDENCE

A. General background

Statements and reports agreed as evidence by the Prosecution and the Defense

234. Prosecution and Defense agreed on the contents of the following evidence:

235. *Statements given during the investigations by the following witnesses:* Laurenso da Costa Hornay, Emilia Peres, Ismail Vinhas, Roberto Dias Viera, Armadouru Sampaio Miguel Fernandes, Almerindo Fernandes Xavier, Florinda Soriano, Faustino da Costa, Nicolau dos Santos, Martino Vououm, Ilario Lemos Lay, Raul Pereira, Lorencu Pereira, Clementina de Jesus, Domingos Sávio, José dos Santos, Romaldo Loyola, Pedro dos Santos Viera, Eurico da Costa, Custody Montessori, Izencia Magalhaes, Joanico de Carmo Vieira, José Fernandes, Manuel Rodrigues, João Goncalves, Armindo da Silva, Jerry Freitas Amaral, Felix Correia, Father José Vattaparambil, João Bosco, Evaristo Freitas, Americo Fernandes, Agapito Francisco, José dos Santos *alias* Laletele, and Father João de Deus Pires.

236. *Reports:* information report by James Chapman, post mortem report by Dr. Ramaldo Bosco.

237. *Death certificates and post mortem reports:*

	<i>Victim</i>	<i>Name of Report</i>
	Izino Freitas Amaral	Death Certificate: Dr. Niriellage Chandrasiri
		Autopsy Report: Dr. Niriellage Chandrasiri
	Brother Jacinto Xavier	Death Certificate: Dr. Michael S. Pollanen
		Victim Identification Form : Dr. Katherine L. Gruspier
		Postmortem Examination Report: Dr. Michael S. Pollanen
		Report of Forensic Anthropologist: Dr. Katherine L. Gruspier
	Brother Fernandes Dos Santos	Death Certificate: Dr. Michael S. Pollanen
		Postmortem Examination Report: Dr. Michael S. Pollanen
		Report of Forensic Anthropologist: Dr. Katherine L. Gruspier
	Brother Valério Da Conceicao Pereira	Death Certificate: Dr. Michael S. Pollanen
		Postmortem Examination Report: Dr. Michael S. Pollanen
		Report of Forensic Anthropologist: Dr. Katherine L. Gruspier
	Sister Erminia Cazzagina	Death Certificate: Dr. Michael S. Pollanen
		Victim Identification Form: Dr. Katherine L. Gruspier
		Report of Forensic Anthropologist: Dr. Katherine L. Gruspier
		Postmortem Examination Report: Dr. Michael S.

		Pollanen
	Sister Celeste De Carvalho	Death Certificate: Dr. Michael S. Pollanen
		Victim Identification Form: Dr. Katherine L. Gruspier
		Postmortem Examination Report: Dr. Michael S. Pollanen
		Report of Forensic Anthropologist: Dr. Katherine L. Gruspier
	Agus Muliawan	Death Certificate: Dr. Michael S. Pollanen
		Report of Forensic Anthropologist: Dr. Katherine L. Gruspier
		Postmortem Examination Report: Dr. Michael S. Pollanen
	Cristovo Rudi Freitas Barreto	Death Certificate Dr.: Michael S. Pollanen
		Report of Forensic Anthropologist: Dr. Katherine L. Gruspier
		Postmortem Examination Report: Dr. Michael S. Pollanen
	Titi Sandora Lopes	Death Certificate: Dr. Michael S. Pollanen
		Victim Identification Form: Dr. Katherine L. Gruspier
		Autopsy Report Dr.: Dr. Niriellage Chandrasiri
		Report of Forensic Anthropologist: Dr. Katherine L. Gruspier

238. Forensic reports:

Report	Date
L.E. Parker: Scenes of Crime Examiners Report	10/05/00
Robert D Stair (UNTAET) Canadian Forensic Team Crime Scene Report	18/03/00
David John Picker: Forensic Services Firearm Report	24/08/00
Sofia Egana: Forensic Anthropologist	03/10/01

239. *Investigators' statements and reports by:*

- Nath Phromtep: CIVPOL
- Allen James Williams: UNAMET CIV POL
- Darren John Cripps: Service Police Statement
- Lee Edward Parker: Final Report
- Lee Edward Parker: Service Police Report
- Grant Elba Edwards: Service Police Report
- Shayne Terence Tows-Hammond: Crime Scene Investigation
- Md Monzurul Morshed: Investigation Report

- Wayne Anthony Fee: Police Statement
- Suzannah Linton: Evidence Report
- Susan Margaret Pollard: Service Police Report

Witnesses whose statements the Prosecution no longer wishes to rely upon

- Jamie MONIZ(14/08/00)
- José PEREIRA(24/01/01)
- Abilio Dos SANTOS(08/02/01)
- Orlando VALENTE (edited)(06/02/01)
- Maria Dos SANTOS(03/05/00 and 21/09/00)
- Pedro da COSTA(02/10/00)
- Laurinda LOPES(23/09/00)
- Joaquim FERNANDES(28/12/00)
- João MONIZ (27/12/00)
- Oscar FRAIS(27/12/00)
- Jacinta BELO(06/02/01)
- Adam CARVALHO(06/02/01)
- Joaquim FERNANDES (Sr.)(24/08/01)

Reports which are admitted as evidence by order of Court:

EXPERT REPORTS: HISTORY OF WIDESPREAD OR SYSTEMATIC ACTIVITIES AGAINST CIVILIANS AND RECORDS OF CRIMES

- Report of the Security Council Mission to Jakarta and Dili: Security Council Mission, 14 September 1999
- Report of the High Commissioner for Human Rights on the human rights situation in East Timor: Commission on Human Rights, 23-24 September 1999
- Situation of Human Rights in East Timor: General Assembly 54th session: The Joint Mission of Special Rapporteurs to East Timor, 8 December 1999
- Report of the International Commission of Inquiry On East Timor to The Secretary-General, 31 January 2000
- Report of the Indonesian Commission on Human Rights Violations in East Timor: Executive Summary Report on the Investigation of Human Rights Violation in East Timor – KPP-HAM, The Commission for Human Rights Violations in East Timor of KOMNAS HAM (National Human Rights Commission) Jakarta, January 2000.

B. The Prosecution Case Evidence

Torture and murder of Evaristo Lopes

Testimony of the witness Moisés Lopes:

240. The witness Moises Lopes, under oath, told the Court that he knew the victim Evaristo Lopes and saw how he was arrested and killed because they – the victim, he himself and the witnesses Rudi de Jesus and Domingos Ribeiro – were together in the car. They went to the telecom office to make a long distance call to Jakarta. Domingos Ribeiro wished to make that call. But when they reached the telecom office, they realized that they had forgotten the phone

number they were going to call; so they had to return home to get the number. On the way back, João Lemourai stopped them using a sword:

- 241.** "He ordered us to stop and get off. Then Domingos and I myself had to get off. At the time, Rudi de Jesus was the driver. (...) We stayed quiet. There was a blue car which suddenly came from behind and blocked us. It was driven by a KOPASSUS officer. At that time, João Lemorai saw Evaristo Lopes and told him: '*You with long hair, get out of the car!*'. Then he grabbed Evaristo Lopes' hair like he was going to cut the hair. They started beating Evaristo Lopes and Lopes screamed for help from us. Lemorai shout at us: '*Do not move!*'. We were afraid and we sat in the same place. After that, someone who I do not know – maybe a commander of KOPASSUS – got out from the blue car and was going to take Evaristo Lopes to the command post. He told us to go back home. We went back home. Firstly, we all went to the house of Domingos Ribeiro. After we returned to Los Palos, Rudi went home and so did I.
- 242.** The witness Moises Lopes explained, when questioned by the Prosecutor, that in fact they were going to pick up a member of FALINTIL following an order of the local commander of FALINTIL. The telephone was just an excuse or strategy because the place was suspicious and there were some people like Hussein who was the commander of the military district (the other one was Janeiro). So they went to Domingos' house, and, from there, to the telecom office. On their way to the telecom office, nothing was obstructing the road when they passed by Tito's shop. He did not also recognize any Team Alfa member when they passed by Tito's shop. He did not know them. But when they came back from telecom office, there were some Team Alfa members who approached them. There was also a roadblock at some distance before the crossroad. The first Team Alfa member to approach was João da Costa Lemorai. He ordered Evaristo Lopes to get out off the car and took him to the command post. He slapped his face. Another Team Alfa member was hitting him four times. João Lemorai ordered us to turn our faces and to look away in other direction. I saw Evaristo Lopes being beaten again three times when I saw a man from the blue car coming and order them to take Evaristo Lopes to the comand post. When Evaristo Lopes was taken to the post, he was grabbed by a commander of KOPASSUS and escorted by Team Alfa members, among them João Lemorai.
- 243.** When questioned by counselor Siphosami Malunga, the witness Moises Lopes replied that he had not seen Joni Marques that day, but later that night. He declared: "I did not see Joni, but I saw João Lemorai".
- 244.** The witness, when questioned by the Public Defender Nuno Torres, reported that:
- 245.** "João Lemorai was carrying a sword, a similar sword to those commonly used to kill animals. When the car stopped, João Lemorai approached us. I know definitely that it was João Lemorai. There were others but I cannot identify them. At the time, there were many of João Lemorai's friends. The only person I knew was João Lemorai. There was another one called Alberto. When Evaristo Lopes got out of the car, João Lemorai grabbed his hair. After that, one of João Lemorai's friends punched him on the back with an iron bar".

Testimony of the witness Rudi de Jesus:

- 246.** The witness Rudi de Jesus reported that he had received a letter from FALINTIL in April 1999. The content of the letter was to pick up a FALINTIL chief at the Heroes' Cemetery in Titilari. Since the witness' car was not available at the time, Evaristo Lopes was told to find another car. After that, on 21 April, the witness received Evaristo Lopes and another FALINTIL supporter named Janeiro at his home to pick him up to go to Rasa village. After arriving in Rasa, Evaristo Lopes got out the car and talked to his men. Back at his house, they went to Los Palos in order to follow up the message. When they arrived at the Heroes' Cemetery at Titilari sub-village, there was a sign left, but still another sign missing.
- 247.** About the incident, the witness could remember:
- 248.** "After a coffee-break at Evaristo Lopes' house, the victim Evaristo Lopes and me went back to the cemetery, but there was still one sign missing. The group was in a *Kijang* car of the Prosecution's office. Then we decided to stop at Domingos Ribeiro's house, but nobody was there, since the door was locked. Then came a man on a motorbike and opened his car door and ordered Moises to go around, otherwise he would arrest him if he did anything wrong. That man was named Hussein and was from the military command. Then they went back on the way to Los Palos. There they saw Team Alfa members sitting around near Tito's shop. Moises and Domingos asked me to go straight to the telecom office. We went straight to the telecom office. Arriving there, Moises got out of the car and went to the phone office. After that, they came back and said that they had lost the telephone card. On the way back, the witness saw some wood blocking the road. There was one car in front. After they stopped, João da Costa *Lemorai* opened the car door and said: '*Get out!*'. After they got out, *Lemorai* touched Evaristo Lopes with an iron rod. Evaristo Lopes asked João *Lemorai* and screamed out about what they were doing. They replied that they were 'just watching'. One car came from the [Indonesian] Prosecutor's office in front. The witness stopped in front of the car from the Prosecutor's office. One person got out of the car. Evaristo stayed at the roadblock. Then my friends and I went back to Domingos' house. One week later, they found Evaristo Lopes' body and took it for burial in Rasa".

249. To the Prosecution's questions, the witness Rudi de Jesus confirmed that he saw three or four Team Alfa members sitting at Tito's shop when they were going to the telecom office. He could recognize them because they were using military uniforms. At the time, the witness didn't notice any roadblock. But, when they came out from the telecom office, the witness noticed the roadblock about 200 meters from Tito's shop. Near the roadblock, there were a lot of Team Alfa members carrying firearms and samurai swords. He could recognize among them João Lemorai and Joaquim Januario:

250. "Lemorai was holding an iron bar. Lemorai came and opened the car at the left side door, the side where Moises was. I was driving the right-steered car. Evaristo Lopes was also sitting in the front seat. Lemorai ordered: 'The people here inside, get out!'. All the four people in the car got out. Evaristo Lopes was firstly hit by Lemorai with an iron bar, initially in his back and his head about 3 or 4 times. While beating, Lemorai said to the victim: 'We have been looking for you for a long time!'. Evaristo screamed out. The rest of my friends and myself were ordered not to look and not to move". The witness felt threatened when Lemorai said: 'Anyone who moves, I'll kill!'. Meanwhile, Lemorai's friends were also hitting Evaristo Lopes, but the witness could not count how many of them, since he was not allowed to watch the beating. The hitting lasted about 30 minutes. After the men had hit Evaristo Lopes, the head of KOPASSUS dropped out from a *Kijang* car that approached the roadblock and ordered Evaristo to be taken to the command post. He [the head of KOPASSUS] and other Team Alfa members grabbed Evaristo and took him above to the command post. After that, the witness saw the Team Alfa members removing the roadblock and went home by obeying an order given by João Lemorai.

251. To the Defense Counsel, the witness replied that he himself, Domingos Ribeiro, Evaristo Lopes and Moises Lopes were FALINTIL supporters. As a supporter, the witness, who worked as a minibus driver, had to pick people up and to supply money; he never carried a gun. About the hitting of Evaristo Lopes at the roadblock, the witness testified that the victim fell to the ground and then stood up again for about 30 minutes. About his previous statement to the CivPol relating to a 10-minute time period, the witness clarified that some parts of that statement could not be correct. When Evaristo Lopes was escorted to the KOPASSUS base, he could not stand up and walk by himself anymore. His head was injured. The witness testified that he had never heard about Syaful Anwar and did not know the reason why Evaristo Lopes was killed. He also stated that he did not know how Team Alfa and KOPASSUS command got to know that Evaristo Lopes was in the car. The witness denied being responsible for handing Evaristo over to Team Alfa members. The witness added that Evaristo was a relative of his, so he would have no reason to do that. During his cross-examination, the witness pointed out Joni Marques and Gilberto Fernandes as Team Alfa members who were also present at the roadblock. João Lemorai was in charge of the group that night. Joni Marques struck the victim twice in the lower back with his weapon. Gilberto Fernandes was at the roadblock holding an iron bar; the members with firearms were hidden.

252. Challenged by the Defense, the witness stressed that he also saw Gilberto Fernandes beating the victim on his legs, back and head. The witness, once more challenged by the Defense, insisted that he could see those two other militia members at that time because he "saw them carrying weapons there". Even facing the other way, the witness could recognize Joni Marques and Gilberto Fernandes.

253. About the letter, the witness confirmed that it was addressed to Evaristo Lopes. However, he denied having said to anyone about the plan mentioned in that letter. Asked about the kind of weapons used by Team Alfa members that night, the witness drew a machine gun.

254. Questioned by the Panel, the witness confirmed that he had seen all Team Alfa members beating the victim on the roadblock, but remarked that "at the time a lot of people were beating Evaristo" and he "could not know which ones were beating, since there were also people from police and Indonesian Army Intelligence."

The testimony of the witness Gonsalo da Costa Sanches:

255. The witness Gonsalo Sanches initially admitted that he himself had been a member of Team Alfa since 1998. During those militia times, he carried weapons; namely SKS rifles. His commanders were two: the first one was Joni Marques and the second one was Cesar Augusto. In the courtroom, he identified Joni Marques, João Lemorai, Mautersa Monis and Gilberto Fernandes as Team Alfa members. He identified Paulo da Costa, Manuel da Costa, Gonsalo dos Santos and Alarico Fernandes as members of BRTT.

256. About the torture and murder of Evaristo Lopes, the witness Gonsalo Sanches testified that he saw João Lemorai, Gilberto Fernandes and Mautersa Monis going to arrest Evaristo Lopes:

257. "They put planks of wood in the street. They were carrying SKS rifles. Syaful Anwar and myself were going to High School # 1 building. They came out of the post office. Evaristo Lopes was coming from the telecom office. We saw João Lemorai and Mautersa Monis mobbing Evaristo Lopes. Gilberto Fernandes and João Pinto were behind. (...) I grabbed Evaristo Lopes and Mautersa kicked me. I kicked Evaristo Lopes three times. I grabbed his arms because we were friends. Gilberto Fernandes and João Pinto took Evaristo away. His hands were tied behind. Some of them had a spear. Mautersa hit him from the front and Lemorai from the back with an iron spear. His body was

covered with blood. Cesar Augusto told me to get out. After that, I was outside and was called out by João Pinto. At that time, Joni Marques and Rahmad were holding a meeting in a room. I was watching TV when I heard Evaristo Lopes screaming out three times (*‘Team Alfa are killing me!’*). He was kicked by João Lemorai, Mautersa Monis, Oscar Pinto and Martino from BRTT. They kicked him to death. He was not dead yet and Lemorai stabbed him through the mouth. After that, he died. The body was put in a rice sack. They told us to bring it to the cemetery. Joni Marques was the one who said to take the body. The ones who were ordered to take the body were Martino, Augustino da Costa and Armindo. I was asked to take the body, but I did not want to because it was already late at night. So we took the dead body to a hall. Myself, Augustino, Agapito and Armindo went to bury the body. After it was buried, we went back to the command post. After three or four days it was known by other people”.

258. The witness Gonsalo explained, while being questioned by the Prosecutor, that he knew Evaristo Lopes before he [the witness] joined the Team Alfa organization. They had been working together. Some days before Evaristo Lopes was arrested, the witness obtained some information from Malik Ibrahim. The witness saw a confidential letter about people who were involved in the clandestine movement. Their names were there. The witness does not remember if it was the day before Evaristo Lopes was arrested³⁵. He did not hear anything or any order given by KOPASSUS in relation to those FALINTIL clandestine members. The witness alleged that he himself did not know that KOPASSUS wanted to arrest Evaristo Lopes. Once again about the incident, the witness testified:

259. “I did not see with my own eyes how the roadblock was set up at Tito’s shop. When we came to the main road and met João Lemorai and Mautersa with Evaristo Lopes, the victim was already covered in blood. I saw João Lemorai hitting Evaristo Lopes’ head. I saw also Mautersa striking Evaristo from the front. Lemorai and Mautersa were carrying and using iron bars. Gilberto and Pinto were not striking Evaristo. They were just bringing him to the command post. The KOPASSUS commander was the one who gave the order to take Evaristo to the command post. I did not go with the group that went to the comand post. I went first to the Junior High School for one hour, and after that, I went to the command post. (...)

260. “At the command post, Evaristo was held inside the room behind the guest room on the right side [*as you are going to the room from the front*]. There was a window on the back, but it was covered by newspapers. Evaristo was tied up on his hands and sitting. There was a spear on his feet on the back of his body. His hands and feet were separately tied on a spear and he was handling something heavy. In the room, Evaristo was with Lemorai, Mautersa, Joni Marques, Cesar Augusto, João Pinto, Oscar Pinto and Martino Bebeta. Gilberto Fernandes also was in the room and punching the victim. João da Costa Lemorai and Mautersa Monis were punching Evaristo Lopes by using an iron bar; others were using their hands. They were punching him many times and Evaristo screamed: *‘I am not guilty; that was not my fault!’*. Joni Marques struck Evaristo and kicked him in the stomach. Gilberto Fernandes kicked Evaristo about three or four times from the front in the stomach. He was using his hands. While they were beating Evaristo, Lemorai was asking him whether he worked for FALINTIL. Evaristo responded by saying that it was true he worked with FALINTIL”.

261. Gonsalo da Costa Sanches testified that he saw those men with Evaristo for a long time. João Lemorai was in the room for the whole time that the witness was watching and Joni Marques was talking with Rahmad in Rahmad’s room:

262. “They were making plans in the room, but I did not know anything about it. Joni Marques and Rahmad came out of the room and gave an order to kill Evaristo. But I do not know which one of them gave the order. They came out the room and said *‘Kill him!’*. Lemorai took a knife and put it into the mouth of Evaristo Lopes and the knife came out in the front of his neck. Evaristo was facing to the front and Lemorai was standing in front of him. Evaristo was sitting on a chair, but after he was stabbed he fell down. After João Lemorai stabbed him, the victim was not died yet. I did not see anybody cutting Evaristo’s hair. When I got there, it was already done. Lemorai, Mautersa, Pinto, Martino and Syaful Anuar kicked him and stabbed him until he died. Lemorai then went into the TV room and said that Evaristo was already dead. Joni gave the order to put the body in the rice sack and said that we should dump the body in Maharara, about 9km from Los Palos. That was the plan, but nobody wanted to go there. We went to dump the body in Saikurne about 5 km from Los Palos. There were 10 people on that last journey: Joni Marques, Tito Aero, Agostinho da Costa, Martino and Benedito, and others that I don’t remember now. João Lemorai did not come with us.

263. When questioned by the counselor Siphosami Malunga, the witness clarified that, when he arrived at the comand post, he saw Joni Marques, who was not in the room, but sitting on the floor. Then he [Joni] went to have discussions with Rahmad in the other room.

The testimony of the witness Domingos Ribeiro:

³⁵ In his statement before CivPol, it is mentioned that it was one week before Evaristo Lopes was arrested.

- 264.** Domingos Ribeiro testified that on 21 April 1999 Rudi de Jesus, Evaristo Lopes and Moises Lopes, all of them FALINTIL supporters, came in a vehicle parked on a road near his house. Sitting in front of his house, Moises called him and they came in to discuss a plan to pick up FALINTIL members. Evaristo Lopes suggested that they should try to find an excuse to cover up their operation. In Los Palos, they went to the telecom office. The witness and Moises got out of the car and came into the telecom post. Rudi de Jesus and Evaristo Lopes stayed in the car. After going to register his name, the witness found out that he had lost the telephone number he intended to call; that made Moises angry with him. They went back out to the car and drove home. On the way to Tito's shop, they could see at some distance a roadblock made of stones and wood. João Lemorai was standing there. In a loud voice, he stopped them: *'You all get out!* Evaristo Lopes, standing outside, was hit and beaten. The witness, Moises and Rudi were ordered and threatened by João Lemorai to stand in front of the car. João Lemorai grabbed the witness' head and said: *'Don't move! If you move, I'll cut your throat!'* Evaristo continued to be beaten for few minutes until a lot of Team Alfa members arrived. Not long after, a KOPASSUS member ordered them to take Evaristo to the command post. After Evaristo was taken away, the witness and his colleagues went home. At that time, the roadblock was open. After they went home, the witness stated that they still had a plan to pick up FALINTIL members in Rasa. But since there was no signal there, they decided to go back to Tilari.
- 265.** To the Prosecution, the witness clarified that he had noticed Team Alfa members at Tito's shop, sitting around a tree, when the group went to the telecom post. He recognized them because they were carrying instruments, including rifles. At the time, the witness already knew João da Costa Lemorai. Upon returning from the telecom office, the witness could see about five Team Alfa members at the roadblock, including Joaquim Januario and João Lemorai. The latter was carrying an one-and-half-arm length sword; not an iron rod as written in the statement given before the police. Since the witness alleged that mis-translation was likely to cause inconsistencies in some points of his statement to CivPol, he also clarified that the distance from the base to where Team Alfa members took Evaristo was about 200 meters as measured by the police investigators at the crime scene. About the approach made by João Lemorai, the witness said that Lemorai struck the front of the car. Firstly, Lemorai opened the driver door and ordered everyone to get out. Evaristo Lopes was sitting in the middle of the front seat. Lemorai ordered the victim: *'You, long-haired guy, get out!'*. Few minutes later in his deposition, the witness denied having said that João Lemorai had beaten the victim:
- 266.** "I only said that Lemorai opened the door. I didn't say that João Lemorai beat him. I said that members of Team Alfa were involved in beating Evaristo. I saw Team Alfa members beating Evaristo, but I didn't recognize them individually since it was night time. (...) I also couldn't see any injury to Evaristo's body, since it was night time. (...) They mobbed him and struck him with iron, others with hands. (...) I can state that João Lemorai took my head and didn't let me move. (...). After they took Evaristo Lopes away, João Lemorai told the rest of us: *'We'll cut his long hair and bring him back tomorrow.'*"
- 267.** About possible inconsistency in relation to his statement given to the CivPol, the witness clarified:
- 268.** "The truth is that we went to the telecom office. When we got there we didn't have the number. We had one intention: to come back from Los Palos to pick up a member of FALINTIL; that was our intention".

The testimony of the witness Armindo Soares:

- 269.** The witness Armindo Soares came before the Court and testified that he had witnessed the torture and killing of Evaristo Lopes. He had been a Team Alfa member since 1999, and he was still a member in April 1999. He was there because the Indonesian Armed Forces reminded him to be there. He had been there for two days when the incident occurred. He was in the next room and he could see Evaristo Lopes through the window. There were people with the victim in the room: Joni Marques, João Lemorai, Martino, Gilberto Fernandes, Mautersa Monis and Oscar Pinto. Joaquim Januario was there as well. They were beating and kicking the victim. The witness added:
- 270.** "I saw Joni Lemorai tie the victim with a plastic cord around his feet. I also saw him hitting the back of the victim. The victim was bleeding. João Lemorai was hitting him continuously, for approximately 20 minutes, using a white cable to strike him. The witness saw Joni Marques cutting the victim's hair. Gilberto Fernandes hit him five times using his own feet on the left side of the stomach and on the chest; and Mautersa was also hitting him. I did not see anyone speaking to the victim who was screaming. The victim was naked; no clothes at all. At approximately midnight, Gilberto Fernandes came and told us that the person had died. He did not say that to me particularly. I forgot to mention that Syaful Anuar came along to assist in the killing of the victim. I was in the room and I saw them carrying the body. I cleaned the blood that was present on the floor."
- 271.** When questioned by the Prosecutor, the witness clarified that he came to the window to look at the victim many times. The first time, he watched for 20 minutes and went away, back home to sleep. After he heard a sound coming through a triplex³⁶, he came back to the window and saw João Lemorai, Gilberto Fernandes and Oscar with

³⁶ Triplex is a sort of locally manufactured wooden board.

the victim. Lemorai was still using a cable to beat the victim. Evaristo was still alive. He saw that the victim was being hit, and he did not watch any longer. At approximately midnight, he went to contemplate in a quiet place. The witness added:

- 272.** “At almost midnight, I heard Evaristo screaming, so I returned to the post. I saw that the victim was already dead. His head was split and there was a large wound on the head. There was a lot of blood everywhere. Martino cut off the ear of the victim. Joni Marques was the one who gave the order to bury the body. I heard the order”.
- 273.** Responding to a Prosecutor’s specific question, the witness emphasized:
- 274.** “(...) I do recall that Syaful Anwar was the one who killed the victim.”
- 275.** However, after the Prosecutor refreshed his memory about his previous statement to CivPol [“... *In front of Gilberto Fernandes, Evaristo Lopes was killed by Syaful Anwar, who had cut Evaristo’s throat. João Lemorai and Pinto helped Syaful by holding Evaristo’s head from behind and holding Evaristo feet...*], the witness testified:
- 276.** “Yes, it was a long time ago. I forget what I said. I do actually recall that Syaful Anwar was the one who killed the victim”.

The testimony of the witness Mario Ribeiro:

- 277.** The witness Mario Ribeiro, 43 years old, was a member of Team Alfa since 1987. As such, he admitted that he knew about the facts because he was present at the KOPASSUS base at the time. “KOPASSUS and Team Alfa took that base in rotation.”
- 278.** Firstly, he recognized in the courtroom the accused João da Costa *Lemorai*, Mautersa Monis and Joni Marques. Regarding the death of Evaristo Lopes, he could testify about the events which took place at the base:
- 279.** “João Lemorai, Mautersa Monis and Joni Marques: they were the ones who beat up Evaristo Lopes”, emphasized the witness. “I saw Joni Marques punching and kicking Evaristo Lopes. (...) They started beating him at night time around midnight. (...) When the person was already dead, Joni Marques and Sergeant Armad came and woke me up to bury that person. I went to follow the order with Gonsalo, Oscar and Agapito.”
- 280.** During his cross-examination, the witness explained that Team Alfa members were given orders by Commander Thomas, who followed directives from KOPASSUS. Those orders were specifically to fight against the FALINTIL movement. For that purpose, KOPASSUS provided them weapons. If a FALINTIL or FALINTIL member was found, the orders given were to shoot him or her quickly. “Every time we looked for FALINTIL members, there were three of us and six others from KOPASSUS”. As a Team Alfa member, the witness also earned money (about Rp 75,000 monthly) and food. Staying at home and also participating in Team Alfa operations fulfilled his duties. The witness sometimes used to speak to FALINTIL, given that he worked for this group until 1987 when he came down from the forest. “Because they were my friends, I never shot them in my operations when I was carrying guns”, alleged the witness.
- 281.** About the death of the victim, the witness reported that he was on guard at the post from 7:00 in the morning until 8:00 in the evening in accordance with the guard rotation. On that night, a meeting was held by Sergeant Armad and Syaful Anwar, and Team Alfa members Joaquim Januario and Thomas with the purpose of discussing the death of Evaristo Lopes. “I knew about the meeting because my colleague Felix told me. On that day, they gathered and they were going to arrest that person”, explained the witness to the Prosecution. “I saw them going into a closed room; therefore I myself didn’t know what they talked about”. In the morning, the witness had heard the name of Evaristo Lopes mentioned by Team Alfa members. “From the time he was taken to the room, they beat him and I knew that Evaristo Lopes was at that place.”
- 282.** Detailing the beating of the victim, the witness stated as follows:
- 283.** “Joni Marques said: ‘We’ve beaten up Evaristo Lopes. He is dead. You take him away!’. We picked him up in a big plastic bag, like a tent, and we went to bury the dead body. (...) [At the time Evaristo was being beaten up] I was in front of the door about 6 meters away. Evaristo was in the last room inside that building. Beating him up inside that room there were João Lemorai, Joni Marques, Joaquim Januario, Júlio da Costa, Virgal da Costa, Mautersa Monis, Alexio Dias Quintas, Gonsalo Sanches, Oscar, Sergeant Syaful and Gilberto [whose surname is unknown for me but I can point him out right now in this courtroom]. (...) Sergeant Armad came to the room just to have a look. He didn’t beat Evaristo. (...) The first person I saw beating Evaristo was João Lemorai. I don’t know which part of his body he was beating. (...) They beat him up from 10:00 PM until midnight. [As I was] on guard there, I heard many screams. I also saw João Lemorai and Mautersa Monis and one KOPASSUS member beating Evaristo Lopes. (...) I saw João Lemorai using an electric cable to hit that person. Many people also beat him using the cable. João Lemorai hit the victim on his back and his head. (...) Gilberto just hit and kicked him in the stomach, mouth and face. I couldn’t count how many times. Mautersa also kicked the victim. (...) Also Syaful was there, hitting that person. (...) [After having his memory refreshed from the content of his statement to CivPol], I remember that Joni Marques

said [about three times] to Evaristo Lopes while he was beating him: *'You're telling lies, you already have contact with FALINTIL!'*. People inside the room – Gilberto, Oscar and Mautersa – they also said that Evaristo was lying. I saw that for about twenty minutes. Then I went to sleep about 11 o'clock. They continued beating Evaristo Lopes. (...) I was woken up by Joni Marques and Sergeant Armad around midnight to bury the dead body, [that] I recognized as Evaristo Lopes."

284. To the Defense Counsel, the witness explained about training held in Aileu in 1995 when he joined Team Alfa. "Javanese people trained us". For 12 years as a Team Alfa member, the witness never found a FALINTIL member during his turns to search for pro-independence militias. About the death of Evaristo Lopes, the witness stated that he was unaware of the motive:

285. "That was the first time that I witnessed such incident. After that, I didn't see any other incident either. (...) I didn't see the victim at the time he was killed, but I saw the corpse being taken to the car. (...) But I saw them beating him up in that room, since I was 6 meters away. (...) I knew he was already dead because his body was taken to the car. (...) I don't know about any injuries [when I went out to bury the dead body]. I know that they took his clothes off, but I can state that Evaristo Lopes was not tied up at the time they were beating him up. (...) The light of the room was on. They were surrounding him, but I could see because I was 6 meters away and looked over the door. The room had no windows, but two doors, one on the left and another on the right side. I was guarding the base outside and I also saw a person named Armindo Soares there. Soares was taking guard behind the building. I don't know whether he was inside the building or not, but I know he was taking guard with me. I also saw Gonsalo da Costa Amaral inside the room. I saw him also beating Evaristo Lopes. After beating him, Gonsalo later told us that on that night they had come and beaten up someone from the village. That night, they were all watching TV, including Gonsalo. (...) I think Gonsalo became involved in Team Alfa more or less for one year. (...) What I know about Evaristo Lopes' arrest was told at the command post. Once Evaristo got to the post, Sergeant Armad said to Team Alfa members: *'Where did you arrest Evaristo?'* They replied: *'We arrested him at Tito's shop'*. (...) Armad of KOPASSUS was the one who ordered them to go there. But I don't know what Armad said. [About Syaful Anwar], I saw him leaving the base on that night in a blue *Kijang*, but I didn't know where he was going to. Since we didn't speak the Indonesian language, we stayed at the base. The ones who spoke Indonesian went with him. Gonsalo usually went along and he went that night with Syaful Anwar. [About my meetings with FALINTIL] I informed them about the beating that was going on or had to take place. If the situation was quite dangerous, we needed to meet once a month. I was a FALINTIL clandestine member. In 1994, KOPASSUS arrested me again. For four months, they pulled out the hairs of my beard, one by one. I was a member of Team Alfa, but I also had contact with FALINTIL; there were suspicious of me, so they arrested me. At the time, they arrested all the clandestine (...), they mentioned my name. (...) Actually I really didn't work for Team Alfa, but for the clandestine movement. I joined to avoid suspicion. I didn't know Evaristo Lopes. He lived in Rasa. I lived in Leuro. All I know is that Evaristo Lopes was said to be a member of the clandestine movement. Therefore, he was arrested (...)"

286. About Gilberto Fernandes' conduct, the witness once again pointed out the accused in the courtroom and identified him. "He beat Evaristo Lopes with his hands, but I couldn't count how many times. (...) On that evening, another man named Valério had also been detained and beaten up at the base. Valério was arrested by Joaquim Januario also at Tito's shop around 6 PM".

287. Questioned by the defense counsel for Joni Marques, the witness clarified that he was still awake at 10:00 PM and outside the room, after finishing his shift, because Evaristo Lopes' screaming woke him up again. "Yes, we went to sleep, but we still could hear".

288. Finally questioned by the Court, the witness testified about the close ties between the head of the district (*Bupati*) and KOPASSUS force. During one of the meetings involving Team Alfa members and KOPASSUS, the *Bupati* Erminio da Conceicao declared: *'Autonomy must win! Where did the CNRT get the weapons from?'* The Defense for Joni Marques asked whether the instructions given to Team Alfa members included also the searching for FALINTIL supporters. The witness remarked: "They ordered us to search for FALINTIL only".

The testimony of the witness Salvador Amaral:

289. The witness Salvador Amaral was a Tim Ratih militia member since 1995. His duties, according to him, were "to stay together with other pro-autonomy groups and to cook at the base". But later he explained: "I carried weapons, but I only worked at night time. At the time I was at home, the commander called me to be on guard at the base".

290. About the torture and killing of Evaristo Lopes, his first statement was excerpted as follows:

291. "(...) I listened to the screams and I went to the room. At the time, I saw those who were beating Evaristo Lopes. They were: João Lemorai, Oscar, Joni Marques, Martinho, Augustinho, Gilberto, Syaful Anwar, Salvador and Cesar Augusto. I was there and also beat up the victim twice. At the time, João Lemorai came and stabbed the victim. Then I said to him: *'Don't attack him!'*. However, they tried to kill me. At the time, I was scared, so I had to cooperate with them. Since I was scared, I had to kick the victim. João Lemorai kicked the victim, took an electric

wire and hit the victim. After that, he hit the victim with an iron bar. Blood came out and Syaful drank it by leaking in his mouth. At the time I was outside. (...) I saw Oscar holding the victim's hands and João Lemorai holding the victim's head while Syaful Anwar cut the victim's throat. Then, in the morning, I asked João Lemorai who had captured and killed the victim. Two days later, he told me that Oscar was holding the victim's hands, and he, Lemorai, was holding the head and Syaful Anwar cutting the throat. On that night, Gonsalo took the dead body to the car. At the time we left the body in a plastic bag and Syaful Anwar drove the car. We buried the dead body about 200 meters from the main road. Joni Marques, Oscar, Martinho, Agapito, Salvador, Gonsalo and two KOPASSUS members came with me to the burial".

292. Questioned by the Prosecution, the witness declared that he had not known Evaristo Lopes before. From outside the base, he could see them beating up the victim:

293. "I was at a distance of 5 meters. (...) I went into the room where the screaming was coming from, the room in the middle of the building. Firstly, I went through the back part; then I moved to that place through a door. Since the front door was guarded and covered up by triplex, I went through the back door. (...) When I entered, I saw João Lemorai, Joni Marques, Oscar and Syaful Anwar beating the victim. (...) I could see João Lemorai beating the victim first. He kicked him and beat him up by using an electric wire. (...) He was kicking him in the chest and the whole part of his body. He beat him up repeatedly, so I could not count how many times. (...) They were all involved in beating him up. Joni Marques was also involved in the beating and besides that he cut the victim's hair using a knife. (...) I saw Joni Marques using his fist to punch him. He pushed the victim and hit and kicked all the body of Evaristo Lopes. He had beaten up the victim for a while, so I could not see how many times he was beating up. (...) I also remember a man named Gilberto, whose surname is unknown to me. I only said Gilberto to the CivPol, but I can recognize him if I looked at him in this courtroom. [*Pointing to the accused Gilberto Fernandes inside the courtroom*]. I can state I really know him. He was together with Alfa on that night. I saw him beating the victim. He only kicked and hit him on the face and the whole part of his body. (...) When I first went into the room, I saw that João Lemorai had tied up the hands of the victim to the back. João Lemorai also used an iron bar to hit the victim. Maybe others were beating him with the iron rod too, but the only person I saw was João Lemorai. João Lemorai had a knife and tried to stab Evaristo Lopes. I tried to prevent it, but then João Lemorai came back and got the knife from Joni Marques. When he took the knife, Joni Marques refused to give it to him, so João Lemorai came back and kicked and beat Evaristo Lopes. (...) I don't know how long I watched the beating and how long it lasted, but now I confirm having said to CivPol that 'approximately five minutes later I went into the room I saw João Lemorai trying to stab Evaristo Lopes'. (...) While I was in the room, I don't remember whether they said something to Evaristo Lopes. If that happened, they said it in Fato-luco dialect or in Indonesian language, so I could not understand what they were saying. (...) After I left the room, I never returned to that place until Evaristo Lopes was killed. Once again, I stated that I actually saw from outside Syaful Anwar cutting the throat of Evaristo Lopes. I saw it and later in the morning I also got more information from João Lemorai. (...) I know who Mautersa Monis is, but I didn't see him in that room".

294. To the Defense Counsel, the witness confirmed that he himself had witnessed the murder of the victim:

295. "I saw it with my own eyes. I stayed outside about 5 meters away. [About the killing], João Lemorai held the victim's hands; Oscar held his head and Syaful Anwar cut his throat". The witness also stated that the ones he saw at that moment in the room were João Lemorai, Oscar and Syaful Anwar. About the fact that he himself had also beaten up the victim, the witness alleged that he was afraid and was told and ordered by João Lemorai and Cesar Augusto (and not Syaful Anwar, as stated to CivPol), that he would be beaten if he refused to hit the victim.

296. About his previous involvement with Tim Ratih militia group, the witness highlighted: "Tim Ratih never killed anybody". He insisted that it was the first time he witnessed someone being killed by cutting the throat.

297. On the conduct of Gonsalo da Costa Sanches, the witness could not state whether he participated in the beating. "The room had a window facing outside with the glass broken".

298. Questioned by the Court, the witness denied knowing what Evaristo Lopes had done wrong when he was arrested. "I was surprised and scared because of his arrest. (...) Also I don't know whether anybody else had been arrested that day. (...) I knew that a lot of people had been arrested in 1999, but I don't remember their names".

The testimony of the witness Valério Valente:

299. The witness Valério Valente, actually 26 years old and First Lieutenant of East Timor Defense Forces (FDTL), and nephew of the Defendant Mautersa Monis, gave his oath and firstly testified that he was a clandestine supporter of the FALINTIL movement at the time. He was the other person arrested by Team Alfa members at the roadblock on the same night as Evaristo Lopes was captured. In short, this was his testimony:

300. "At the time I was being chased by the men sitting here in the courtroom. Thus, I ran away to Java and stayed there for six months. After spending that time in Java, I came back to my region. I was ordered by FALINTIL and I helped them. They ordered me to get provisions like rice and sugar for their needs. At the time my car was

broken (...). We – my two brothers and my friends – went to the shop. On the way back home, we saw them at Tito’s shop. My friends gave up, but I wanted to go home and I went ahead. Those who arrested me are the ones here in this courtroom. (...) I didn’t feel I was going to be arrested. I wondered: *‘What is going wrong? Why am I going to be arrested?’*. I didn’t suspect anything, since if they harassed me I would run away. (...) Then many people came and hit me, one of them carrying a sword. Those people were those four persons: [pointing to the Defendants in the courtroom]: Joni Marques, João Lemorai, Mautersa Monis and Gilberto Fernandes. I was arrested by Gilberto. These four persons also kicked me at the Alfa base. After going to the Alfa base (...) they bashed me. They said to me: *‘You’re one of the people of the forest!’*. I lied, I denied, I didn’t admit that I was with the people in the jungle. One of those bashing me was João Lemorai. They kicked me. Lemorai had an instrument and said: *‘Tell us the names of the people in the forest’*. I said that I didn’t know anything about. About 2 hours of beatings, I still didn’t say anything. After that, one of them said: *‘You’re going to die now!’*. I insisted that I didn’t know anything and asked them what was going on. They said: *‘You’re lying!’* I said: *‘I don’t work for them; I just came back from Java!’* Apart from those four people I have mentioned before, I remember that the militia members Joaquim and Luis also kicked me. Syaful Anwar also hit me with a cable on my body. I refused to admit. Syaful threatened me: *‘If you don’t admit, we’ll kill you!’*. There was a nice guy in Team Alfa who said to me: *‘I was also working for the clandestine movement, but I now work here. Tell me a little bit or you’ll die’*. I don’t remember his name, but for sure it is not one of those men sitting in this courtroom. I thought to myself whether I would tell or not, but they kept beating me. But God was saving me. When they saw a FRETILIN flag stamped in my leg (...) I was scared and thought they would kill me. (...) When they saw the flag, they bashed me. *‘What is up? You are lying!’* (...) I was scared that they were going to kill me. I just said *‘no!’*. My friend said: *‘Just tell me a little and you’ll be safe’*. (...) Then I started saying not important things. (...) After that, they put me in a room. I went in. My friend came with me and I saw a long-haired man. He was like my uncle Mautersa Monis. He had been also kidnapped. His name was Lopes. I was in the room. They interrogated me and I said *‘Whatever I know I will tell you’*. They still hit me and my body was injured. They said: *‘Tell us the truth or you’re going to die!’*

301. About the torture and murder of Evaristo Lopes, the witness testified:

302. “(...) I was also afraid I was going to die when they said in relation to that man: *‘If you don’t speak, you’ll die just like your friend!’* My friend was screaming, I could hear him. Actually I didn’t see him dying or being beaten. I just saw the blood coming out and heard his screams. I don’t know who killed him.”

303. Questioned by the Prosecution, the witness Valério Valente said that Team Alfa members had a samurai sword but didn’t take it out. He gave a description of the room where he had been held. “It was inside, on the right side and in the middle, no windows, and I don’t remember how many doors”. About the beating, the witness added that João Lemorai also used an electric cable to beat him. About his close ties with Mautersa Monis, the witness remarked that his uncle refused to admit any family relationship to him:

304. “I don’t know how many times he came into the room where I was held. For sure he was not always there. (...) I was taken to the base around 6:00 PM and I went out the next day about 8:30 AM. During that time, I don’t know how many times Mautersa came into my room. At the time, I heard the screamings [of Gilberto Lopes]. I didn’t know who he was, but when I looked at the door he was bleeding. (...) Lemorai opened the door so that I could see Lopes inside. It was in the middle of the night. I remember having heard some Team Alfa members saying that *‘we’ve kidnapped a man from the jungle with long hair’*. I once stated that Lemorai opened the door and pointed at that man and threatened me: *‘You’re going to be like that guy!’* (...) The screaming stopped about 4 o’clock. At that moment, there were two Team Alfa members with me in my room, one of them carrying a rifle. I don’t know their names (...) Next day, around lunchtime, I went back home after being taken to the Kodim district base in a blue *Kijang* with a KOPASSUS commander”.

305. Questioned by the Defense of João Lemorai and Gilberto Fernandes, the witness alleged that maybe his arrest was due to the suspicions that KOPASSUS had on him as a clandestine FRETILIN supporter. “I didn’t tell anything, maybe their secret police or intelligence service told them that”. However, the witness could not explain why he was released the next day. The witness refused having said to the CivPol before that the one who threatened him by showing Evaristo Lopes’ bleeding face was Syaful Anwar. “I remember that João Lemorai said that. It was him; not Syaful Anwar. When I opened the door, I don’t remember Syaful Anwar saying that”.

306. Questioned by the Defense of Mautersa Monis, the witness explained that his uncle was 10 meters away from him at the roadblock when he was arrested. “I had no reaction. (...) Later, at the post, Mautersa hit me. He didn’t recognize me or pretended not to recognize me. I think maybe because he was afraid. (...) We are relatives, I have no grudges against him”.

The Prosecution’s closing arguments

307. The Prosecution made the following conclusions in the closing statement:

“Count 1: Crimes Against Humanity - Torture of Evaristo Lopes: 21st April 1999

Evaristo Lopes was, of course, killed on 21st April 1999. The Prosecution have, however, included an additional count of Torture to deal with the situation where the Panel conclude that any one of accused's conduct did not contribute to the killing of Lopes but did constitute participation in the torture.

To prove torture the evidence must show:

- that severe pain or suffering was inflicted upon Evaristo Lopes
- that Lopes was a person in custody or under the control of the accused
- that the infliction of that pain or suffering was intentional
- that the pain or suffering did not arise from lawful sanctions
- that the accused is criminally responsible for the conduct
- that the conduct was part of a widespread or systematic attack against the civilian population
- that the accused knew the conduct was part of a such an attack

The prosecution submit that (i), (ii), (iii), (iv) and (vi) are not in issue with any of the accused. There is no issue that Evaristo Lopes suffered severe pain. No accused has said otherwise and the evidence of the witnesses is conclusive. Lopes was taken into custody at the base shared by Team Alfa and the KOPASSUS. There is no question that the beating he received was intentional and that it did not arise out of any lawful sanction.

The Prosecution submit that there is no real issue that this conduct taken against Evaristo Lopes was part of a widespread or systematic attack directed against the civilian population. Lopes was a civilian, albeit one who was at the time he was detained working for the clandestine movement. As discussed earlier, such a person is still a civilian for the purpose of the law of crimes against humanity. This conduct was taken by Team Alfa at the direction of the KOPASSUS. It was no doubt perpetrated as one part of the Indonesians' continued campaign. It may even have been directed specifically against Evaristo Lopes after he was identified in a letter as being a clandestine member.

The roadblock was set up during the time between the car in which Lopes was a passenger passed by Tito's shop for the first time and was removed as soon as Lopes was taken to the base. This is good evidence that the roadblock was intended specifically to stop him. If it had any other purpose, it would surely have been left in place after he was arrested in order to stop other vehicles.

During the course of the beating upon him, there was evidence that Lopes was questioned about his involvement with FALINTIL.

JONI MARQUES

The issue in respect of Joni Marques on this count is:

Did he participate in inflicting pain and suffering upon Evaristo Lopes?

Did he know that the conduct was part of a widespread or systematic attack directed against a civilian population?

Joni Marques said that he was not present at the roadblock when the car in which Lopes was a passenger was stopped and that he only saw Lopes when he was brought to the post. Rudi de Jesus is the only witness who says that Joni Marques was at the roadblock. Other witnesses and Joni Marques himself say that he was not. As Rudi de Jesus only identified Joni Marques in Court during the trial, more than two years after the event, the Prosecution do not rely on this identification in their submissions. What is certain, however, is that Joni Marques was at the Team Alfa/KOPASSUS base and he was in the room where Lopes was being held.

Joni Marques says:

Joni Marques (10/7): "First we beat the victim – I saw it...I took a sword and cut the hair of the victim...I didn't hit the victim. I only saw Syaful hit Lopes." "I cut Lopes' hair" "I think he was being beaten because he was a FALINTIL supporter." "I cut his hair to pretend I was involved so they would not know my true feelings..to look like I was Team Alfa and not clandestine FALINTIL." "I was in the room about 25 minutes...when I returned I saw Syaful stab him and stand on his neck." "When I first saw him I cut his hair; nobody had beaten him."

The fact that Lopes's hair was cut is confirmed by the witnesses from Los Palos hospital, Dr Romaldo BOSCO stmt 28/4/99 and Almerindo Fernandes XAVIER 26/9/00, who examined the body of Lopes.

However, there are witnesses who say that Joni Marques did more than that:

Gonsalo da Costa Sanchez (2/8): "Joni Marques kicked him in the stomach, not for long" "I saw Joni marques kicking Lopes in the stomach"

Mario Ribeiro (13/8): "Joni Marques ..kicked and hit that person to death" "Joni Marques told Lopes 'you're lying, you have spoken already to FALINTIL'..perhaps he said that about 3 times"

Rudi de Jesus (1/8): "Team Alfa were the tough guys in Los Palos." "If they wanted to they could arrest us and take us away, one of my friends was beaten once...everyone was afraid of Team Alfa. Team Alfa was an enemy of FALINTIL..I knew members of Team Alfa, it was necessary."

Salvador Amaral (14/8): "Joni Marques beat him up and also cut his hair...he used his fist and he kicked him...hit and kicked him all over his body."

The prosecution does not only rely on this evidence that Joni Marques struck Evaristo Lopes. Joni Marques had another significant role. He was clearly one of the leading members of Team Alfa in Los Palos. On the evidence we have he was the most senior member of Team Alfa present at the base on 21st April 1999. His presence at the base would give encouragement to the other members of Team Alfa. When he did not intervene to stop what was being done to Evaristo Lopes, it would have been a signal to the others that it was acceptable to carry on.

The combination of the evidence that Joni Marques beat Evaristo Lopes and his position of authority within Team Alfa makes Joni Marques a joint participant in the torture. As he accepts himself, Lopes was being beaten because he was a FALINTIL supporter. What better evidence that Joni Marques knew that this offence was being committed as part of a widespread or systematic attack upon the civilian population!

JOÃO DA COSTA

As with Joni Marques, the prosecution submit that all the elements of the case against João da Costa are admitted and not in issue, except the extent of his participation and his knowledge that this was part of a widespread or systematic attack.

João da Costa admits that he was at the roadblock:

João da Costa (6/3): "we blocked road and we arrested Evaristo...we beat him"... "I was involved in the torture but I didn't know about the plan of the political movement...I was ordered to do the job. KOPASSUS member Syaful Anwar gave me the order"

(12/7): "At about 8 pm we were ordered to build a roadblock and capture Lopes...I knew who he was..three of us at roadblock, me, Mautersa and Joaquim" "I stopped the car and I opened the door, then Mautersa beat him four or five times." "Gilberto and others took him to the base...I stayed at road then went to the post." "I beat Lopes at the post..with an electric cable, about four times" "I was ordered to capture Lopes." "I didn't know Lopes was FALINTIL or clandestine." "I was ordered to beat him and so I did."

Not only do the witnesses confirm that João da Costa beat him at the post, they also say that he beat him at the roadblock, saying that he was armed with an iron bar:

Rudi de Jesus (1/8): "João da Costa was the first person to hit him..with an iron bar..on his back and on his head 3 or 4 times; he said 'we've been looking for you for a long time.'"

Moises Lopes (31/7): "João Lemorai screamed 'you are a civil servant, you are all members of CNRT.'" "Lemorai grabbed Lopes hair, he slapped him on the back of head..."

Gonsalo da Costa Sanchez (2/8): "he was kicked by Lemorai and Mautersa and Martino... Five of them kicked him to death. Martino was kicking and so was Oscar Pinto. He wasn't dead so Lemorai stabbed him through the mouth into his neck, he used a knife. After that he was dead. I saw ..Lemorai hit him in the head and he bashed other parts of his body with an iron stick about 1 metre long...they were beating him for 10 minutes without stopping...Lemorai bashed him from behind and Mautersa Moniz bashed him from the front..Mautersa and Lemorai had iron bars." "Lemorai asked him if he worked for FALINTIL" "They came out of the room and said 'kill him' and straight away Lemorai used a knife and stabbed him in the mouth. It came out the front of his neck. Lopes screamed Team Alfa is killing me and he became weak...after the stabbing he fell down..It was a dagger..When Lemorai stabbed him, he wasn't dead yet and 4 or 5 of them kicked him to death, Lemorai, Mautersa Moniz, Oscar Pinto, João Pinto, Martino, Syaful Anwar, they jumped on him, stamped on him until he was dead. Lemorai went into the television room and said Lopes is dead."

Armindo Suarez (8/8): "Lemorai was tying Lopes hands...I saw Lemorai beating him with a cable.. Lemorai was using a white cable, sometimes he was kicking, sometimes he was punching with a fist." "They said 'you are FALINTIL, you only come out at night'..Cejar Augusto said that...Lemorai, Oscar Pinto, Martino and Gilberto Fernandes were in the room when he said that" (9/9): Saw João Lemorai asking..'why are you roaming about in the night? Why do you come out very night? Are you helping FALINTIL?'"

Mario Ribeiro (13/8): "João Lemorai used a cable to hit him..on his body and on his head." "In the room they beat him up. They said 'you're lying you have got contact with FALINTIL'. Lopes said 'no, in the name of God I went to telecom to call my brother'"

Salvador Amaral (14/8): "João Lemorai was the first one I saw beat him...he kicked him, punched him and also using electric cable..kicked him on his chest and all over his body..he beat him repeatedly, I couldn't count how many times..he beat him with the cable all over his body. I saw João Lemorai tie up his hands, at the back. João Lemorai used an iron bar to hit Lopes."

Valério Valente (16/8): "Lemorai opened the door so I could see Lopes..Lemorai said 'If I didn't admit I would be like that'. They said 'you are lying, why are you not admitting. You are working in the forest'" "They said 'we have kidnapped a man from the jungle with long hair. A man named Lopes. They said 'you are going to be like that'. I was afraid. They said 'if you don't speak you will die like your friend'"

There is substantial evidence that João da Costa played the leading role in the beating of Evaristo Lopes. There can be no doubt that he participated in the crime pursuant to section 14.3(a). As to whether João da Costa knew this was part of a widespread or systematic attack, the question is posed: what possible reason was there, other than an attack upon a suspected member of clandestine FALINTIL?.

João da Costa said himself that he was ordered to do the job by a KOPASSUS member Syaful Anwar. João da Costa, who joined Team Alfa in 1995, told us its purpose was for the Indonesian politicians to supply Team Alfa to fight against FALINTIL members.

It is inconceivable that a man in João da Costa's position, as a member of Team Alfa, receiving orders from the KOPASSUS did not know that what he was doing was part of a widespread or systematic attack. More than that, there is evidence from witnesses that he himself accused Lopes of working for FALINTIL, being a man from the jungle. If he did not know the significance of working for FALINTIL or being a man from the jungle, the words used by him to Lopes would have been meaningless.

MAUTERSA MONIZ

Mautersa admits the following:

Mautersa Moniz (12/7): "I received orders to set up a road block..me and João went and stopped the car...I was given a piece of iron bar by Syaful Anwar." "When Lopes got out I was ordered to beat him by Syaful...I hit him four times on his back, once with the iron bar

and kicked him four times on the back.” “At the base there were lots of Team Alfa and KOPASSUS and they hit him...because many people got beaten there, if he goes there he would die.” “My nephew Valério Valente was arrested in another room...I went into his room...I never saw him again...I never went into the room that Lopes was in.”

That statement is simply not true. Three of the witnesses say that Mautersa was also in the room where Lopes was being beaten. Moreover, Valério says that Mautersa was not with him all the time, but would come and go into his room. The witnesses describe Mautersa Moniz playing an active part in the beating; not just at the road block (which he admits) but inside the room in the base:

Gonsalo da Costa Sanchez (2/8): “In the room with Lopes were Lemorai, Mautersa, Joni Marques, Cejak, João Pinto, Oscar Pinto and Martino..and Gilberto, they were bashing Lopes. The only ones using instruments were Lemorai and Mautersa with iron bars

Armindo Suarez (8/8): “I saw Mautersa Moniz hit Lopes..in the chest and once he kicked him wearing Indonesian boots.”

Mario Ribeiro (13/8): “At the time he was beaten I saw João Lemorai, Mautersa Moniz and one KOPASSUS member” Mautersa Moniz hit him, I couldn’t count how many times.. “I saw João Lemorai, Mautersa Moniz, Gilberto, Joni Marques and others, 12 in the room. They were the ones who beat up Evaristo Lopes in the room and 1 KOPASSUS, Syaful Anwar, was also in the room.”

Valério Valente (16/8): “Mautersa came into the room and beat me..he was not always there..he did come into the room, but I don’t know how many times.” “They took turns, one came in and then another”

Mario Ribeiro (13/8): “Joni Marques told Lopes ‘you’re lying, you have spoken already to FALINTIL’..perhaps he said that about 3 times...Mautersa Moniz, Gilberto and Oscar said ‘you are lying.’”

Valério Valente (16/8): they said ‘you are lying, why are you not admitting. You are working in the forest’” “They said ‘we have kidnapped a man from the jungle with long hair’”.

What was said to Evaristo Lopes and to Valério Valente all showed this to be a part of a widespread or systematic attack upon a member of the civilian population. That must have been obvious to Mautersa at the time he took part in this offence.

GILBERTO FERNANDES

Gilberto Fernandes said:

Gilberto Fernandes (11/7): “Told to bring a man to post, Gonsalo, Syaful Anwar and me did so” “At the post..he was beaten up..I hit him about two times. After that I got out from there” “I hit him about three times, I hit him from the back on his hips” “I only hit him three times, I didn’t have the intention to beat him, I was forced by Syaful Anwar.”

(13/7): “after I had hit him, then I left.” “I don’t know how Lopes was killed.” “I hit Lopes because Syaful asked me to.” “I hit Lopes with my hands.” “I hit Lopes first, then Joni cut his hair and then Syaful and João hit him.”

The witnesses say:

Rudi de Jesus (1/8): “(Gilberto Fernandes stands up). I don’t know his name but he was at the roadblock.. with the other Team Alfa men..he had iron bar when we arrived at the block..he was standing on the road with João Lemorai. I know him as a Team Alfa member. I saw him in Los Palos with other Team Alfa men

Gonsalo da Costa Sanchez (2/8): “Gilberto Fernandes and João Pinto took Lopes away.”...”Gilberto Fernandes hit him 3 or 4 times, then went out, struck him from the front, in the stomach with hand and feet.”

(8/8): “Gilberto Fernandes hit Lopes 3 times. He did not use a weapon, he kicked him in the stomach..at the post...Gilberto was there a long time, until the victim died and then he went to his room... he was in the room when Lemorai stabbed Lopes”.

Armindo Suarez (8/8): “Lemorai kept hitting, continuously as well as Gilberto Fernandes. Gilberto said to me the next day ‘my hand has been broken because I killed that person’”

“Gilberto hit Lopes ...5 times, he used his barehands..left and right side of the stomach and the chest” “They said ‘you are FALINTIL, you only come out at night’..Cejar Augusto said that...Lemorai, Oscar Pinto, Martino and Gilberto Fernandes were in the room when he said that”.

Mario Ribeiro (13/8): “Gilberto also beat him..he just hit and kicked him...kicked him in the stomach, hit him in the face”

Salvador Amaral (14/8): [pointing at Gilberto Fernandes] “I saw that man beating the victim. He kicked and hit him. On the face and the whole part of the body”

The evidence is that Gilberto beat Lopes and then left the room. There is no evidence that he was present in the room when he was killed or that he was an individual there in the position to encourage others to commit the offence. The Prosecution submit therefore that it would be an appropriate situation for the Panel to consider finding him guilty of the count of Crimes Against Humanity - Torture, but not the count of murder.

Gilberto Fernandes was a member of Team Alfa. He knew that Team Alfa took orders from KOPASSUS. He said himself that it was Syaful Anwar who gave him the orders to beat Lopes. Lopes was taken from a roadblock which was set up to stop him and then he was taken by Gilberto Fernandes to a room in a base which was occupied by Team Alfa and KOPASSUS. There could be no other purpose for this action that to play its part in the attack on the population.

Although Gilberto claims to have been forced into his actions on the 21st April 1999, it is worth noting that the evidence from Valério Valente that it was Gilberto who also arrested him on that night.

Count 2: Murder of Evaristo Lopes on 21 April 1999

To find any of the accused guilty of murder, the court must find:

- That the accused kill or caused the death of Evaristo Lopes.
- That killing was part of a widespread or systematic attack on the civilian population.
- The accused knew it was part of such attack.

JONI MARQUES

Joni Marques said:

Joni Marques (10/7): “I was present when he died. He was beaten to death...I had no intent to kill him, but I accept I am implicated in the torture....I was present when he died. He was beaten to death...I had no intent to kill him”

By his presence and encouragement Joni Marques was responsible jointly with the others involved pursuant to section 14.3(a) reg 2000/15. Even if that is not accepted, he must be responsible pursuant to section 14.3(d), his presence and support being a contribution to the commission of the offence.

The Prosecution say that the killing of Evaristo Lopes was the natural consequence of the conduct of the participants in the beating.

Joni Marques by his conduct which I have already described, played a significant part in the death of Lopes. It is accepted that there is no evidence that Joni Marques gave the final blow that killed Lopes. In fact, the evidence is not at all clear about who did make the final blow. But, it is not only the final action which kills a man. Every blow by the accused brought Lopes's death closer and more inevitable.

The evidence is not conclusive that Lopes was killed by his throat being cut. The evidence from the witnesses who examined the body at the hospital do not confirm that.

There is evidence however that Joni Marques played a more significant role:

Gonsalo da Costa Sanchez (2/8 and 7/8): Joni Marques was co-ordinating in Rahmat's room, but I don't know what they talked about” “When they came out of the room, they

ordered Lopes to be killed, I heard the order. They came out of the room and said 'kill him' and straight away Lemorai used a knife and stabbed him in the mouth, it came out the front of his neck. Lopes screamed 'Team Alfa is killing me' and he became weak..after the stab he fell down." "I heard a person saying that Lopes had to be killed but whether it was Joni Marques or Rahmat..one of them said it"

On that night, Joni Marques was not an ordinary member of Team Alfa. He was not just a 'foot soldier'. He was co-ordinating with the KOPASSUS commander, making the decision that Lopes would be killed. It does not matter whether it was Marques who actually said "Lopes will be killed'. The fact is that he and Rahmat must have taken that decision to kill Lopes and then left the room to give the order.

After Lopes was killed, Joni Marques was the one who gave the order to dispose of his body. There can be no doubt that on that night Joni Marques was in a position to give orders and see that they were carried out.

JOÃO DA COSTA

The witnesses show João da Costa to have taken a direct role in the final act of killing Lopes:

Gonsalo da Costa Sanchez (2/8): "Five of them kicked him to death. Martino was kicking and so was Oscar Pinto. He wasn't dead so Lemorai stabbed him through the mouth into his neck, he used a knife. After that he was dead" "When they came out of the room they ordered Lopes to be killed, I heard the order. They came out of the room and said 'kill him' and straight away Lemorai used a knife and stabbed him in the mouth. It came out the front of his neck. Lopes screamed: 'Team Alfa is killing me" and he became weak..after the stab he fell down..It was a dagger..When Lemorai stabbed him, he wasn't dead yet and 4 or 5 of them kicked him to death: Lemorai, Mautersa Moniz, Oscar Pinto, João Pinto, Martino, Syaful Anwar. They jumped on him, stamped on him until he was dead. Lemorai went into the television room and said Lopes is dead."

Armindo Suarez (8/8): "Gilberto Fernandes told me Syaful Anwar killed Lopes, helped by João Lemorai and Oscar Pinto. They held him from the back." (9/9): "Gilberto didn't tell me directly, I heard him".

Salvador Amaral (14/8): "Oscar held his hand, João Lemorai held his head and Syaful cut his throat and I saw Lopes fall to the ground..I saw it from outside..about 5 metres away" "I entered when João Lemorai was trying to kill Lopes with his knife. I prevented him; then he tried to get the knife from Joni Marques but I stopped him...I saw Syaful cut his throat with my own eyes. I saw it from the window"

As with Joni Marques, the Prosecution's first submission on the murder is that it is not only the man who takes the final act who is guilty of the murder. Every person who makes a contribution which leads to the death is a joint participant.

Not only was the death the natural consequence of the beating which was given to Evaristo Lopes, but the final act of killing him was made more likely. It was facilitated by the beating that went on before.

The Prosecution say that in relation to the murder of Evaristo Lopes, the evidence shows João da Costa to have played an active part in bringing about his death.

MAUTERSA MONIZ

Mautersa Moniz claims that he was not present when Evaristo Lopes was killed. He says he was in the other room with his cousin. That is not supported by the witnesses:

Gonsalo da Costa Sanchez (2/8): "When Lemorai stabbed him, he wasn't dead yet and 4 or 5 of them kicked him to death: Lemorai, Mautersa Moniz, Oscar Pinto, João Pinto, Martino, Syaful Anwar, they jumped on him, stamped on him until he was dead".

(8/8): "Mautersa Moniz was with Lopes from the time he was arrested until Lopes died"

Mario Ribeiro (13/8): "Mautersa Moniz and João Lemorai beat him to death"

The issue is whether Mautersa's actions contributed to the eventual death of Lopes. The prosecution say that it was his continued presence and involvement in the beating that made him a joint participant.”

Deportation or forcible transfer of civilian population

The testimony of the witness Anselmo Correia Pinto:

- 308.** In the beginning of his deposition, the witness Anselmo Correia Pinto recognized in the courtroom the Defendants Alarico Fernandes, Gonsalo dos Santos, Paulo da Costa, Gilberto Fernandes and Amélio da Costa. “I know them because we all are from the same village of Leuro”.
- 309.** About the burning of the houses, the witness narrated that such facts indeed happened at the time of the popular consultation. He stated:
- 310.** “I could see with my own eyes houses burning. Even my house was burnt. (...) Militia ordered them to go there”.
- 311.** About the burning of his own house, the given witness’ testimony came as follows:
- 312.** “Carolino, a militiaman, came to burn my house and forced Alarico and Gonsalo to burn houses because at the time I was CNRT. (...) I was the chief village. (...) They threatened me and burned my house. [Differently of what I stated to CivPol], Alarico and Gonsalo were not carrying machetes, but only Carolino had one and threatened me. (...) Carolino Portela threatened me by saying to Alarico and Gonsalo and by pointing his finger severely at me: *‘He works for CNRT and UNAMET! Go and burn his houses!’*. (...) He said that three times. (...) Alarico and Gonsalo were just behind Carolino – about one meter – when he said those words. (...) Both of them were carrying a bag. [After saying those words] Carolino pushed Gonsalo and Alarico. Carolino gave Alarico the matches. (...) They used a match, but it didn’t catch fire, so they went to José Nunes’ house. After José’s house was on fire, they came to burn my house. [Correcting what I stated at CivPol], I state that Carolino gave a match to Alarico, and not a lighter. In Indonesian language, there is no difference between match from wood and lighter. So, Alarico was given a match, not a lighter. [About the burning of the house of José Nunes] Carolino ordered Gonsalo and Alarico by saying *‘He also lied! Go and burn that person’s house, because that person also works for UNAMET!’*. Carolino pushed them and they went to burn José Nunes’ house. At the time, Carolino was still holding the machete. Alarico and Gonsalo also used a machete. Alarico also used matches to set fire to that house. José’s house had walls made of bamboo and the roof of zinc [just like mine]. Carolino Portela was very angry. I was afraid of him. He said: *‘They are CNRT, burn their houses!’*. I was afraid. Carolino could kill me. Apart from Alarico and Gonsalo, no one else was burning houses at the village. After my house was burned, I went up top of the mountain and from there I saw my house burning down, totally burned down. I didn’t try to stop the fire since I was afraid. Inside my house there was one table, one cabinet like this, and books; they all were burned. My family saw what was happening and moved with me to the hill. Apart from my house and José’s house, I didn’t see Gonsalo and Alarico setting fire to other houses in my village. Other houses were also burned in Soro Kucil village, but I didn’t go there, I was afraid”.
- 313.** About the stabbing of a man named Antonio Soriano, the witness reported that he was told by Soriano’s wife, who came to him and said that her husband had been stabbed by Carolino. He remarked:
- 314.** “When I saw him he was bleeding”. (...) His house was upon the hill, so his wife came and told me because at that time I was the village chief and therefore she came to report to me. Carolino used a bayonet to stab him. (...) There were a lot of people there, about twenty, that is why I don’t know who exactly stabbed Soriano”.
- 315.** The Defense of Joni Marques raised no questions.
- 316.** To the other counselors, the witness stated that he knew Carolino since he came from the same village of Leuro. He knew that Carolino was a Team Alfa member in the command:
- 317.** “Most followed him, but most didn’t like him because at the time he threatened a number of people. (...) He also carried a weapon, so people were afraid of him; he was one of Team Alfa commanders. In my village, there was only a small commander who followed the orders of Team Alfa, but the majority didn’t follow those orders. At the time, there were also other groups in my village. I can point out *PAM Swakarsa*, an unarmed group whose purpose was to be a people’s front supporting autonomy. Their leader was the *Bupati* [the head of the district]. [About my personal belongings and furniture] some of them I moved and others I hid, some of them until they arrived. Before they arrived, I moved my things to the highway. I did it because I knew they had already stabbed Soriano and already threatened me. (...)”.
- 318.** About Alarico and Gonsalo’s conduct, the witness stressed: “they didn’t threat me”.

319. He also narrated that Alarico and Gonsalo said to him: '*Carolino told us to burn your house; he said that he was going to kill us and therefore we have to burn your house*'. (...) I didn't try to extinguish the fire of my house because I was afraid. (...) After hiding with my family in the hills, we returned on the afternoon of the same day. When we went back I stayed at the main road until afternoon when Carolino had already returned to Los Palos. On the following day, I escaped during the night to the forest, but later I returned to my own village. At the time, Team Alfa didn't force other people to move from one place to other place. As far as I know, it was the *Bupati* (head of the district) of our region who ordered the people and the families, with the backing of police forces. They ordered us to go to Los Palos, then to Com in order to go to Kupang to become refugees. [However] there was no one who was forced by Alarico to leave the village. (...) At the time of the burning of the houses, there were just Gonsalo, Alarico and Carolino. (...) Alarico and Gonsalo refused to burn my house, I think they would be killed by Carolino."

320. Finally questioned by the Court, the witness clarified:

321. "The houses were burned, as far as I know as village chief, because their owners were CNRT and worked for UNAMET".

Testimony of the witness Antonio Melo Soriano:

322. Antonio Melo Soriano, aged 58 years, reported that he had information that other people went to Kupang in September 1999. Firstly, he knew Hilário da Silva among the 10 accused in the courtroom.

323. About the facts, he summarized:

324. "Carolino came to me, but I escaped to the house of my siblings and I stayed there. Carolino followed me. Carolino stabbed me. At the time Paulo also came with Carolino, holding a sword, but he didn't do anything to me. I escaped from that place and ran off to the main road for about one hour. Carolino followed me and kicked me. At the time, I was feeling a lot of pain so I just laid down. Later, I ran over a hill, and a vehicle arrived. I had to use the car feeling a lot of pain. Felisberto, now deceased, helped me so that I could be transported. After that we went (...). We stayed at Leuro one day, next day we went to 745 Base and stayed there for one week. From the 745 Base, a truck took us to Com. We stayed in Com for two weeks. We were at Com and suddenly INTERFET arrived. We were at the Com Harbor and INTERFET came to disperse people there. The police said: '*Go to the main road*'. A priest came to pick us up. We went and stayed at Leuro mission for a week. After that, the leaders came and make the announcement, people organized mass and went to Los Palos. We went to Los Palos for two days (...). After two days, we were told to go back to our own villages. We got to our villages; then we discovered that our houses had been burnt, so we stayed at the homes of other people. About the attack by Carolino, when Carolino kicked me, nobody else was involved. He said a lot of bad things to me. Paulo da Costa [*touching him in the courtroom*] came to me on that day about 10:00. I don't know whether he belonged to Team Alfa group, but he was together with them. The reason why Carolino Portela attacked us on that day was because my friends were organizers of the party. At the time, I was a supporter of FALINTIL. At the time, the head of my village was Anselmo Correia. I was stabbed in my head; I was stripped off and 130,000 rupiah were stolen from me. My house was burned, but I don't know who set it on fire. I know Joni Marques [*touching Joni Marques*], but he didn't do anything. When I got out the vehicle, I saw Joni Marques. I don't know whether he said anything to anyone. I also know Alarico Fernandes, but I didn't see him at my village on that day. I also know Gonsalo dos Santos. (...) I remember there was a vehicle driven by Paulo da Costa that took us to the 745 Base".

325. Questioned by the Prosecution, the witness reported that Team Alfa members were driving the villagers on that day:

326. "I didn't see the vehicle, but they were using one. Firstly, I saw Carolino and Paulo. They came near my house. Carolino said: '*Hey, why don't you go to Com?*'. After that, I immediately escaped to the house of my sibling. (...) Carolino followed me to the house of my sibling. He found me and he stabbed me. Carolino was with Paulo. Carolino carried a bayonet. Paulo was carrying a sword as long as my arm and 2 fingers-thick. But Paulo da Costa didn't hit me. Once in my sibling's house, I escaped to the main road. He followed me and kicked me. Carolino was the only one to kick me; Paulo da Costa was beside him. After that, he went to the village. At the time when Carolino did the stabbing in my sibling's house, his sword fell to the ground. (...) I was lying down on the main road when my house had been burning. I didn't see who burned it, but at the time my wife was arguing with them. (...) After Carolino burned my house, he followed me to the house of my siblings. Apart from Carolino, I didn't see anybody else involved in burning my house because I was sitting in the house in pain. About Gonsalo dos Santos, I didn't recognize him at the time in my village. We are from the same village. (...) He wasn't there at the time. At the time, when I was struck, I didn't see Gonsalo there. I left my village on a rubbish truck. I was in pain. I got to the vehicle and I just laid down and rested. I was in pain. (...) I knew that the vehicle was heading to Los Palos. I knew that because we stayed one day at 745 Base. People around was telling that. There were a lot of us on the truck. Felisberto, now deceased, organized the people to go on the truck. I don't know who was carrying guns on that day in my village

of Souro Kecil, but I know that Javanese people were carrying guns. I heard the sound of gunfire, but I don't know who did it."

327. Questioned by the Defense Counsel, the witness once again clarified that he had known both Carolino Portela and Paulo da Costa before the incident:

328. "(...) They came to my house from the main road and asked where I was going. At the time, I began to feel afraid so I ran away. (...) Carolino was on the main road and he yelled at me: '*Where are you going, members of Xanana's group? You aren't going anywhere!*' Then I became afraid. Paulo didn't say anything. When I was hiding at my sibling's house I was by myself. The house was unlocked, so I closed the door. My only sibling had already died at the time. His wife and children went to the main road seated there. They were told that everyone was escaping to Kupang. The Javanese people forced them to go. (...) They said: '*If you don't go, Frelitin will kill everyone!*' Team Alfa members also said: '*Whoever does not go to Kupang will be killed!*'. At the time, there were autonomy-oriented people who wanted to go to Kupang. (...) I don't know whether they were forced or not. (...) But I was forced. They were angry with me; they beat me. That is why I went. (...) At the time when Carolino came and hit me, my wife was there. At the time Carolino went to burn my house, my wife was angry with him. He came after me and stabbed me. My house was burned first; then I was stabbed. Carolino stole my 130,000 Rp. Paulo da Costa was standing there, but he didn't do anything. (...) Felisberto Sávio, the head of the village, was my relative and a Team Alfa member."

329. Finally questioned again by the Court, the witness clarified that the Javanese were carrying guns and gathering their things to go back to their area. They had seen all those things that happened in his village, but they looked down.

The testimony of Angelina Soriano:

330. Angelina Soriano, wife of the witness Antonio Soriano, testified that Team Alfa was very suspicious of her because she was a follower of Xanana:

331. "Carolino Portela was suspicious of me. Regardless, after that they burned our house. They took our property and set it on fire. We saw the house on fire; then we cried and we were shaking; then we ran away. We ran away to the highway where members of the community were sitting. Carolino Portela came to the highway and stabbed my husband in the head. Paulo was carrying a sickle; he didn't cut Soriano, but the sickle fell to the ground. Antonio Soriano ran away and fell down on the highway. There were a lot of villagers there on the highway. Portela followed him, kicked him and said: '*You have your trousers on that way. You are a follower of Xanana*'. After that, my family came and gave me water to drink. We went to a small hill and climbed to the top. He slept there. After that, a vehicle arrived to drive us from the village. When the village chief had come, we were crying. (...) Portela wanted to kill us, but Felisberto allowed us not to go into the vehicle. After that, we went to Los Palos and to a place (I don't know the name), but the village was Coaloara. We stayed there until the next morning (I don't know for how long), but in the morning, they took us to the barracks. We stayed there for three weeks. A vehicle came and many people came to pick us up to the 745 Base. They took us to Com for three days. After that, our friends came. When we saw them, we cried out and said: '*Let us go or we're gonna die!*'. So, when they arrived, we left the harbor. The sisters came. They had a car and they mentioned Antonio Soriano's name. After that, we got into the car to go to Leuro. We stayed in Leuro for 5 days. After 5 days, a truck took us to Los Palos. We stayed in Los Palos for 3 days. The leaders told us to pay for transport individually to take us back to Leuro. We arrived back in Leuro to live in a small house where we've been ever since. We stayed in a small house that we made. The head of sub-village registered our names and we received zinc (corrugated iron)".

332. Responding to the questions from the Prosecution, the witness told the Court that in September 1999 she was living in Leuro village, gardening and taking care of the pets. Before the incident, they were in the forest for a quite a long time. She was not sure about how long: "I came back together to my husband at my house. I came home and lived together with my family".

333. The witness denied having made the following statement to CivPol: "*I was with Ermenita Soriano. After that, I heard a lot of noise outside my house with yellings and shootings. I saw 8 or 10 members of Team Alfa who were broken in two separate groups. They were walking in several directions in my village*". Her excuse was that nobody had read out or explained the document to her.

334. Asked about the accused in the courtroom, the witness testified that she did not see any of them at the time her husband was stabbed. "All the people sitting here I didn't see them present at the time my husband was stabbed". But further she added: "I don't know why Paulo was carrying a sickle. (...) Carolino said to me: '*You're a follower of Xanana. You're not going to Com. We are going to burn your house and your family's house!*'. Carolino used a cigarette lighter with gas to burn my house and their houses. He was very angry. My two houses and Olivio's and Faustino's were burnt. Regarding the other houses burnt, I don't know because we went to Com".

- 335.** To the defense counselor of Alarico Fernandes and Paulo da Costa, the witness stated that she already knew the second accused before the incident, since they lived in same village of Soro Moco, named during the Indonesian period as Soro Kecil. She also clarified:
- 336.** “First Carolino burned my house. After that, he beat my husband. Paulo da Costa didn’t say anything when he was standing beside Carolino Portela; no threat. Paulo didn’t hit Soriano. He was just standing there”.
- 337.** She also stated that she knew Lucia Pereira’s house, but she could not remember what brand was the car that took Lucia Pereira to the 745 Base. Finally, the witness explained to the Court that she was quite afraid at the time, but could not say anything about the feeling among other members of the community. “I know that they were looking for a more favourable way, so they went to the highway”.

The testimony of the witness Lúcia Pereira:

- 338.** This witness firstly recognized only Alarico and Hilário in the courtroom. Here are her initial words:
- 339.** “We got in the car and we went to Los Palos. From there we went to Com. Paulo took us to Com. We stayed in Com for one month. INTERFET arrived. After INTERFET arrived, we went back to our village. We were said to go to Leuro mission for 5 days. After 5 days we went to Los Palos. There was a person round in my village. My eyes were not so clear, so I couldn’t see him or her well. I saw my houses being burned down. Carolino threatened me if I didn’t go to Kupang. A white minibus took me to the 745 military base. But I couldn’t recognize the driver because my eyes are bad. I could recognize Amélio and Paulo at the time. They were inside the car, I saw them. We lived in the same village. I didn’t see who burnt my house, since I was in the garden. (...) I don’t know how many houses were burned. I stayed at the 745 Base for 3 days. Later someone came and told us to go to Com. People were leaving so we had to follow them”.
- 340.** Questioned by the Prosecution, she said that her village was Soro Moco. The threat from Carolino was by saying those words and because he was carrying a bayonet. He was about 20 meters away from the witness at the time. “I was afraid of him because he was carrying a bayonet and threatening people. Carolino said, very angrily: ‘*You shouldn’t stay here, you have to go away to Kupang!*’. So we went and stayed in Com until INTERFET arrival. (...) [Now I remember] that I saw Carolino in my village and Paulo was the one driving the vehicle that was taking people to Com. I don’t know what Paulo was doing in my village. I just know he was driving the vehicle. I don’t know about his brother Amélio. We were forced to leave our village because we were afraid of Carolino. Paulo took all of us. (...) Regarding my house, I don’t know what happened. It was only when I returned that I saw my house burned down. All my belongings were burned; the people even stole my chickens. (...) It looked like a lot of houses had been burned. I am not sure any longer about the color of the vehicle that drove us to Com as my eyes are not good. (...) Paulo was the driver. (...)”
- 341.** Responding to the Defence Counsel’s questions, the witness added:
- 342.** “I already knew Paulo before the incident (...). From our village, Paulo took us to 745 Base and from there he also took us to the Com Harbor. I don’t remember the dates of those two journeys, but the same small car was used. (...) In those two events, Paulo didn’t say anything to me. Paulo didn’t force me”.

The testimony of the witness José dos Santos:

- 343.** José dos Santos remembered that the villagers were told to go to Kupang in September 1999:
- 344.** “Felisberto Sávio, the head of the village, told us to go to Kupang. I didn’t see on that day the faces of the men sitting in the courtroom. At the time, I saw from my house Carolino Portela hitting Antonio Soriano, but I don’t know who was with him. (...) Felisberto Sávio told us to leave the village before Antonio Soriano was struck. We were all from Leuro village and we were all on the highway at the time. BTT soldiers were in my village on that day, but I don’t know exactly how many. (...) They were supposed to be there to stand guard, but I don’t know their actual purpose (...). There were also a lot of Team Alfa members there, but I only saw Carolino Portela hitting Antonio Soriano. (...) Team Alfa members went from there to another place; therefore I didn’t recognize them. I didn’t speak to Carolino. I just saw him hitting Soriano. He didn’t say anything to me either. I didn’t say to CivPol that Carolino had spoken to me. I did say that he was very angry on the highway. I didn’t see Carolino threatening other people, but I did see him hitting Soriano. I confirm that he was threatening him because he was a CNRT supporter. Carolino was with soldiers who once were on the highway. I was in Suro Kecil when Felisberto told us to go to Kupang. They summoned us to go to the village office to hear the order. It was said there that if we stayed in the village, an armed force would come. Nobody was with Felisberto when he told us to leave the village. (...) We left the village by an ordinary minibus driven by Paulo, whose surname I don’t know, but [*pointing him in the courtroom*] we are from the same village of Soro Kecil. Paulo just took members of the community to Com. About the other men sitting in this courtroom, I didn’t see any of them in my village on that day. (...) We went to the 745 barracks with a lot of people.

(...) We stayed at Com for one month. We were waiting for a ship that was coming to pick us up and take us to Kupang. After being in Com, we were waiting for a ship, but there were no more ships, so we went back to our home villages. There were no more Indonesian ships. A foreign ship came and then we went to our village. We went back to our home village because the Javanese had already left, so we were not afraid anymore. (...) We were taken in a priest's vehicle to Fuiloro mission. From Los Palos we went back to Soro Kecil. (...) When I arrived at my house, I saw the corrugated iron was taken away”.

345. To the Defense Counsel, the witness could not remember what sort of car took them to 745 Base. But he confirmed that “it was the same vehicle that took us to Com with a number 50 written down. It was a small vehicle commonly known as a “mikrolet” or minibus.” Recalling his statement to the CivPol, the witness stood by what he had said that for sure “Paulo was the driver who led us from Soro Kecil to the 745 Base”. About Paulo, once again the witness remarked: “Paulo didn't force us. He didn't say anything. We went because we were scared of getting killed. That is why we went (...). There were a lot of us. Therefore, I don't know whether Lucia went in the same vehicle as us”.

The testimony of the witness José da Costa Nunes:

346. He testified:

347. “At the time, I was living in Leuro. I stayed with my wife and children there. At the time they shot at my house, then I fled. I know Alarico and Gonsalo [*touching them*]. I didn't see the rest of the men sitting in this courtroom at the time in my village of Lotorula. (...) On that day, Alarico was lighting matches to burn my house. Unfortunately he was successful; he went to the kitchen to burn the house. My house was completely burned down. Gonsalo was standing with Alarico in front of my house. They said that I was a member of CNRT and for that reason they burned my house. I was truly a CNRT member. My son and daughter were working for UNAMET. (...) Nothing happened to my family. I was the only victim since they destroyed my possessions, my table and my goat. My wife and children had gone to the main road; they were sitting there about 15 meters away. (...) At the time I could only see Alarico, Gonsalo and Carolino. I saw another person's house named Anselmo being burned by the fire from my house. I didn't know the reasons behind those burnings. I only knew they came and burnt my house around midday. There were only two houses I saw burning with my own eyes. I didn't say to the CivPol that the number was 20. I only stated that they burned my house, not the number. (...) Alarico and Gonsalo were the ones I saw starting the fire at Anselmo's house. After burning my house, I went with my family where my sister lived and I stayed there.”

348. Questioned by the Defense Counsel, the witness stated that Carolino Portela was involved with Team Alfa. Alarico and Gonsalo didn't say anything to the witness when they came to his place. Alarico didn't force him to leave the village:

349. “I didn't say anything to him. I was angry with him, (...) everything was burned inside my house. Alarico or Carolino didn't give me an opportunity to take my possessions out (...) First of all, my house was burnt, then Gonsalo and Alarico burned Anselmo's house. At the time Alarico carried only a machete, not firearms. Carrying machetes was normal only for the gardening. Alarico was wearing normal clothes, but I was afraid that they would cut me up. That is why I was afraid. I was afraid because he is a young man and I am an old man. He is physically strong, so I'd not be able to fight against him, (...) he was burning my house.”

350. About Gonsalo's behavior, the witness testified that this accused “was not carrying a firearm, but he was a member of Team Alfa and he worked at the commander post. (...) The truth is that Alarico was the one who was burning the houses; Gonsalo was standing outside”.

351. Finally questioned by the Court, the witness remembered that an Indonesian person cut his ear at the time when he had fled to the forest. “I was taken to the Indonesian Army battalion 745 and there they cut my ear. They cut my ear off a long time ago, before coming to burn my house.”

The testimony of the witness Victor da Costa Almeida:

352. This witness lived in Lali in September 1999. He explained as follows:

353. “(...) At the time, some people came and burnt in the vicinity where I was living. They burned 58 houses and one vehicle. My house was made of coconut leaves, so they set it alight with matches. (...) I know the people who came and burned my village. Their names are: Gonsalo, Alarico, Amélio, Paulo, Sérgio, Horácio. They came from Leuro about one hour. I saw that with my own eyes. All of them are here in this courtroom. Sérgio went to Kupang. (...) From the place where it was burning the vehicle to the place in my garden is about 6 meters. I wanted to know who was burning. That is why I was in my garden. Everybody else was afraid. I was the one who could see them. (...) They used matches and petrol to burn. (...) Firstly, they – Gonsalo, Alarico, Amélio, Paulo, Sérgio and Horácio –

burned Mateus da Costa's, my father's house. (...) I didn't see who first set the house on fire. (...) Gonsalo came to my village and burned as many as 58 houses with them. (...) I saw with my own eyes Gonsalo burning as many as 58 houses. (...) He was carrying matches. (...) I also saw Alarico in my village burning houses. They went and burned as many as 58 houses. I saw them (not him) burning 58 houses, side by side, closed approximately. Horácio, Sérgio, Paulo, Amélio and Gonsalo were with Alarico at the time he set fire. They were separated, until the houses were completely burned. After burning my father's house, they went to burn my young brother Carlos' house. (...) I saw them burning one house and moving to the next house until the job was completed. The first person to burn my brother's house was Gonsalo. He burnt the house from the side. There were no others; (...) the people I mentioned before were, one by one, burning the houses. Nobody said anything. 58 houses were burnt and 7 houses were not burnt. I am telling the truth. I saw it with my own eyes from the very beginning until the end. I don't know how many hours the fires lasted, but I watched until it finished. After they finished burning the houses, they went back to the village of Leuro. They burned the houses, then I fell slept in my garden. The following morning, I went to the forest. The seven houses that were not burnt belonged to myself, Nuno, Chico, Albano, Domingos Pacheco, Adriano and Cancio. I don't know why they didn't burn those seven houses. (...) The owners of 58 and the 7 houses all of them went to Indonesia. They didn't want to go to Indonesia. The owners of the 58 houses didn't want to go to Indonesia. The people came to burn the houses of those who didn't want to go to Indonesia. (...) Nanakuro and Lali are in the same village, if we consider together 58 houses burned. When Foema was burned, I was already in the jungle. I don't know who burned houses in Omokano because I wasn't there. I was told that Team Alfa came to Foema and burned houses there. When they burned the houses, I ran off to the jungle. I returned about 14 days after INTERFET came".

354. Questioned by the Defense Counsel, the witness admitted he was a supporter of CNRT. The other six owners of the houses that were not burned were also supporters of CNRT. The witness provided other details about the burning:

355. "I was the only person there when they came to burn my house. I told my wife and my children to flee to keep distance from myself. I ordered them to go. (...) I intended to hide myself in the garden, so I could see who were burning the house. I witnessed the 58 houses burning. I saw that with my own eyes. (...). After the first one, I could see clearly the next 57 houses being burnt. I saw Paulo and Alarico burning all the houses from the start to the end, I saw. Then they went back to Leuro. They came and they grouped together to burn one by one. (...) There is no electricity in my village, and my house is traditional style. When the house is burning, it lights out as the morning. That is why I could see their faces. [About the burning of the vehicle] the person who took a match and set my vehicle on fire was Sérgio. He put diesel on the vehicle and then ignited it. Paulo and Alarico were together; they were surrounding the vehicle, assisting in the burning. At the time, I was able to identify the one using the lighter. Alarico and Paulo were holding gas lighters. They burned one house; they took coconut leaves to set the other houses on fire. The houses were in two lines – one on the left, one on the right. Three houses to the west and three houses in the east were not burnt. I don't know the reason why they were not burnt. The distance between those houses was quite considerable. The owners had already fled before they came. They were afraid to be hit by the people who were coming. They were afraid of the pro-autonomy people, because the owners were CNRT supporters. They were afraid to die. (...) I can't remember what clothes Paulo and Alarico wore, but I saw that they were not carrying weapons. (...) When those things happened, the sun had already set. After sunset, those people came to my village. It was dark, evening already. I don't know about the distance between Gonsalo and myself when I saw him carrying a lighter, but because they came in the evening and they started burning, by the light of the burning I could see them. He was holding a lighter near the house. The houses were on fire; it gave illumination. I could distinguish him when the fire ignited. When the first house was burnt, from the fire I could see the illumination. After Gonsalo lit his lighter, I could see him. (...) They were together burning the houses. Gonsalo was the first person to burn the houses. I don't know how many houses Gonsalo himself burned, but he burned together with them."

The testimony of the witness Olivio Lopes

356. Olivio Lopes initially stated that he knew the Defendants because "all of them came from the same village". Joni Marques is his uncle, others are friends of the witness. He testified in Fatoluco dialect:

357. "They burned my house. I was standing on the highway. Carolino came to me and said: '*Do you wanna go?*'. I answered '*yes*'. I took my bag and Carolino asked me for a match. There were 3 matches on my pocket, but I said I had no match. After that, I went to get a bag, and Carolino went to burn Antonio Soriano's house. They burned Antonio Soriano's house and used fire to burn other houses. Carolino came and had an argument with Antonio's wife because of the house that was burning. Then Antonio's wife said: '*I chose CNRT because this place belongs to us, that's why I was a follower of CNRT*'. He asked her: '*Where is your husband?*' She replied: '*I don't know*'. He said again to the wife: '*Even if Antonio is there, I will send him straight into the fire!*'. After that I went and sat on the highway. Carolino went to look for Antonio Soriano. He started kicking Antonio, beating him, punching him. After Antonio went to the highway, Carolino stabbed him in the head. After that, Paulo was standing next him. Carolino said to him: '*Inside the pants you are wearing, there is something that will determine your destiny*'. After that, Carolino took some money from inside a bag (135,000 rupiah), gave me a 5,000 rupiah bill and took the rest of the

money. After that, he went and pulled my arm and said that I was also lying. I said: ‘*Yes, I was lying, for the safe of my children and my wife; I was lying*’. After that, he didn’t hold me anymore and went back to the village. We were sitting there until 2 o’clock. Then, a garbage truck came along and took us to the command facilities. We stayed there for one night and early in the morning, about 6:30, we were taken to the 745 Base. We stayed there for one week. After that, the car of 745 Base took us to Com. We stayed in Com for 3 or 4 days. After that, we went to the harbor where we stayed for 2 weeks. One of the Defendants came and had not got out yet. He spoke to INTERFET and said we were allowed to go outside the harbor. We waited for a priest’s car that came to pick us up to Fuilo. We stayed at Fuilo for 5 days. After that, the priest made the announcement and told us that we could return to our village. He said: ‘*When you go back to your villages, you’ll find your houses burnt*’.

358. Questioned by the Prosecution, the witness testified:

359. “I saw only Carolino in my village on the day my house was burnt. Paulo was standing next to him and next to Soriano’s house. During September 1999, I was living in Leuro village, Suro Kecil sub-village. I wasn’t doing anything. The person that I saw burning the houses was Carolino. Carolino is the one I only know. He came to that place holding matches and burning houses. That is what I saw. Carolino was a Team Alfa member. I saw only him burning houses. After that, he went and chased Soriano. Paulo was standing next him. Paulo wasn’t doing anything. Paulo was carrying a sickle, but he was not doing anything. I was able to count four other houses being burned. Some of the belongings were burned, other belongings were taken to the highway. My house and my belongings were also burned. Some of my possessions I took, but some were burned. Most of my belongings were taken out the house, but there were not so many. I know the name of the owners of the houses that were burned. I saw them taking their property out of the house. There were BTT soldiers at my place. BTT took the things to the place where we were taken. They didn’t do anything. Some of them were reading newspapers. BTT didn’t do anything. [After having his memory refreshed by the Prosecutor, recalling his previous statement to CivPol³⁷], Yes, that is right. The soldiers didn’t do anything, but there was a soldier shooting a coconut, another one shooting a chicken, that is all I saw. The BTT soldiers who were at my place didn’t burn any houses. I didn’t know anything about the soldiers’ plan. I am an ordinary citizen. Nobody told me. I haven’t heard anything about that. I don’t know about other targets of Team Alfa, apart from the houses that were burned. I saw Carolino stabbing Antonio Soriano in his head. I was at a distance of about 30 meters. He was also kicked in the waist. Carolino stabbed Antonio once in the head with a bayonet and kicked him once in the waist. I saw it from the highway where I was sitting. Antonio Soriano fell down bleeding. I really saw it and the other members of the community on the highway also saw it. Definitely, the victim was Antonio Soriano. Soriano was stabbed and kicked only by Carolino. Paulo was close to Carolino. Paulo didn’t do anything to stop Carolino. Paulo just stayed silent. That is what I saw from where I was. (...) From my village they took us to the command post. The command post was quite far from the 745 Base. There was one truck and a lot of us were taken. I couldn’t count how many. The truck was very large. I don’t know the length, but it was a garbage truck. I confirm that I said to CivPol that I was very afraid at the time and I thought that Team Alfa or TNI were going to kill people. I thought it because at the time I believed that Antonio Soriano had been killed. I had saw him being stabbed. That is why I became afraid. I didn’t see TNI or Team Alfa killing anyone. The money given by Carolino came from Soriano’s pocket. The money was taken by Carolino. Carolino took the money when Soriano fell over. We were CNRT. Soriano was also CNRT. When we came back from Com, he told me he had been stabbed because he was CNRT. We stayed for one week at 745 Base. They didn’t do anything. What I saw at the 745 Base were ordinary members of the community. I didn’t see Team Alfa people there. At the 745 Base, there were many vehicles to take us to Com. The one we traveled on belonged to 745. It was a military truck. We were not forced to go to Com. At the 745 Base, people didn’t force us. The vehicle was already there and they ordered us to get in the vehicle. I will repeat: The vehicle was already there and they ordered us to get the vehicle. They ordered that we could go to Kupang. I didn’t go Kupang. I stayed in Com; then I went home. I didn’t go to Kupang because we were staying temporarily in the harbor. There were no more ships. All the leaders told the community that we would be going to Kupang. One of those leaders was Anselmo Correia Pinto, who gave the orders to us that we would be going to Kupang. He was the village chief. I was just an ordinary member of the community. We all had to follow the orders of the community leader when he spoke to us. The village chief said: ‘*Wherever we go, we go to Kupang, we have to take the vehicles and go to Com.*’ We were not forced to go. We were at Com Harbor waiting for a ship, but because no ship came we had to go back to our village. If there had been a ship, we would have gone to Kupang. I was not forced. The community gathered. We were going to go together to Kupang. When I came back to my village, there were six houses burnt. Those houses were close to one another. At first, they burnt four houses. After we came back, two more houses, so it was six. When those two houses were burned, we were still on the way back, so we couldn’t know what happened. [In the course of my journey to home] we saw the houses that had been burned, but no more flames. We saw clothes, knives, pots, they were burnt, that is what we saw. Other ones were also burned, but I didn’t see them being burned. The people taken were people from Leuro, but I don’t know which locations in Leuro they were taken from. I don’t know their addresses. We were in one village; we lived there.”

360. Questioned by the Defense Counsel, the witness clarified:

³⁷ “Those soldiers were doing nothing to stop the members of Team Alfa from evicting the people from their homes and burning their homes” (Case File C, p. 128)

361. “The majority left the village. Some people just remained in their houses. The order given was: ‘*Whoever wants to leave, leave with us. If you want to stay, you stay*’. It was like an option. A lot of houses were burned in my village, but I can’t estimate how many. I knew Carolino Portela because he burned houses. We lived in the same village and the same sub-village. Carolino was a Team Alfa member, but I don’t know his position or rank. I saw Paulo da Costa standing next to Carolino at the time Soriano was stabbed. Paulo and myself were in the same sub-village that formed part of Leuro village. At the time that Paulo da Costa was standing next to Carolino when Carolino burned my house, Paulo didn’t say anything to me.”

362. Finally questioned by the Court again, the witness replied:

363. “About the six houses that were burned, their owners were: Angelina Soriano, Antonio Soriano, Olivio Lopes, Florinda Soriano, Faustino Fernandes and Laurinda Fernandes. These are the names of the people who I know; the others I don’t know. Carolino burned those six houses. Those houses were burned because their owners were CNRT. They said to them that ‘*they were lying*’. Because of that, they burned the 6 houses. Carolino said they were CNRT. That is why their houses were burned. When Carolino stabbed Antonio, Paulo da Costa was standing next to Antonio Soriano, but he wasn’t doing anything. [After being refreshed about this, in his previous statement to the CivPol, he had mentioned having seen Paulo and Carolino kicking and punching Antonio in the legs]. Indeed, it was Carolino who hit Antonio Soriano. Maybe the interpreter translated incorrectly. Paulo was just standing beside Carolino. About the burning, Carolino used matches and also those things to burn. After the fire was lighted, he used the houses that were on fire. [I know that the car that took us to Los Palos was a garbage truck] because when we got up on the truck we saw it was a garbage truck. The garbage truck was owned by the government, but I don’t know precisely who was in the truck. (...)”

364. At the end, once again granted time for a new cross-examination by the Defense, the witness clarified:

365. “I was not a member of CNRT. I was an ordinary member of community and I was living there. My house was also burned. Angelina’s husband (Antonio Soriano) was a member of CNRT. I don’t know if Florindo Soriano was member of CNRT or not, but he was a child of Antonio Soriano. The houses of Angelino and Floriano were located in Soro Kecil. Their houses were very close, about 15 meters far from each other. Those four houses were burnt. The third house was burnt which caused the burning of the fourth house. The fourth house was Antonio Soriano’s house. First, Antonio Soriano’s house was on fire; then the fire spread to the other houses. That was a result of Antonio’s house burning. (...) [The houses were set on fire because of the fire in Antonio’s house], but whether they were CNRT members or not, I don’t know. As far as I know, Soriano was a member of CNRT. Antonio is the only one that I know was a CNRT member.

The testimony of the witness Aurito Rodrigues:

366. This witness identified himself as uncle of the Defendant Mautersa Monis. Under oath, his initial words to the Court were:

367. “It happened in September 1999. I received information from Team Alfa that, on the 9th of September, militia and BRTT were coming from Leuro to Foema. In order to avoid this threat, we ran away to the forest; the ones who remained were old people. After that they ran away to the forest. We continued to assist the organization to go back to the village to check on the situation and on the conditions in the village in order to prepare ourselves. In case of any militia coming, we could report to the villagers about the militia movements so that they could avoid them. After that, after the 30th of August, we saw that there were several members of Team Alfa and BRTT coming to the villages. There were burning houses and frightening everyone. There were 46 houses burned in Foema and about 68 in other villages. The ones who did the burning we know as Joni Marques, Gonsalo, Gilberto, Alarico, Paulo, Amélio and Manuel. And after that, they forced several families – about 30 or 31 families – to leave their homes and to go to the 745 Base in Los Palos. After that, we started to evacuate some people to the forest and prepare ourselves to try to support the situation. We formed 9 groups. We tried to get pigs, chickens, buffalos. The animals that had not been shot we led to the forest to distribute to the villagers. After that, several days later, there was a group from Alfa who went to Soro Kecil village and burned 21 houses. We then heard such information. I was told to go and check the situation, but the village was burnt. About 87 families ran away to the forest and a number of houses were burnt. After that, we were in the forest for several weeks and we saw TNI soldiers going by and so we gave the information to the villagers to move from the back. Also at that time, after the popular consultation, there were people from BRTT and Team Alfa who came to Foema subvillage. We didn’t want to face them, so we ran away at night. The ones who formed that group were Joni Marques, Felisberto, Sérgio, Alexio, Carolino and Horácio; they were from Alfa. There were other crews from BTT and PAM Swakarsa. Paulo and Amélio, we know them as well. They went all around the place using sharp instruments and when the situation became more tense they used rifles to threaten the villagers. In Foema and other sub-villages, houses were burnt.

368. “At the time of the burning of the houses, I witnessed. I was in the group to check the situation in the village. In that group, we didn’t fire arms. We just went to check the situation to see whether they were going to burn houses or whether they had gone to Los Palos or to the forest. We had to check the situation to protect the villagers.”

369. To the Prosecution’s questions, the witness explained: “At that time, I heard the information from João da Cruz. He had been gone to Los Palos to take his family to Com. He came back and he said that there was a plan of Team Alfa in Leuro. He came by car to Finatuto. When he was there he informed me about that and I met João da Cruz. We were told to prepare ourselves for the crimes which might take place. The militia of Leuro was ready to destroy. Then I started to make preparations and everyone ran to the forest. [About Team Alfa members in Leuro], at that time I knew them as the leaders. It was Joni, Alexio, Sérgio, Horácio, Jerônimo, Carolino and the former head of Leuro village, Felisberto. These were the ones I knew. From *PAM Swakarsa* and BRTT, I knew Gonsalo, Alarico, Octavio, Júlio and Carolino. I knew that Paulo, Gonsalo and Amélio belonged to *PAM Swakarsa* or BRTT. They were altogether about 22. Among the people who are sitting behind me in this courtroom I can recognize: Joni, Paulo, Amélio, Alarico, Gilberto, Mautersa and Lemorai. I know Lemorai, I don’t know where he is from, but I know he came from Los Palos. He was known by my friends. He often beat people up. (...) [Before I got the information on the 9th September that Team Alfa was coming from Leuro] Team Alfa, together with BRTT and with the ones who are behind me, they wandered around the villagers along the highway, they carried samurai swords and they often shouted. From my organization – the pro-independence movement – we were always careful of them. We were also under the CNRT, umbrella organization, and we got the information about what was going on in the villages in order to confront the situation and also to take care, to supervise the community. I myself was the head of the organization in my village. About 3rd of October, I was chosen to be the village secretary, so I left my organization and became secretary of the village until now. On the 8th of September, I saw with my own eyes the situation was getting more and more tense. About 7 o’clock on that night, there were people from BRTT, Team Alfa, TNI, came from Leuro village and went into the sub-village to burn houses. At the time, I saw Gonsalo and Júlio – I don’t know exactly their full names, but Gonsalo is the same person I saw in this courtroom – with automatic weapons. There were about 15 of them. (...) Still on the 8th of September, about 7:00 PM we were on the edge of Nanakuro sub-village when we received the information that there were already militia and TNI on the way. So we gathered up to prepare ourselves, close to the houses, but when they arrived they started to burn houses. [When they arrived at Nanakuro], I saw Júlio my own eyes, and also Gonsalo and lot of others, burning houses. There were some of them in front carrying petrol. We were scared of getting shot. The situation was becoming tense, and then we retreated back. There were about 58 houses burnt in Nanakuro, (...) some of them were left, but no more than 10. (...) . At the time of the burning, I didn’t see very clearly, but they were yelling out: *‘Members of CNRT, you are members of CNRT, come on here, we can shoot you, we can kill you! You want freedom, you want independence, but you don’t know what independence is!’*. (...) At the time Gonsalo was walking alone with the sword, but a lot of his friends were carrying machetes and using coconut palm leaves to set fire to the houses. Gonsalo was next to his friends, advancing to the front, moving away. (...). On the 8th of September, the villagers were still in their houses. Some went out about 10 or 20 meters when the burning was taking place. The people started yelling out and running away. In Nanakuro, at the time, there were about 22 people. (...) We were witnessing the events from about 100m in the village at 7:00 PM. About 4:00 in the morning, we gathered our friends again. [At that opportunity] those people were still in the edge of the village of Lali. Lali was still a sub-village at that time, a part of Nanakuro. In Lali, they had started to burn a car. We heard some screams and then we retreated. (...) I counted 58 houses burning, including the village of Nanakuro. (...) 10 of the houses in Nanakuro were left. At the time the houses were burned, the only few families that stayed in Nanakuro were removed to 745 Base, and then they moved to Kupang. Team Alfa forced them to go. (...) At the time, it was quite tense. So they used to threaten by shooting and by saying: *‘Anyone of you who doesn’t want to go to Kupang, we’ll kill you!’* (...) After burning the houses of Nanakuro and Foema, they gathered people in one place, like in Sinotuto. They were all gathering there to raise the Indonesian flag. They came to shoot and forced us so that they could go to Kupang. That was about 10 or 12 September. From the Team Alfa group, they came and shot, they beat with samurai swords, forced them to go by car or by walking alone to Los Palos. (...) They used *Kijang* and other Armed Forces cars. (...) We saw 3 cars from the Indonesian Forces Kodin. They went to Atape, but about two or three hours later they returned and went to Los Palos. [In the village of Foema] we recognized them, since we kept hiding there. We saw destruction of houses and belongings, including domestic animals (dogs, chickens, pigs), and missing of people, like the teacher Alufo. I was on the hill, about 100m from the place I was hiding where I could look down. At the time, I could see with my own eyes, those who burnt the houses in Foema: Júlio, Norberto and Carolino. After burning the village, they went to Omokano [where] they [Lamberto, Carolino and about other 7 or 8 people] also burned about 33 houses. The people were wearing red clothes. After burning the houses, they kept going to Omokano to burn houses. It was the same group who had burned in Foema, including BRTT and also from the district command office. At that opportunity, I didn’t see any of the guys who are now in courtroom in the group who went to burn houses in Omokano. At the time, Joni Marques was between Foema and Nanakuro. He was there during the day, and they started burning after that. Joni Marques was walking with Carolino. Júlio was screaming and shouting: *“We have to burn chickens and houses!”*, but Joni Marques said: *“No, leave them!”*. After burning, there were noise, they shot. About 6:00 PM, when they came out, we only saw dogs, pigs and chickens, so we only took those animals to the forest. I saw Joni Marques on that day, (...) he was carrying SKS rifle, but he didn’t shoot. His

friends were shooting; they were shooting around. At the time, after burning houses, Joni Marques walked around with Carolino, whilst Júlio was shouting. (...)"

370. About Joni Marques' conduct:

371. "(...) I didn't see him directly burning houses, but at the time that he was walking around there, 46 houses that belonged to the community were burnt. I didn't see Gonsalo actually burning houses in Foema and Omokano or Nanakuro. [About Gilberto], at the time they were walking in the group, shouting, threatening people and my self. Gilberto is from my village. He shouted: *'Very soon you're going to kill one another'*. About Alarico's role during the burning, the witness said "they were all involved, but I can't point him exactly; they were under BRTT group (...) and were also members of *PAM Swakarsa*".

372. The witness stated the same about Paulo da Costa:

373. "At the time I saw him with my own eyes. Everyday they walked together; they came along by car; they were screaming or shouting from Los Palos. They shouted *'Very soon we will be fighting among ourselves. Those who reject autonomy will destroy you, from the East to the West'*."

374. About Amélio da Costa, the witness also said:

375. "(...) He also was involved with the BRTT, including the *PAM Swakarsa* group". Questioned about the quantity of houses burnt, the witness pointed out: "About 11 houses were not burned. They only burned the good houses, the houses that belonged to pro-independence supporters, not pro-autonomy".

376. Questioned by the defense Counsel, the witness firstly clarified that he could watch the scene hiding at the side of his house from about 100 meters away. "There were approximately 9 people from Team Alfa and BRTT in Foema on that day". He could hear a yelling from Júlio Moquete, a BRTT member: *'Let's burn chickens; let's go to the main road!'*. He also heard Joni crying out: *'Don't burn all the chickens because chickens can be useful!'*. He could recognize Joni and others because their heads were not covered by clothes.

377. The witness continued:

378. "After they finished burning the houses, apart from the area, a NGO came to survey the damages, so they counted. (...) We went to the place that was burned down and we counted the number of houses that had been burned and we passed it on to the people. After they had finished the burning, we went first. Then the NGO came and asked for a list. We gave a list to the NGO. There were 46". [From the 46 houses] "at the time I saw Joni Marques with my eyes in Foema with a person named Carolino. He was with 9 people. I didn't see Joni Marques himself burning houses, but I saw Júlio. The 9 persons were: Joni Marques, Lamberto, Júlio Marques, Carmelino and five others that I don't know very well. What I do know is that Joni (with 3 others: Lamberto, Júlio and Carolino) came to burn the houses. (...) I watched the burning from beginning to end. (...) I saw Joni Marques walking away from the villages from where the houses were burning to the main road toward a place named Jenituto to the other side had not yet been burned. (...) He was with Júlio and Carolino burning houses and they went to another village along Jenituto. (...) Joni shouted to me: *'Follow me to Jenituto!'*. I was at the edge of the village at that time. (...) I didn't know what his intention was. I know that nothing happened to Jenituto; not a single house was burnt there".

379. About the happenings in Nanakuro village on that day, the witness explained:

380. "I saw Gonsalo with five members of TNI carrying 5 automatic rifles". About Omokano village, he continued: "They burned Omokano. After Omokano was on fire from about 1:00 PM until 3:00 PM, I was still in my own village watching what was going on. I didn't see Omokano being burned. When I went to Foema, I heard shots and the houses on fire. (...) At the time I didn't really know what happened in Omokano. So, I don't know who burned Omokano."

381. During cross-examination by the Defense on behalf Paulo da Costa and Alarico Fernandes, the witness reported about his own activities:

382. "I established with a group of nine young men because the situation and conditions for the common people were so crude. The militia was crude. We had to go to the forest. We defended the villagers and ourselves. If the militia was targeting the community, we went there to avoid the attack. The only purpose of the group was to provide information to the community. It was an organization that could evaluate the situation created by the militia. This organization had better knowledge. If we could know the movement of the militia, we could inform the community in order to avoid disastrous consequences. None of us had arms. I saw militia killing several dogs, pigs, chickens; we took all of them to where the people were hidden in the forest to distribute them among the community and civilians. The animals were already dead; they had been shot. (...) These people in the forest were CNRT supporters".

383. About Team Alfa, BRTT and *PAM Swakarsa*, the witness testified:

384. "Some of them had firearms; some used words; they were mixed together". He could distinguish between them because "the first group was Team Alfa. Approaching the referendum, other group was formed (BRTT). There were the ones with criminal activities, so we could distinguish those groups from FALINTIL". Once again the witness

clarified about the facts that occurred in Nanakuro: “At that time, at 7:00 PM we were on the edge of Nanakuro sub-village. We received the information that there were already militia and TNI on the way, so we gathered up to prepare ourselves, close to the houses, but when they arrived they started to burn houses. [When they arrived at Nanakuro] I saw Júlio with my own eyes, and also Gonsalo and lot of others burning houses. There was one in front carrying petrol. We were scared of getting shot. The situation was becoming tense. Then we retreated back. There were about 58 houses burnt in Nanakuro. Some were not left burning, but not more than 10. At the time Gonsalo was burning, I didn’t see very clearly what he was doing, but he was together with his friends. (...) Gonsalo was walking alone with a sword, but a lot of his friends were using machetes and coconut palm leaves to set fire to burn the houses. Gonsalo was next to his friends and he was advancing to the front, moving away, we were scared, becoming crueler. (...) I knew Paulo and Alarico before September 1999, since we had been hunting together for several years. [After a new request from the counselor, the witness could correctly identify both of them inside the courtroom]. I knew that Alarico and Hilário were members of BRTT and PAM Swakarsa because Alarico used to bring fish to my house and I asked him about that. He said: ‘I’m gonna join BRTT because I want to follow the guys’. (...) They followed those groups; they were just civilians. Approaching the referendum, they became involved. They carried firearms; that is why they were members of BRTT. I myself saw Alarico and Paulo carrying weapons since the 5th of September; they were in a car with swords and firearms. They were going from Los Palos to Leuro. I was in the road. I saw that with my own eyes. (...) I didn’t really see Paulo and Alarico burning houses and threatening the civilians in Foema, Leuro and Nanakuro. I just had information on that. (...) My house was also completely burnt and destroyed. (...) The people who did the burning in Foema were Júlio, Lamberto, Carolino and Joni. I was unable to identify clearly the other five because they had banners covering their heads. At the time, in Nanakuro, I saw with my own eyes, I saw Gonsalo with five TNI members, more than 10 people, but I couldn’t hear them. I was at a distance of 30 meters when I saw the burning taking place. I didn’t see Gonsalo burning at that time, but I saw him standing on the road, coming from the main road, I saw him yelling and jumping. I really myself didn’t see Gonsalo burning houses. (...) I didn’t see him doing anything”.

385. To the Court, the witness finally clarified that “from the 8th of September, at 7:00 PM, Nanakuro was burning. At 12:00 Foema was burning. We heard that Omokano at approximately 4:00 PM. [Therefore], the incidents in Foema, Nanakuro and Omokano were not a part of the same sequence”.

The testimony of the witness Basilio Fernandes:

386. Initially, the witness stated that before September 1999, he and other villagers went looking for shelter and it was suggested to them by Felisberto Sávio, the head of the village, to escape to Kupang:

387. “(...) It had been said that a military force of Garuda [*Indonesia*] would come. They would come and destroy. Apart from Garuda, another group was supposed to destroy in my village: BRTT, a kind of Indonesian military force. I didn’t belong to any group. I was only an ordinary citizen. [Looking at the Defendants sitting in this courtroom] I can recognize Alarico, Gonsalo, Hilário, Amélio, Paulo and Joni as those who I saw in my village in September 1999. At the time, Alarico was in my village, but he didn’t do anything. Gonsalo was there as well, but he did not do anything. Hilário, Paulo and Amélio, as I know, also did not do anything. Joni was a member of Team Alfa and he was carrying a gun. (...) Team Alfa members were those who were carrying guns to go to war. On that day the Team Alfa members I saw were Justino and Carolino. All of Team Alfa members were carrying guns on that day. They were carrying SKS rifles. Joni carried one. (...) I didn’t see anyone burning houses in my village. I don’t know exactly when I left my village. My house was burnt. At the time I didn’t see the burning of any houses. I could not notice any smoke of fire. I left earlier to the town. From my village to the town there was no one getting angry with me or threatening me. From my village we – all the villagers – went to Laruara and from Laruara to 745 Base and from there we left to Kupang. Some of the villagers wanted to go because some military went to the KOPASSUS base. I saw Joni Marques carrying a gun when he was in my village, but when he returned I didn’t see him anymore. (...) I saw Alexio Oliveira when he was at the military 745 Base. He was originally from Foema. (...) I saw him carrying his belongings to his room, but later I saw him being taken out. Those who took him out were Gonsalo, Alarico and Eurico. They took him out to surrender him to the military 745 Base. From the military 745 Base, I saw him being offered or transferred, but I didn’t know what happened to him. I was a member of FRETILIN. When I returned from the jungle, I worked together with the Indonesian Army Forces (TNI). It was from 1987 to 1988. I was about 12-years old. I was ordered by Indonesians. Sometimes I wore uniform; sometimes civilian clothes”.

388. Questioned by the Prosecution, the witness explained that he knew Joni Marques:

389. “Because they were from the same village (...) and he came during the period he was the leader of Team Alfa. I knew about his position as Team Alfa leader. I knew it because I was told by friends and colleagues. (...) I wasn’t sure that I was told by KOPASSUS members of the Indonesian Army. Joni Marques came and introduced me to KOPASSUS members. I was introduced and taken by KOPASSUS members because I was persuaded by them how to capture my brothers in the jungle at the time. KOPASSUS members came to me and brought me to the place. They informed me to go to hiding places where my brothers were and to kill my brothers. (...) [Still about Joni Marques], before 1999 we were at the same village, so I often came across him and we talked, we met. I met Joni Marques once

at the place of the KOPASSUS. I became involved with FRETILIN by knowing the directions of FRETILIN. (...) I supported FRETILIN by providing bullets and uniforms to FRETILIN. (...) I would like to go [Kupang] as a refugee, [since] it was said that the Indonesians would come to destroy us (...), according to the head of the village. I traveled in a garbage collector car. I didn't know who actually was driving the car. We were told to go, so it was my own risk to travel on that car. Nobody told me to go. We were told by Felisberto Sávio; therefore we had to go. The villagers from Leuro were traveling on that car. (...) I left earlier to the town. Then Antonio Soriano came later, but I only heard that Antonio Soriano was beaten up. I stayed there at 745 military base for 3 days (...) then Alexio Oliveira came in the afternoon. There were five people (Manuel, Gonsalo, Alarico, Eurico and Horácio) when Alexio Oliveira was taken and led away. At the time, there were four soldiers at the place. (...) Gonsalo and Alarico were carrying machetes when they took Alexio away. The machetes had covers (...). They took Alexio away and they offered him to the Indonesian military, but wherever they put him away I didn't know. (...) He was taken to the place behind the main road. From outside Alexio Oliveira was taken into the base, but it was towards the back part of the base. (...) The group took him away not on that day, but a day after that. Manuel told me something. I didn't hear anything from anybody [about where they were taking in]. (...) He was not taken holding off, but he just went away. They took him at 8:00 PM at night. Since then, I didn't see Alexio again. On the same night, I met again the men from the group who took him away. I don't know exactly what time we met again, but we met later that night, about one hour later. In that group, one hour later, I saw Gonsalo, Alarico and Manuel. None of them said anything to me (...) They came from inside the 745 Base and they were coming out. They were going to the main road. I stayed there and next morning very early Manuel came. Manuel was holding a sword and got into the vehicle. Manuel came to the place and took out his sword. I asked him: 'Why is that sword bent?'. He replied to me: 'The sword is bent because it was used yesterday to kill Alexio. Gonsalo was holding this sword and used this sword to cut Alexio'. I saw the sword; it was about one-arm's length. The handle was white and made of aluminium; the cover was made of wood, but not painted. [At this opportunity the witness was shown the exhibit C-001] I saw Manuel holding that sword. I saw with my eyes that the blade of the sword was bent at one point, which is still round. Gonsalo was not present when Manuel talked to me about his sword. But Florindo was there. I was speaking to him for a short while. After I had been speaking to Manuel, Florindo arrived. There were small children there, who were not aware to comprehend what was going on. When I saw the sword it was clean, but there was a bend in the blade, that it was hidden to straighten it".

390. Questioned by the Defense Counsel, the witness explained:

391. "(...) At the time, there was no other reason to leave the village. But Felisberto said that the Garuda troops would come and kill us; therefore we escape. At the time nobody threatened us. Nobody was angry us. But there were soldiers present there who fired the shots. We were afraid of those shots, therefore we left".

392. About the murder of Alexio Oliveira, the witness reported that "Joni Marques came to that place and took the motorbike that belonged to Alexio Oliveira and I don't know where he went. Joni was not amongst the people who took Alexio Oliveira at that place. (...) Alexio Oliveira came first and was sitting in the house; then Joni Marques arrived. But when Alexio Oliveira was taken away, Joni was not there at that place. Joni Marques was not part of the group that I saw later when I had a conversation with Manuel about the sword. Prior to these incidents, I knew Paulo da Costa and Alarico Fernandes because we are from the same village. They were ordinary civilians. Paulo is a driver; Alarico is an ordinary civilian. Alarico and Paulo did not force anybody to leave their places. I was with my family when I left my village heading to 745 Base. (...) At the time Alexio was traveling by public transport (a small minibus) and he got off at the base by himself. (...) He went by himself into the house, by the building; that is what I saw. I don't know whether Alarico was in the company of Alexio Oliveria. (...) At the time Alexio arrived, Alarico took Alexio and removed him from that place. Florindo da Costa was there, but whether he was involved or not, I didn't see. Florindo was at the place – inside the house, inside the building – but I didn't see him with them taking Alexio. Whether or not they wanted to kill him or not, I don't know, because I didn't see it. When Alexio was taken, there were four Army personnel. Alexio came out of the building. Nobody was holding him. Nobody was hitting him. He was taken outside. There were four soldiers outside that place. Two of them were standing on the back. Alexio was handed over to the soldiers. The people who took him were Gonsalo, Alarico, Horácio and Manuel. At the time, Alarico was carrying a large machete. I don't know the names of the soldiers who received Alexio from those people. (...) At the time I was seated there, one of the soldiers named Kumis ("moustache") came side by side with Manuel. I don't know what they were talking about. I could see them about 10 meters away. They were standing there and speaking among themselves. (...) A day after Alexio was taken, Manuel came back, struck the sword and mentioned the dent we were talking about."

393. About Gonsalo's conduct, the witness replied to the Defense:

394. "Gonsalo is an ordinary civilian who works in the fields. At the time he was there, but he was not angry with anybody. He didn't hit anybody." He continued: "I knew Alexio Oliveira because he was a teacher in my village. On that evening, nobody hit him. Nobody was angry with him. (...) When he went to the room, there was nobody hitting him."

395. Finally, he also testified:

396. “After that group handed over Alexio to the soldiers, they went back to their respective places. (...) They left and handed over Alexio. One hour later, they came to the house and we sat there.”

The testimony of the witness Florindo da Costa:

397. Florindo da Costa identified in the courtroom Joni Marques, Amélio da Costa, Paulo da Costa, Hilário da Silva, Alarico Fernandes and Gilberto Fernandes:

398. “All of them are from Leuro. At the time, I was in the village of Leuro. I saw Carolino burning my house. Carolino was my blood brother because originally we had one parent. He didn’t exactly burn my house, but he did burn other people’s houses. At the time I left to Kupang so I did not know who burned my house. I went by car. Before going to Kupang, I went to the military camp 745. Then I went to Com. To get to the military camp 745, there was a car to come and pick us up. It was a type of *bemo* with the name *Cruzeiro* written on it. Paulo da Costa was driving the car. At the time we were driven in the car driven by Paulo. I saw in my village Joni Marques (that I have pointed out), Carolino, another Carolino and Justino. These are people that I recognized in my village. They picked us up. I wanted to go to Com”.

399. Responding to questions of the Presiding Judge:

400. “I did want to go to Com. I stayed there for two days. After that, we travelled in a ship to Kupang.”

401. Responding to the Prosecutor:

402. “When we left our village of Leuro, other people from our village came along so we traveled all together. We left our village because the former head of the village ordered us to go. That is why we left to Kupang. We were told to leave, so we had to depart. If we didn’t go, the military of Rajawali – a type of military infantry called Rajawali – would come in a cleansing operation and take us away from that village. Apart from the *kepala desa* (former head of village) in my village, it was Júlio who also told us to go and leave Leuro. Júlio was a member of BRTT. It was the former head of the village who ordered or reminded us and that is why we followed them. The infantry would come to undertake a cleansing operation to kill us all. (...) No one in this courtroom was organizing the villagers to leave Leuro. It was only the former head of village.”

403. The witness disagreed with the statement he gave to CivPol on 19 June 2000, which says: “*But the Team Alfa, commanded by Joni, went to Leuro carrying four SKS weapons, and called the villagers in order to be evacuated*”. He said that about the announcement of organizing the villagers. He did not know about. What he knows is that they (Joni, Carolino Maulara, another Carolino and Justino) came with four rifles. [Touching him in the courtroom] “This is Joni Marques who I know.”

404. The witness explained that Joni Marques came by car to pick them up to leave the village. Before that, many people had already fled. They then followed later. On the day the witness left Leuro, the villagers were taken in a rubbish collecting truck. He traveled there by *Cruzeiro* car; not by garbage car. It was Paulo who was driving the *Cruzeiro* car:

405. “(...) Joni Marques stayed back at the village. Carolino traveled with us. On that day, moving villagers from Leuro, were Joni, Justino, Carolino and Paulo. Because at the time, the community, the people, were already gathered, so Joni, Carolino, Justino and another Carolino came and delivered to pick us up. (...) I don’t remember when Paulo arrived at the village with the *Cruzeiro* vehicle. I forgot the time. Carolino, Justino, Joni and Carolino came from Los Palos altogether at once in the *Cruzeiro* car. From their village, we were taken first to the military base. On the day we left our village to Leuro, we did not stop to pick up other people to go to the military post. Because our car was full enough of people, so they could not pick up any more passengers. When we got to the 745 Base, there were other villagers already there. From the military base to 745 Base, we still had to stay in Com. We only went back to the village of Leuro to pick up the people while they were going. I forgot how many days and the exact day after we left Leuro and went back to pick up other people. What I remember is that they picked us up to the military 745 Base and they went straight back to the village to pick up more people to the military camp.

Prosecution’s conclusions

406. The Prosecutor addressed the following conclusions in his closing statement:

“Count 3: Crimes Against Humanity - Deportation or Forcible Transfer of the civilian population: 8 September to 30 September 1999

In order for the court to find any of the accused guilty of deportation or forcible transfer, the evidence must prove the following:

The accused deported or forcibly transferred (forcibly displaced) without grounds permitted under international law persons to another location by expulsion or other coercive acts

The persons were lawfully present in the area from which they were deported or transferred

The accused was aware of the factual circumstances that established the lawfulness of such presence

The conduct was committed as part of a widespread or systematic attack directed against a civilian population

The accused knew that the conduct was part of such an attack.

The Prosecution submit that large numbers of the villagers from Leuro and surrounding villages were forcibly displaced. They went as refugees to 745 Base and then to Com. Some continued on to Kupang. They did not want to leave Leuro. That is obvious from the fact that many of them have come back. Certainly all the witnesses we heard from have returned to their village.

The transfer does not need to be to West Timor; transfer to the 745 Base is sufficient. Furthermore, the forcible displacement does not only include those villagers who went to 745 Base and Com, it includes also the villagers who fled into the forest and mountains. They are just as much displaced as the villagers who were transported by the garbage truck and the Cruzeiro mikrolet.

There were no grounds under international law to permit the villagers to be moved in this way. The villagers were lawfully present in their villages. And there can be no issue that the accused on this charge knew that the villagers were lawfully present in their villages.

As was said during the submissions about the law, forcibly does not only mean physical force. It includes the threat of force or coercion. Coercion may be the fear of violence.

The Prosecution pose this question: "What was it that caused the villagers to leave?" The answer is that they feared violence, directed against themselves or their property. These people did not flee to the forest or leave as refugees for no reason. They believed that if they stayed they would come to harm. It is important to consider from where that harm might come. Was it from FALINTIL, from CNRT? Or was it from the Indonesians and the armed militia groups? It was those people who were disappointed or angry at the result of the popular consultation. It was from the very same groups that these men associated themselves with.

That fear of violence was perpetrated in part by each of the accused. Moreover, once the fear of violence had been established, the accused played their part in enabling the villagers to leave.

The Prosecution submit that there is no doubt that the villagers left by force. What is at issue is whether these accused are responsible for either the act of deportation or the fear which led to that deportation.

JONI MARQUES

Joni Marques said that:

Joni Marques (10/7): "I would never do that to my fellow villagers...They were 100% for autonomy; if they stayed CNRT will slaughter us. They said we had been helping them. No intent to force them or make threats."

He claims to have been some sort of guardian angel - a saviour of the people from his village. For one moment I wish to consider his statement about this charge. What evidence is there to support his view that "if they stayed CNRT will slaughter us". Why? Why would CNRT wish to do that? They had just won the popular consultation with a vote of 78.4%. What interest had CNRT in slaughtering innocent villagers, even if those villagers had voted for autonomy? CNRT had won its victory at the ballot box.

The claim by Joni Marques to be protecting his villagers simply does not stand up to scrutiny. The witnesses say that their fear was not that CNRT would kill them, but that the Indonesians would kill them.

Anselmo Correia Pinto (16/8): "Bupati was leader of the group, he's head of the district.. he was a Team Alfa member" (17/8): "it was the Bupati..who gave the order to the people, families of armed forces, teachers and police..to go to Los Palos, then Com, then to Kupang as refugees."

José dos Santos (22/8): "The soldiers told us to go to Kupang..The village chief told us all to go to Kupang, we were told that if we stayed some armed forces would come and they would kill us. Felisberto was the kepala desa" ""We wanted to go to Kupang because we were afraid of dying, therefore we went..we went back to our own village because Javanese have already left so we weren't afraid anymore" "we went because we were scared of being killed"

Antonio Soriano (18/9): "wife and children headed towards road and were sitting there. The Javanese people forced them to go to Kupang. There was a referendum and the people were forced to go to Kupang. They said that if we didn't go that Fretalin would kill everyone. Team Alfa said 'whoever didn't go to Kupang would mean they were FALINTIL and they would be killed'. Both sides pro-autonomy and independence had to go to Kupang."

Basilio Fernandes (20/9): "We were taken to the house of the head of the village...Felisberto Sávio.. asked us all to gather in order to go to Kupang..He said that there will be military force of Garuda, to wipe us out, that's why we escaped. Garuda is the Indonesian force, will come and totally destroy East Timor...that's why we had to escape to Kupang"

Eurico da Costa (24/9): "I was living in Leuro village. After the popular consultation, Team Alfa came and told us if we hide..we would know where you are" "[Team Alfa] didn't come to kill us, but only to threaten us and make us scared so we would go to West Timor"

Florindo da Costa (19/9): "The former head of the village ordered us to go to Kupang and so went..if we didn't go, the military Rajawadi will come and kill us all, clean us up..Rajawadi, an infantry which operated 'cleaning up'...it was said it was a sapuradi, a cleansing operation or kill us all"

Alarico Fernandes (13/7): "Before the popular vote, Team Alfa had started to force people, including Joni. They attacked directly the people in the village. Took Indonesian flag and said this flag belongs to us, we have to raise flag for Xanana." "They had 11 SKS rifles; that's why we were scared. They said anyone who supported CNRT they will cut off their heads; therefore we burnt the villages and we were scared...They used firearms and forced the people; they threatened us; that's why we ran away. They first used violence in about August, before the popular vote" ""Team Alfa forced the people to follow the refugees to Kupang and not to follow CNRT..we did not want to go.. they threatened us with weapons.."

Paulo da Costa (13/7): ""On 2 September 1999, Joni Marques and his brother Gilberto Sávio they forced people from Leuro. I am a normal civilian, I didn't force anyone...Head of village and Joni Marques forced the population..at the time they had weapons to force the people."

Gonsalo dos SANTOS: (16/7): "Joni Marques and Felisberto Sávio forced and threatened me to leave my village." "Our wish was not to go to Kupang. We were threatened by Team Alfa..they said 'that if the autonomy won, the Indonesian flag would be flying and if it lost it will be pulled down, if autonomy lost there would be bloodshed in that village...it was because of the threat from Felisberto and Joni Marques that we were pro-autonomy.'" "I had no choice but to go to Kupang..I would be killed if I didn't."

The evidence from the witnesses shows that the order to move the villagers as refugees no doubt came from the Indonesian military or civil authority. The Prosecution does not suggest that Team Alfa would have had the authority to order Battalion 745 to accept a large group of refugees, or the authority to request a boat to be sent to Com port to collect people to go to Kupang. Those orders must have been given by men in positions of greater power.

The plans to move the people must have been made prior to the popular consultation. It is not realistic to think that the movement of these villagers which began around 8th September 1999 was organized in the four days after the announcement of the results on 4th September. This must of have been a order which was anticipated in advance.

However, once the order had been given the Indonesian controlled groups, like Team Alfa, Pam Swakarsa and BRTT were required to play their part. It was because of their membership or association with those groups that all these accused came to be involved in the deportation.

The Prosecution say that Joni Marques is criminally responsible on this charge in respect of two matters:

First, he with others burnt houses and property in the villages around Leuro; in particular Foemaa and Omokano. This played a fundamental part in creating in the people a fear of the violence that would occur if they did not either flee to the forest or go as refugees.

Aurito Rodrigues (22/8): "On 13th September, we saw that there were several members of Team Alfa and BTT coming into Foemaa. 46 houses were burnt in Foemaa and about 38 in the other village." "Prior to the consultation BRTT, Pam Swakarsa and Team Alfa came to Foemaa village, but we weren't brave enough to face them..Joni marques, Felisberto, Carolino, Horácio from Team Alfa...from BRTT and Pam Swakarsa Paulo and Amélio. They went around using sharp instruments and when the situation became more tense they used rifles to threaten villagers"

(23/8): "On 13th September, Team Alfa and BRTT were burning houses in Foemaa..Joni yelled 'don't burn the chicken pen, the chickens maybe of some use later', but Júlio burnt everything anyway" "9 people came to burn Foemaa, I saw Joni, Júlio, Carolino, Lamberto...5 were wearing bandanas..I went to the village with others..we counted the number of houses burnt..when the NGO came we gave over a list..it was 46 in Foemaa..it was about 3 hours between 12 and 3, at 4pm I went in" "Joni was walking down from top towards the main road..away from villages where the houses were being burnt..towards..where there were houses which had to be burnt. Joni was in village with Júlio and Carolino burning houses. Then they followed him to Jenatatutu..not a single house was burnt in Jenatatutu. After Foemaa was burnt, they went to Omokano from 1pm until 4pm..when I went to Foemaa to inspect. I heard shots in Omokano and all the houses were on fire"

Antonio Soriano (18/9): "When I got onto vehicle, I saw Joni Marques; he was just there.

Basilio Fernandes (20/9): "I saw in Leuro Joni Marques..he was Team Alfa; he had a gun...Team Alfa were members who carry guns and go to war.."

Jacinta da Costa (21/9): ""on the main road..Joni Marques came and shot his gun in the left and right of Ralmundo...shot 3 times.." "Joni Marques was always with Indonesian military and he had a gun...the day before Alexio was taken away, Joni Marques came to the house of Moises..Joni said 'tomorrow we will be back to burn the houses'"

Alarico Fernandes (6/3): "burning houses, Joni Marques ordered me to do that" (13/7): "I return to Leuro. Joni suddenly appeared. He forced us to get into the car..in Foemaa he said 'all males get off..those who ran away were CNRT, so we must burn the houses'...we had to do it because he carried a weapon..I burnt the houses from Foemaa to Omokano..at Foemaa Joni gave us matches" "Joni usually used a motorbike" "all the houses in Foemaa were burnt...Joni told us to burn all of them, he said they were CNRT" "After Foemaa we went to Omokano and burnt the houses as in Foemaa, Joni told us to burn those houses too""Joni asked me to burn the houses" "Joni and two others told me to burn houses in Foemaa and Omokano."

Paulo da Costa (13/7): "I went to 745 and waited to go to Com...there 2 or 3 days..went back to Leuro 2 or 3 times...Joni came with me once...Joni ordered me to go to Leuro..Joni was in charge of the people in Leuro".

Secondly, there is some evidence that he played a part with others in transporting people from their villages to the 745 Base and then onto Com. He did that on, amongst other days, the 11th September 1999, on the journey during which Alexio Oliveira was picked up. The transportation was provided by a government garbage truck or the mikrolet driven by Paulo. The fact that it was a government garbage truck supports the conclusion that this was a program supported by the Indonesian authorities.

Upon the orders of his superiors, Joni Marques put into effect what must have been the plan of the Indonesian authorities. He spread fear amongst the villagers to the extent that they were prepared to either flee from the homes into the forest or accept transportation provided for them to go to the 745 Base and onto Com.

The role that Joni Marques played was fundamental. If the people were not in fear, they would not have moved. The fact that they were in fear satisfies the definition of 'forcibly' in the phrase 'forcibly transferred' (there is no issue that they were transferred).

The nature of the project, to move the villagers as refugees, is evidence that this was part of a systematic plan. The nature of the threats, that Indonesian forces would wipe out anyone who remained is evidence that this was widespread. The nature of the property burning, as one village after the next was destroyed, is evidence that this was both widespread and

systematic. Without doubt, this was directed against a civilian population, not just in the villages around Leuro, but as we heard from the witnesses there were refugees from many other villages as the same thing was happening in villages around Los Palos. As we know from the Human Rights reports in Case File C, this was happening all over East Timor.

In playing the part he did, Joni Marques must have known that his actions were part of a large plan. The refugees were not taken to 745 Base on the mere possibility that they would be accepted there. The refugees went to 745 Base as the first stage on a journey to Kupang and Joni Marques must have known that.

ALARICO FERNANDES

Alarico answered his charge in the following way:

Alarico Fernandes (6/3): "In relation to deportation, I object to that. I am a simple man and part of the community."

(13/7): "I was part of the community. The people who forced the community were part of Team Alfa."

However, Alarico Fernandes accepted his part in the burning of houses.

Alarico Fernandes (6/3): "On the charge of burning houses, Joni Marques ordered me to do that"

(13/7): "I burned two houses because I was forced to by Team Alfa, by Carolino Portella...he said 'you burn these houses'..I was afraid, so I did...I used a lighter.. The house belonged to José Mato and Jtao de la Pinto" "in Foemaa [Joni] said 'all males get off, so we must burn the houses'...we had to do it because he carried a weapon..I burnt the houses from Foemaa to Omokano..at Foemaa Joni gave us matches" "all the houses in Foemaa were burnt...Joni told us to burn all of them" "After Foemaa, we went to Omokano and burnt the houses as in Foemaa. Joni told us to burn those houses too" "I burned 2 houses in Leuro, then I went to Foemaa then to Omokano. I burned a heap of houses in one day in three different places...I was the only person in Leuro to be asked to burn houses...I burnt them because otherwise he would kill me." "Joni and two others told me to burn houses in Foemaa and Omokano."

That statement made by Alarico is supported by the evidence of the witnesses. First, in respect of the two houses:

Anselmo Correia Pinto (16/8): "I saw one militia Carolino at my house... Alarico and Gonsalo were about 1 metre behind Carolino... Carolino ordered then to burn my house...He pushed them. They used a match but it wouldn't light..they went to José's house.. After his home was on fire, they took the fire to burn my house..my house didn't catch fire, so they went to José's house. It caught fire and they used the fire to burn my house" "Alarico said 'Carolino said that he was going to kill us, therefore we've come to burn your house'"

(17/8): "If Alarico and Gonsalo had refused Carolino's order, they would have been killed"

José da Costa Nunes (23/8): "Alarico was trying to use his lighter or matches, but it did not ignite. He took something from the kitchen which was alight and set fire to my house..Gonsalo was standing with Alarico in front of the door. Gonsalo was burning the house. They told me I was a member of CNRT; for that reason they burned my house...My son was working with UNAMET. I was a member of CNRT" "I saw the house of Anselmo burnt..it was about 12 noon" "It was the house of Anselmo Correia Pinto that I saw burnt. Alarico and Gonsalo burnt it" "Alarico lit the flame to my house..Gonsalo also went there. They gathered together and burnt the houses. Alarico burnt the house and Gonsalo was standing next to him"

The burning of those two houses was on the same day that Antonio Soriano was beaten. That day was said to be 8th September 1999.

The burning of the houses in Foemaa and Omokano, which Alarico admits, is described by the witness Aurito Rodrigues:

Aurito Rodrigues (22/8): "On 13th September 1999...46 houses were burnt in Foemaa and about 38 in the other village. The ones who did the burning were Joni marques, Gonsalo, Gilberto, Alarico, Paulo, Amélio and Manuel".

The statements of Romoldo Loyola (23/8/00) and Pedro dos Santos Viera (22/8/00) confirm that those two villages were burnt on about the 13th September 1999.

All of that is accepted by Alarico Fernandes. However, there is further evidence which says he was also involved in the burning of Nan Curo and Lali. The witness said:

Vito da Costa Almeida (23/8): "I was living in Lali. Some people came and burnt that area..they burnt 58 houses and one vehicle. My house was made of coconut leaves so they used matches to burn my house" "the people who came were Gonsalo, Alarico, Amélio, Paulo, Sérgio, Horácio..they came from Leuro" "Alarico used matches and burnt houses..[the group] they gathered together and burnt houses until all the houses were burnt" "Paulo and Alarico were together and were surrounding the vehicle assisting in burning the vehicle"

The burning of Nana Curo and Lali is also described by the witness Aurito Rodrigues, although he did not identify Alarico in the group. That witness says that the burning of Nana Curo and Lali took place on 8th September 1999, the same day as the two houses which Alarico admits burning.

There is also evidence that Alarico was more involved with Team Alfa and the autonomy supporters than he has tried to suggest to the Court.

Gonsalo da Costa Sanchez (2/8): "Alarico [was] BRTT"

Aurito Rodrigues (22/8): "Alarico was BRTT or Pam Swakarsa" "Alarico..was involved but I can't tell exactly. They were all under BRTT" "Paulo was in the group" "Everyday they walked together; they often came along..sometimes with swords..they often shouted..'very soon we'll be fighting against the CNRT. We from the pro-autonomy will destroy you"

(23/8): "Alarico and Paulo were civilians like us at the start. Later they started to carry weapons and swords..I saw them carrying weapons from the 5th or 6th on the vehicle from Los Palos to Leuro. They were yelling out..there were firearms or swords"

When the mikrolet was driven from Leuro to the 745 Base on 11th September 1999 (the day Alexio Oliveira was picked up), Alarico Fernandes was on it.

Florindo da Costa (19/9): "When we picked up Alexio Oliveira Paulo, Gonsalo, Alarico and Amélio were on the minibus"

When Alexio Oliveira was taken to the PROVOST at the 745 Base, Alarico followed behind:

Basilio Fernandes (20/9): "Alexio was handed over to the soldiers..by Gonsalo, Alarico, Eurico, Horácio and Manuel"

Florindo da Costa (19/9): "Paulo, Gonsalo together with PROVOST took Alexio Oliveira to PROVOST house. Me and Alarico followed."

So there is evidence that Alarico Fernandes:

Was with BRTT carrying weapons on 5th or 6th September 1999

Burnt two houses with Gonsalo dos Santos on 8th September in Leuro

Burnt houses with others in Nan Curo and Lali on 8th September

Was together with Joni Marques and others on the mikrolet which picked up Alexio Oliveira on 11th September

Was following behind the group that took Alexio Oliveira to the PROVOST house at the 745 Base on 11th September

Burnt houses in Foemaa and Omokano on 13th September 1999

It is worth remembering also that on the 21st September 1999, Alarico was still spending time with this group. He was with them in the Coconut Grove at Ira-Ara. Why, when he claims he was forced to commit criminal offences on 8th and 13th September, was he still in the company of these men on 21st September 1999?

And, if all that was not enough, on 27th September 1999 Alarico Fernandes is still with Team Alfa. He was on the mikrolet when it was attacked near Lautem.

It is no defence to these charges that Alarico Fernandes was ordered to commit the offence; Section 21 of regulation 2000/15.

If Alarico Fernandes is claiming that he acted under duress, under the threat of death, the Prosecution submits that such a defence is not supported by the evidence against him. Alarico Fernandes had willingly joined in with the activities of the pro-autonomy groups by the time that these offences were committed. If he had been forced to burn the two houses on 8th September 1999 under threat of death from Carolino Portella, there is no sense in his presence with the group in Nana Curo and Lali later that day, or on the minibus on 11th, or following the group at the 745 Base on the evening of the 11th, or with the group again in Foemaa on 13th, or at Ira-Ara on 21st or Lautem on 27th.

Alarico played his part in creating the atmosphere of threat and fear which forced the population to leave their homes.

As Alarico Fernandes himself accepts in relation to the two houses on the 8th September:

Alarico Fernandes (13/7): "they wanted to burn these two houses because they were members of CNRT"

And in relation to the villages of Foemaa and Omokano:

"Joni asked me to burn the houses because they were CNRT houses and CNRT was the enemy of Team Alfa..he always told us in the village if you find CNT kill them."

The order that Alarico Fernandes was given was to burn as a part of the widespread or systematic attack. There could not have been a clearer way to express it. At the time that Alarico carried out those orders he knew that his actions were a part of such an attack

PAULO DA COSTA

Paulo da Costa said that:

Paulo da Costa (13/7): "I am a normal civilian. I didn't force anyone...I used the minibus to take the refugees from Leuro to 745 ... I went to Leuro with Carolino Portella because he wanted to kill Soriano." "I didn't know Carolino was Team Alfa member." "I said please don't beat him up." "I didn't know that [Soriano] was CNRT" "because all of us are for autonomy because we lost we wanted to leave." "I went to 745 and waited to go to Com...there 2 or 3 days..went back to Leuro 2 or 3 times...Joni came with me once...Joni ordered me to go to Leuro..." "I only took my family in the bus" "I made the trips to Leuro all on the same day." "I didn't see any homes burning during the journeys." "At Com we were waiting to go to Kupang...I wanted to go because autonomy lost." "I didn't force anyone to leave the village." "I was not Team Alfa, but only a driver..they forced me to pick up people; they would kill me."

That account of his actions bears little relation to the evidence we have heard. First, he is in the village with Carolino Portella:

Olivio Lopes (21/8): "Paulo was standing next to Carolino, but he was not doing anything" "Paulo was carrying a sickle"

Angelina Soriano (21/8): "Carolino Portella.. stabbed my husband in the head. Paulo was carrying a sickle, he didn't cut Soriano, but the sickle fell to the ground"

Antonio Soriano (18/9): "Carolino followed me and stabbed me. Paulo accompanied him. He was holding a sword, but he didn't do anything. The sword fell out of his hand." "Paulo was there..at about 10 o'clock. Paulo was there together with Team Alfa" "Paulo was with Carolino at my house, then they followed me to my siblings. Paulo there when Carolino stabbed me in the house. Paulo there when Carolino kicked me in the road" "Paulo was there with Carolino, standing there when Carolino took my money and stabbed me. But Paulo didn't do anything"

He is also identified burning houses in Nan Curo and Lali on 8th September 1999:

Vito da Costa Almeida (23/8): "The people who came were Gonsalo, Alarico, Amélio, Paulo, Sérgio, Horácio..they came from Leuro" "Paulo and Alarico were together and were surrounding the vehicle assisting in burning the vehicle"

Next he is taking villagers to the 745 Base in the mikrolet:

Lucia Pereira (21/8): "I was taken to 745 in a white minibus. Amélio and Paulo were inside the car" "Paulo was the driver of the vehicle to Com from 745"

José dos Santos (22/8): "Paulo took us in a minibus..lots of people came in the car driven by Paulo..we went to 745 barracks".

On the 11th he is taking Alexio Oliveira to the 745 Base

Florindo da Costa (19/9): " A vehicle came and took us to 745. The car was Cruzero, a type of bemo. Paulo was the driver.

On the night of the 11th September, he is taking Alexio Oliveira to the PROVOST:

Florindo da Costa (19/9): "We followed behind...Paulo, Gonsalo together with PROVOST took Alexio Oliveira to PROVOST house" "Alexio never return after that. Paulo and Gonsalo came back to where we were"

On the 13th September 1999, Paulo is identified in Foemaa burning houses:

Aurito Rodrigues (22/8): "The ones who did the burning were Joni Marques, Gonsalo, Gilberto, Alarico, Paulo, Amélio and Manuel.." "from BRTT and Pam Swakarsa Paulo and Amélio, they went around using sharp instruments" "They were all under BRTT" "Paulo was in the group" "Everyday they walked together, they often came along..sometimes with swords..they often shouted..very soon we'll be fighting against the CNRT. We from the pro-autonomy will destroy you"

(23/8): "I know Paulo involved in Pam Swakarsa..he told me he was going to join BRTT because he would join the guys who would win... Alarico and Paulo were civilians like us at the start. Later they started to carry weapons and swords..I saw them carrying weapons from 5th or 6th on the vehicle from Los Palos to Leuro. They were yelling out..there were firearms or swords"

As Hilário da Silva described him:

Hilário da Silva (26/7): "Paulo was the driver of the Cruzero. He followed Joni Marques everywhere. Wherever Felisberto and Joni Marques went, he followed. He was their driver"

For a man who is frightened of Team Alfa, he spends a remarkable amount of time with them. The picture that Paulo da Costa has tried to give this court, of a man acting under sufferance is wholly unbelievable. He is too often supporting the pro-autonomy groups. He shares exactly the same pattern of dates as Alarico Fernandes, except for Paulo one has to add in the 25th September 1999 incident in which the clergy were killed.

The Prosecution asks this question: Why was Paulo the driver of that vehicle? The mikrolet did not belong to him. It was stolen from Martin Vououm (statement 22/9/00). Surely, Paulo was not the only person capable of driving it? Why did Team Alfa use him for all of these journeys? If he was not willing to go with them, he could simply have said "its yours, take it". But instead he joined with the group day after day, playing an active part in their activities.

Paulo was a willing and active member of Team Alfa; not just a driver, forced into chauffeuring the group around the scenes of these crimes, but a willing participant.

As to this charge, Paulo was a significant part of the group which put fear into the minds of the people of Leuro, to the extent that they were prepared to flee to the mountains or seek refuge at the 745 Base on their way to Kupang.

Paulo da Costa had attached himself to the pro-autonomy group. In doing so he knew that his actions, directed as they were against the civilian population in the villages around Leuro, were part of a widespread or systematic campaign. He knew as he ferried people to the 745 Base and then later to Com that this was part of a bigger scheme to deport the population to Kupang.

GONSALO DOS SANTOS

Gonsalo dos Santos said:

Gonsalo dos Santos (6/3): "I was only a witness; not a perpetrator"

(16/7): "I never went back to Leuro or Foemaa after I had arrived at the 745 Base." "I traveled on the minibus for the first time when I went from 745 to the wharf." "I was part of the people being forced." "I was not involved in any activities of arson." " Our wish was not to go to Kupang. We were threatened by Team Alfa"

The evidence tells a very different story. First, before the referendum::

Aurito Rodrigues (22/8): "Gonsalo and Paulo we had worked with. As the referendum approached, they changed. They became members of BRTT."

On the 8th September, the burning of the two houses on the orders of Carolino Portella:

Anselmo Correia Pinto (16/8): "I saw one militia Carolino at my house... Alarico and Gonsalo were about 1 metre behind Carolino... Carolino ordered then to burn my house...He pushed them. They used a match but it wouldn't light..they went to José's house.. After his home was on fire, they took the fire to burn my house..my house didn't catch fire, so they went to José's house. It caught fire and they used the fire to burn my house" "Alarico said 'Carolino said that he was going to kill us; therefore we've come to burn your house'"

(17/8): "If Alarico and Gonsalo had refused Carolino's order, they would have been killed"

José da Costa Nunes (23/8): "Alarico was trying to use his lighter or matches, but it did not ignite. He took something from the kitchen which was alight and set fire to my house..Gonsalo was standing with Alarico in front of the door. Gonsalo was burning the house. They told me I was a member of CNRT and for that reason they burned my house...My son was working with UNAMET. I was a member of CNRT" "I saw the house of Anselmo burnt..it was about 12 noon" "It was the house of Anselmo Correia Pinto that I saw burnt. Alarico and Gonsalo burnt it" "Alarico lit the flame to my house..Gonsalo also went there, they gathered together and burnt the houses. Alarico burnt the house and Gonsalo was standing next to him"

On the 8th September in Nana Curo and Lali:

Aurito Rodrigues (22/8): "At 7pm people of BTT, Team Alfa and TNI from Leuro went to Nana Curo to burn houses.." "Gonsalo was burning..he was with his friends, yelling 'members of CNRT, come out here, we can kill you. Do you have any young sister, come out here so we can rape them. You want independence, you don't know what independence is'..there were lots of people together, so I don't exactly know who said those words" "Gonsalo was walking along with a sword."

(23/8): "I saw Gonsalo in Nana Curo..there was Team Alfa and ABRI. The burning occurred at 7pm. I was about 30 metres away. I didn't see Gonsalo burning. I saw Gonsalo jumping and yelling..he had a sword and was shouting"

Vito da Costa Almeida (23/8): "I saw Gonsalo carrying matches..Alarico used matches and burnt houses..[the group] they gathered together and burnt houses until all the houses were burnt" "The first who burnt Carlos' house was Gonsalo..he burnt the house from the side of the house..he used matches..he lit one..to ignite the house..those that I have mentioned one by one went around and burn all the houses" "Gonsalo was holding a lighter and he lit up a house, that illuminated the area and I could see him" "I don't know how many houses Gonsalo burnt himself. Gonsalo was the first person to burn the house, I saw that"

On the 11th September 1999, on the mikrolet:

Florindo da Costa (19/9): "When we picked up Alexio Oliveira Paulo, Gonsalo, Alarico and Amélio were on the minibus"

On the 11th September 1999, at the 745 Base:

Florindo da Costa (19/9): ""PROVOST took Alexio, and Gonsalo and Paulo went with him to the PROVOST house. Alexio never returned after that. Paulo and Gonsalo came back to where we were".

Basilio Fernandes (20/9): "Alexio was handed over to the soldiers..by Gonsalo, Alarico, Eurico, Horácio and Manuel".

On the 13th at Foemaa and Omokano:

Aurito Rodrigues (22/8): "The ones who did the burning were Joni Marques, Gonsalo, Gilberto, Alarico, Paulo, Amélio and Manuel." (23/8): "I didn't see anything in Foemaa and Omokano that Gonsalo burnt"

Gonsalo dos Santos was far more involved in the pro-autonomy group than he has been prepared to tell the court. During the period between the 8th September and the 13th he participated in the burning of houses in Leuro, Nana Curo, Lali, Foemaa and Omokano. By doing so, he participated in the circumstances which brought about the displacement of the

population. He did this knowing that his actions were part of a widespread or systematic attack on the civilian population.

Count 4: Crimes Against Humanity – Persecution: 8th to 30th September 1999

To prove the charge of persecution the evidence must show that:

The accused severely deprived a person of a fundamental right contrary to international law.

That person was targeted by the accused by reason of the identity of a group.

That targeting was based on political or other ground.

The conduct was connected to another act from within section 5.1 Reg 2000/15.

The conduct was part of a widespread or systematic attack.

The accused knew that it was part of such an attack.

As the Prosecution has said during the course of the proceedings, the fundamental rights which the prosecution allege were deprived were:

The right to shelter;

The right to personal property;

The right to personal safety.

The group which the Prosecution say were targeted were those who were, or were perceived to be members or supporters of independence for East Timor; specifically, members or supporters of CNRT.

The acts were committed in connection with the deportation or forcible transfer from the villages, the serious injury caused to Antonio Soriano and the murder of Alexio Oliveira.

Although there was a project to remove all of the population from the villages around Leuro, within that project was a desire to single out a particular group as a target for additional violence. That group was those perceived to be supporters of independence.

The witnesses gave the following evidence:

Anselmo Correia Pinto (16/8): “Carolino said ‘you worked for UNAMET and worked for CNRT; because of that, I’m going to kill you’...Alarico and Gonsalo were about 1 metre behind Carolino when he said that..Carolino ordered then to burn my house. He said ‘he works for UNAMET; burn his house’. He said it twice” ““When Carolino ordered Gonsalo and Alarico to burn José’s house, he said ‘he works for UNAMET, he works for CNRT’, so they went. He said ‘he’s also a liar. Go and burn this person’s house””.

(17/8): “As village chief and as far as I know, all the homes burnt were CNRT or worked for UNAMET”

Angelina Soriano (21/8): “Carolino..kicked him in the stomach..he said ..‘you are a follower of Xanana”” “Before he stabbed my husband Carolino said ‘you, you who came from the forest must be follower of Xanana”” “The people went to the highway, they were looked at in a more favourable way. My husband and I were looked on in a less favourable way”

Aurito Rodrigues (22/8): “Gonsalo was burning..he was with his friends, yelling ‘members of CNRT, come out here; we can kill you. Do you have any young sister, come out here so we can rape them. You want independence; you don’t know what independence is’..there were lots of people together, so I don’t exactly know who said those words” “Paulo was in the group” “Everyday they walked together, they often came along..sometimes with swords..they often shouted..‘very soon we’ll be fighting against the CNRT. We from the pro-autonomy will destroy you”” “In Foemaa about 11 houses were not burned, the not so good ones left behind and those of pro-autonomy not burned..all good houses, all house of pro-independence were burnt..I know because I know all who belonged to CNRT. We’ve got..written information and their identities”

Vito da Costa Almeida (23/8): “[In Nan Curo] The owners fled. They were afraid they were going to be hit by the people coming. They were afraid of the pro-autonomy people because the owners were CNRT. If they stayed in their houses, they were afraid they would die”

José da Costa Nunes (23/8): "Gonsalo was standing with Alarico in front of the door. Gonsalo was burning the house. They told me I was a member of CNRT. For that reason, they burned my house...My son was working with UNAMET. I was a member of CNRT"

Raul Pereira statement (28/12/00): "24th January 2000 appointed 'kepala desa' of Leuro..many homes..within the village had been destroyed by fire..37 residential homes destroyed in Leuro village ... it is my belief that Team Alfa members destroyed the houses because Pam Swakarsa had identified them as supporting pro-independence or CNRT. The houses that belonged to members of BRTT or Team Alfa were not destroyed after the popular consultation."

Jacinta da Costa (21/9): "He pointed his gun at Alexio Oliveira and said 'you are a CNRT member, so now I have to shoot you'..'you went to forest and talked to FALINTIL and I know about this"

Eurico da Costa (24/9): "When Alexio Oliveira came, I asked him 'why did you come'..because in the past he was using his motorbike to meet CNRT members..I was surprised when I saw him arriving because his arrival will cause his death, because the situation was bad and he was working with CNRT"

Alarico Fernandes (13/7): "They said anyone who supported CNRT they will cut off heads. Therefore we burnt the villages and we were scared" "They threatened and wished to kill anyone supporting CNRT" "They threatened the village head because he was CNRT...they told the village head to ask the community not to follow CNRT but to follow Team Alfa." "they wanted to burn these two houses because they were members of CNRT" "all the houses in Foemaa were burnt...Joni told us to burn all of them. He said they were CNRT" "After Foemaa, we went to Omokano and burnt the houses as in Foemaa. Joni told us to burn those houses too" "Joni asked me to burn the houses because they were CNRT houses and CNRT was the enemy of Team Alfa..he always told us in the village if you find CNT kill them."

What is shown by the evidence is that during the period from 8th September 1999 through to 13th September 1999, the Team Alfa group which these men had all become attached to was discriminating against those people it considered to be supporters of independence.

Because the evidence has been provided collectively and is to some extent summarised under the previous offense, I will present just a short analysis of each accused's participation in this offence:

Joni Marques directed the burning of the villages of Foemaa and Omokano because he considered them to be CNRT. He forced Alexio Oliveira onto the mikrolet, to be taken to the 745 Base. The 745 Base was a place where Alexio Oliveira could expect to find himself in danger, due to his political beliefs. Those beliefs were known to Joni Marques and Joni Marques threatened him about that.

Alarico Fernandes burnt the two houses in Leuro on the orders of Carolino, for the very reason that they belonged to men who had worked for UNAMET and CNRT. The houses which were burnt by him in Foemaa and Omokano were burnt because Joni Marques considered them to be houses belonging to CNRT supporters.

Paulo da Costa took part in the burning of Foemaa which was burnt at Joni Marques' request because they were pro-independence houses. He had been seen in a group which was shouting about a future fight with CNRT and how pro-autonomy would destroy them.

Gonsalo da Costa, together with Alarico, burnt the houses of two men on the orders of Carolino for the reason that they were CNRT members. He burnt houses in Nan Curo as part of a group that was heard to shout "members of CNRT come out here; we can kill you". He was also involved in the burning of Foemaa at which all pro-independence houses were burnt on the orders of Joni marques.

The evidence against each of these men has shown the necessary elements, including the discriminatory intent, to be found guilty of this charge."

Murder of Alexio Oliveira

The testimony of the witness Florindo da Costa:

407. The witness told the court that he knew a man named Alexio Oliveira:

408. “(...) At the time there was a car, which came because we were supposed to go to Leuro, but we stopped in Foema. At the time I was sitting on the top of the car. Joni Marques was on the front. I saw Alexio Oliveira there. (I would like to say that Joni was driving the motorbike.) At the time, Joni and Justino were riding their motobike and we were traveling where Alexio was. Alexio Oliveira was in Foema. I did not know the direction of the group Joni that was in, but I noticed Alexio and his mother were standing beside the road, close to the building of the school. At the time, Joni Marques was quite far from us, but I heard two gunshots and Alexio actually came forward in front of Joni. Joni came toward Alexio Oliveira. At the time, Joni came and stopped in front of Alexio. Alexio told Joni: *‘Brother, please help me to go to the commander of registration, so they cannot accept me’*. At the time, Joni replied to him: *‘I am sorry, but you behave like a snake, and I want you to move away from this road’*. However, Alexio insisted on coming with Joni, so Joni took him and went into the car. The car was the *Cruzeiro*. At the time, Alexio Oliveria was standing just beside the door of the car. I helped him by putting his suitcase on the top of the car with me. Because at the time Alexio wanted to go with Joni, Joni asked him to surrender his keys to him. So Alexio went to the car and travelled with us. When I saw Alexio Oliveira and his mother on the side of the road, there was no conversation between Alexio’s mother and Joni. However, Alexio went over and talked with Joni. During the trip, I went to Sawarica. The vehicles stopped, including the motobike. Joni requested the key in order to get the motobike. The car stopped in Sawarica in front of Alexio’s house. Alexio took the key to pick up his motorbike. At the time we stopped, it was dark, so we only followed Joni. It took Alexio Oliveira about 20 minutes to pick up his motobike. At the time we followed Alexio Oliveira and we were traveling on. But then Joni was shooting. Soon the motobike came. Joni shot and the motorbike came. We moved to the main road. Alexio passed the motorbike to Joni, and Alexio Oliveira came as a passenger in the car. All of us went straight to the military camp. We were driven straight away to the military.”

409. The witness told the court that he saw Alarico during the journey. They were all together in the same car, but they didn’t talk to each other:

410. “At the time, during the trip, it was quite dark, so Alarico didn’t do anything. When we arrived of the military camp 745, the car stopped, including Joni and the motorbike. Joni returned the key to the hands of Alexio Oliveira. Horácio actually took the key from Alexio. By the time we arrived, a member of 745 military hit a brother of Joni; the name of this member was Raul. So Joni came over to solve the matter and we followed Joni. We returned to the first position we came to and then we saw the PROVOST military. Then we went in with Paulo. From there we followed him. Paulo and Gonsalo with the military went to the military post to see Alexio Oliveira. PROVOST military were actually inside. It was the PROVOST who took Alexio. Paulo and Gonsalo were accompanying him to the post. After that, from the PROVOST military, Alexio never returned again. Paulo and Gonsalo came back to where we were and reported to us what happened. When we crossed the road, Gonsalo called us and said: *‘My fellow brothers, wait for me. I have to clean my sword!’*. He was yelling when he said that. We were behind and we heard that.”

411. Responding to the questions from the Presiding Judge, the witness said:

412. “I didn’t hear anything further about Alexio Oliveira at that time. All I heard was that Gonsalo wanted to clean his sword. I didn’t see his sword because it was already dark. I couldn’t hear what kind of dirt should be removed from Gonsalo’s sword; it was dark. After that, I didn’t hear any comment about what had happened to Alexio on that afternoon. After that afternoon, I didn’t see Oliveira anymore. (...) We stayed at 745 Base for three days. On the fourth day, we moved to Com.”

Responding to the questions from the Prosecutor, the witness did not know the exact day after they left Leuro when they picked up Alexio Oliveira. However, the witness was sure that, after Oliveira spent a night the military camp, the incident happened on the following day after they picked him up. They returned to Leuro to pick up villagers probably about four times after they had been taken to 745 Base. The witness returned to the village because there were some mothers there, including the wife of his uncle. On that day, he went back to the village with Paulo who was driving the car. On the day he went to pick up villagers, he came back with Alexio Oliveira. The witness was with Alarico, Paulo, Gonsalo, Horácio, Amélio [the witness was able to recognize, by pointing and touching them, Paulo da Costa, Gonsalo, Alarico and Amélio da Costa: “They are here in this courtroom, except Horácio, who passed away”]. On the day Alexio Oliveira was taken in the minibus, Joni Marques and Justino were also there. The witness does not know exactly at what time they arrived at the 745 Base; it was quite dark. When the minibus got to the 745 Base and the villagers got off, Alexio Oliveira came out from the car, stood beside the car and asked for water: At the time the witness saw Oliveira asking for water from Eurico, but he is not sure whether he provided the water or not:

413. “(...) Alexio remained there beside the electricity station, but later people took him away. After that, Alexio was no longer with the community members because he was in the hands of the PROVOST. When we arrived at the military 745 Base, we went together with Joni, but we thought that Alexio had already been taken by PROVOST.”

414. The witness told the Court that at the time Alexio was with Gonsalo, Paulo and Horácio. The witness was with Alarico. They were just sitting there, but were not allowed to say anything. They were not ordered or told to go away, but, instead, they were provided cigarettes by PROVOST. They were smoking together. By the time they arrived, they were forbidden to go. Only Gonsalo and Horácio were allowed to go into the military post. The witness was

standing behind them, so he is sure that they were taking Alexio Oliveira away. From the front of the building, they took him to the side of the house, but the witness did not know from there in which direction they would be taken. That happened within the perimeter of the 745 Base. They just took him to the area inside the military base beside the building. From there, the witness did not know which direction they were taken. He was taken to the back of the house. Not at the back of military base of 745, but at the back of the PROVOST building.

- 415.** When the witness saw Alexio Oliveira for the last time, the victim was with Horácio, Paulo and Gonsalo. When they took Alexio away, there were some PROVOST members with them, but he did not know how many. Paulo and Gonsalo were all carrying machetes of about one arm's length. The machetes were in a cover using a material probably made of triplex. It was about 30 minutes later that Paulo, Gonsalo and Horácio returned. When he saw them again, Alexio Oliveira was not with them. He only saw Gonsalo, Paulo and Horácio, but he didn't see Alexio. He was not with them. He no longer saw any PROVOST members. He only saw Gonsalo, Paulo and Horácio. They were calling out to them [the witness and Alarico]:
- 416.** "They were calling us by saying '*come on, let's go!*'. They were calling us to go back to where we belonged. It was in the military 745 Base. We went back together to where we were before (745 military base)."
- 417.** The witness explained that at the time they were leaving across the road, Gonsalo said '*Brothers, wait for me. I have to clean my sword*'. At that time, they mentioned also to them: '*You, brothers, listen to me. If you mention this matter to anyone else, you will take the responsibility for this because we will not take the responsibility for this*'. When he said he wanted to clean his sword, the witness did not hear anything else in relation to the blood.
- 418.** The witness, before the Court, did not agree on what was written in his statement before CivPol³⁸ that Gonsalo said this '*I want to clean my sword because it is full of blood*'. He emphasized:
- 419.** "I did not say exactly about the cleaning of the blood because I didn't see it with my eyes. We were waiting for him behind while he was cleaning his sword. I was about 3 to 4 meters away. I did not see the sword because it was quite dark. To clean the sword, Gonsalo was using some kind of grass or rubbish."
- 420.** The witness explained that Gonsalo was carrying a sword; not a machete. "Machetes and swords are different things: Gonsalo was carrying a sword".
- 421.** When questioned by the Defense of Joni Marques, the witness confirmed that Felisberto Sávio was the village chief who ordered the people to leave the village. He confirmed also that, in order to bring the people to leave, Felisberto advised and threatened them that if they did not leave, Rajawali would come. The witness clarified that he personally would leave the village. If not, they would come and kill him. After Felisberto Sávio made threats, people started to take their possessions and prepare to depart. The witness stated that Joni Marques didn't force them to leave. "He just came together with the others in a vehicle". For him, nobody forced them, but because the chief of the village said that, they were afraid so they departed".
- 422.** About Alexio Oliveira, the witness confirmed that when Joni met Alexio Oliveira, he said to him: '*I am not sorry, but you are behaving like a snake, so I want you to move away from this road*'. Joni did not force Alexio to come with him or to get him into the car. Alexio came because Joni said he had to leave. At the time, Joni did not strike or threaten Alexio Oliveira. Nobody forced Alexio Oliveira to get into the car.
- 423.** The witness also told the Court that there were no more seats for Alexio's mother in the vehicle. That is why she did not get into the minibus:
- 424.** "Nobody threatened Alexio's mother. We were there then we saw Joni getting into the car. Joni said there was no more room. Alexio's mother walked and followed the vehicle. The witness also told the Court that Alexio said to Joni that he had tried to enlist at the military command, but he was refused. Then he wanted Joni to help him. He didn't speak about his wife."
- 425.** The witness confirmed what he said before CivPol in his statement made in June 2000, when he was talking about the conversation between Joni Marques and Alexio ["... *then Joni Marques said to Alexio: 'you are now a snake, so I am afraid of you. If you don't want to go up to the hills, then please go. Do not stand beside the road*'³⁹. But Alexio replied: '*Your sister [meaning Alexio's wife] has left, so I want to go with you to register myself*'. Joni with a true anger said: '*If you want to go now get into the vehicle*'."]
- 426.** Florindo da Costa confirmed that Joni Marques asked Alexio where his motorbike was. The witness also knew Joni Marques and Alexio Oliveira before the incident, as well as Alexio Oliveira's wife who was a teacher prior to this incident. "Joni Marques lived in Leuro, so I knew him. Alexio lived in Foema and I knew him. That is why I knew both of them".
- 427.** The witness does not remember whether Joni Marques fired two shoots:

³⁸ Case File C - p. 163 in English version.

³⁹ Case File C - p. 162 in English version:

- 428.** "It has been such a long time. I can't remember whether it was one or two shots. Joni Marques was behind us and shot in the air. That is what I saw. Joni Marques came from behind us and fired the shots into the air. We were walking. Joni Marques was not far. We could see. There were others carrying guns. Joni Marques and Justino were carrying arms. It is possible that the shots had been fired by Justino. So I can't say for sure who fired the shots, but at the time there were two of them carrying guns. (...) At the time two of them were carrying guns, so it could have been either of them or Joni Marques".
- 429.** The witness also confirmed that when they arrived at the 745 Base, Joni Marques returned the motorbike key to Alexio Oliveira. Then Horácio took the key away. "At the very same moment Joni Marques gave him the key, Horácio took it immediately from Alexio".
- 430.** However, the witness remarked that he had not said what was written in his statement to the CivPol ("...we arrived at the 745 Base at about 6:30 and the minibus stopped and all the villagers got off the vehicle. Joni handed over Alexio to Gonsalo and said to register his name"⁴⁰). According to him, what was stated is incorrect, because he did not say that. "Before he left, Joni Marques did not say that Alexio had to be killed, to be hand over to PROVOST, or to be kicked or beaten. After that, I didn't see Joni Marques at that place. The very last time I saw Alexio Oliveira, Joni Marques was not with him!".
- 431.** Responding to the questions from the Public Defender Beatriz Sanchez, the witness declared that he knew Alarico and Paulo da Costa before the incident because they are from the same family and village of Leuro. "They are civilians". He did not see them forcing the villagers to leave the village at any particular time. He confirmed that he saw Alarico in the *Cruzeiro* minibus:
- 432.** "Paulo was driving the vehicle. They were coming from Leuro. When we arrived at the 745 Base, Gonsalo and Paulo took Alexio Oliveira to PROVOST. Horácio was also accompanying Alexio Oliveira to PROVOST. I saw those three people taking Alexio Oliveira to PROVOST. Maybe two or three members of the Army were with them, accompanying Alexio to the PROVOST place. At the time, it was dark. I was with Alarico. I followed them. We got there. We saw the Army was there. At the time, Paulo and Alarico didn't carry arms. I did not see Paulo and Alarico saying anything to threaten Alexio Oliveira. Paulo and Alarico were standing behind Alexio:
- 433.** "When we arrived at the PROVOST post, one of the military came and obstructed us by saying: '*The people in front can go ahead; the ones behind stay where you are!*'. Those standing in front were Paulo, Gonsalo and Horácio. Alarico, Eurico and myself were standing at the back".
- 434.** When questioned by the Public Defender Lisete Quintão, the witness said that he knew the accused Gonsalo dos Santos. When the population was forcibly removed, the witness stated that he did not see Gonsalo forcing them. About Alexio Oliveira, the witness testified that he did not see Gonsalo forcing or doing anything against Alexio. The witness confirmed that the last time he saw Alexio was with Gonsalo, Horácio and Paulo. Gonsalo had a sword before that last time.

The testimony of the witness Filipina dos Santos:

- 435.** The witness Filipina dos Santos stated that she did not know Paulo da Costa and Gonsalo dos Santos. She only knew and pointed out Joni Marques. She told the Court that what she knows is that her husband had "ran away". He was arrested in Foema. She did not know how he came back and or why the incident took place. At the time, she came from the house of the teacher Caetano and she saw Joni Marques surrounding Alexio's motorbike. Joni Marques was sitting on the motorbike. She did not see how the group of men had got to her house:
- 436.** "I only heard the sounds of the motorbike when I came out. I saw the presence of Joni Marques and other members, but I didn't see how they traveled". My neighbor Josefina said to Joni Marques: '*Let our sister stay here, so we can bring her to West Timor*'. Then Joni Marques answered: '*Which one is better: to leave her and to die, or to take her to protect her?*' [The witness pointed out that there was a misunderstanding; it was not "sister" but "brother"]. My neighbor Josefina knew Joni Marques because Josefina's husband was a TNI member. After that, Joni Marques left with the motorbike, but his members stayed there. After that, I said to my husband: '*Wait! I am going together with you*'. But he said: '*Stay! Team Alfa members will pick you up*'. He left (...) I don't know what happened to my husband after he left. (...) My husband was involved as a pro-independence supporter. People who were distributing Xanana's picture. (...) I know that he was carrying Xanana's pictures. But I did not know about his clandestine activities".
- 437.** The witness did not see her husband after that. It was the last time she saw him. She has had no news about him since September 1999. "I know that my husband is already dead".
- 438.** She was not able to remember how many persons were in the car when her husband was taken:

⁴⁰ Case File C - p. 162, second paragraph in English version.

439. "I would not recognize them because it was 6:00 PM. I only recognized Joni Marques because he used to be around with the commanders and carried guns. At the time, when I was with my husband he carried guns. He put the guns on his front and got off the motobike".
440. She did not hear Joni Marques saying anything to her husband at the time. What she was listening to at the time were noises. She could not distinguish what they were talking about. She did not see Paulo da Costa or Gonsalo dos Santos that afternoon with her husband. At the time, it was dark. She could not recognize them. Joni Marques left with his motorbike, but his members were still with her husband.
441. When questioned by the Prosecutor Stuart Alford, the witness said that she did not know what the relationship between Joni Marques and her husband was like before the day her husband was arrested. She did not see her husband in the days after he was taken away. She only knows that Joni Marques was a KOPASSUS member and also a militia member. That is how she knows him. Before her husband was taken away, she only saw him at the time he came along with the commanders. She had not met him face-to-face.
442. As far as she knows, her husband and Joni Marques were not friends. Herself and her husband were supporters of CNRT. The time her husband came along to distribute posters of Xanana and flags of CNRT, pro-autonomy members were very angry.
443. When she saw the groups in front of her house, the witness did not know how many were carrying guns. Joni Marques was the one she noticed, but she was not sure about the other ones who were carrying guns with them. She did not see anyone firing a gun. As far as she can remember, at the time they were trying to hide the motorbike, she heard a gunshot. She assumed that Joni Marques may have fired the shot. She saw some members with her husband hanging around. They had some swords with them. The motorbike was hidden under the pigs' pen. The place was a cemented pig pen ("My husband and I put the bike under the pen").
444. Joni Marques was the first one to leave the witness' house. He left earlier on the motorbike. After Joni Marques left, other members followed the teacher:
445. "They left our house to the main road, only by foot. After that I have no idea. My house is about 500 meters from the main road. You can not see my house from the main road."
446. The witness is of the opinion that her husband has passed away because it has been two years since he was taken away. No one has told her anything until now. As her husband was in the hands of the militia, she assumes that he passed away. Joni Marques did not tell her that her husband died:
447. "I haven't come across face to face himself, but I know for sure Joni Marques was the one who took my husband away. It has been two years. For me it is a sign that he has passed away. I only have to believe he had passed away."
448. Responding to questions from the Public Defender Syphosami Malunga, the witness confirmed she saw Joni Marques in Sawarica that day. She was able to identify that it was Joni Marques: "There is only one Joni Marques in Los Palos and he was the one who arrested her husband and used his motorbike". For her, the man she saw that afternoon was really Joni Marques:
449. "At the time, he had long hair. He said they wanted to protect my husband. If he is still alive, please bring him here now!".
450. The witness also confirmed that Joni Marques left the place before her husband got into the minibus. "Joni left first on the motorbike. Then the members left the teacher. (...) Joni Marques had already left with our motorbike when his members were together with my husband".
451. In an additional testimony after the presentation of the forensic report which identified the dead body of Alexio Oliveira, the witness Filipina dos Santos recalled:
452. "When I was called to CivPol to come to this Court and came to Dili, I didn't see the dead body. I saw only his ID cards. In October, I was not shown the bones either, but the belongings of my husband Alexio Oliveira. That happened after I came to the Court last September. I recognized his identification cards, including motorcycle license papers and also a picture of Mother Mary, an additional card, a ballpoint pen and a wallet. I still would like to know about my husband. I'd like to know about the sanctions and about the future. (...) Also when I left this Court in September, I was shown a T-shirt and I recognize it as a shirt that belonged to Alexio. I recall the two of us buying the shirt together before September 1999. At the time that he handed over the motorcycle to Joni Marques, he was wearing that shirt. About the watch, I once again stated: '*this watch belongs to my husband*'. He was wearing a watch like this in September 1999. (...) One of his arms was bent. That happened approximately two years ago, so I can't remember which arm it was".

The testimony of the witness Eurico da Costa:

453. The witness told the Court that after the popular consultation Team Alfa members used to address the villagers warning: *'You are going to hide, but we are going to search for you.'*
454. About the facts, the witness testified:
455. "I knew about the death of Alexio. First, the police came to my house. Secondly, I went to the CivPol office. (...) Alexio Oliveira, during the Indonesian period, was a teacher. He was my brother-in-law. About him, in September, I knew he had a motorbike and he contacted CNRT members. That is all I knew regarding his connection about CNRT. I didn't see him being killed. At the time, it was a very uncertain situation. I know that he disappeared and never returned. The last time I saw Alexio Oliveira was about 1999. I forget the exact date. I met him at the Military Base of 745. We fled to the 745 Base as refugees. When I met him there, I asked him: *'What are you doing here?'*. Alexio Oliveira didn't reply to my question. He offered me his belongings. (...) Alexio Oliveira arrived with some people. At the time, he stood at the window of the car. I was there before Alexio Oliveira came with the other people. At the time I saw him at the 745 Base: Paulo, Alarico, Amélio and Gonsalo. [*The witness pointed and touched the accused Paulo, Amélio, Gonsalo and Alarico in the Court*]. I saw Paulo da Costa with Alexio Oliveira. At the time, Paulo da Costa and Alexio Oliveira were in a car driven to the 745 Base. None of these four gentlemen [Paulo, Alarico, Amélio and Gonsalo] accompanied Alexio Oliveira at the 745 Base. Concerning the missing person Alexio Oliveira, at the time he came and stayed with us, but then he disappeared. Joni Marques was not with Alexio Oliveira at the time in the 745 Base. I didn't see Joni in the company of Alexio Oliveira before being taken to the 745 Base.
456. When questioned by the Prosecutor, the witness confirmed that, after the popular vote, the Alfa members came to their place and said to them: *'You are trained to escape and to hide, but we know where you are anyway, even when are shitting or urinating!'*. It was Alves, Ronaldo and Sérgio - the militia members who said that:
457. "I did not hear anything else from anybody else, except those three persons. This took place when we were attending meetings. They passed in front of my house, so I saw them saying that. I left my village because we heard directly from Alves these words. We were scared. We had to flee to West Timor. It was Alves who organized the transport from our village to the 745 Military Base. Alves organized the car at Los Palos. It was a garbage-collecting car. (...) Alves did not say anything when he was moving the people from Leuro. When our people were moved from Leuro, Sérgio and Ronaldo were not there. There were no other threats apart from those from Sérgio, Alves and Ronaldo."
458. The witness disagreed with the content of the statement he gave to CivPol on 17 August 2000⁴¹:
459. "There was no plan to kill people. We only tried to escape to Kupang. I didn't say that people was going to be killed. There were no plans to kill people when they came to your village. But, since we were scared, we tried to escape to Kupang. I signed that statement, but there was no statement saying: *'they were going to kill us'*. There was no threat to kill me. I didn't say in that statement that I'd be killed".
460. The witness elaborated further on the facts:
461. "When Alexio Oliveira came to the 745 Base, I saw him coming out of a vehicle. It was a type of *Cruzeiro* car, a type of minibus, and it was red. Paulo was the driver. I had seen that car before. During the Indonesian period, that car usually came from the village of Leuro. The car was usually driven to carry people to and from Los Palos. I had not seen Paulo da Costa driving that car before. (...) I knew that Alexio Oliveira owed a motorbike. I saw Alexio's motorbike on that day at the 745 Base. Horácio da Costa was riding the motorbike. First of all, Joni Marques was riding the motorbike, entering the military 745 Base. Then the mikrolet came along. Horácio came with the motorbike. At the time Horácio was riding the motorbike that belonged to Alexio. I don't know how long it took before Joni Marques arrived with the other motorbike. Joni Marques came in on the motorbike. Some time later, the mikrolet arrived. Later I saw Horácio riding the motorbike".
462. The witness told the Court that he had an opportunity to speak with the Alexio Oliveira:
463. Alexio came to the military 745 Base. When I saw him, I asked him: *'Alexio, what are you doing here?'* I asked that question because in the past he was using his motorbike to meet CNRT members. I was surprised when I saw him there at the 745 Base. His presence there would cause him to get killed because the situation at the time was bad and he was in fact a member of CNRT. I do not know about that, but I was surprised because he was a member of CNRT. I don't want to answer the question that *'being a member of CNRT could create a danger for him'*. I mentioned earlier that he was working for CNRT. The conditions at the time were very bad. That is why I had such an opinion. Alexio only said to me: *'We can only give our trust in the hands of Joni'*". After saying that, Alexio gave me all his belongings. It was about 6:00 PM. After Alexio had given his belongings, he followed me to the place where Horácio was - the same Horácio who had been driving Alexio's motorbike. But I did not go with him. There were some houses there and Horácio was in the middle of that room. Horácio was with his father. I went out to do some cooking. I didn't see Alexio again that evening. I did not do anything with those belongings that evening. Alexio offered me his belongings and said: *'Please, pick up my belongings and give me back later because I am going to*

⁴¹ Case File C - p. 204 in English version.

bring my wife'. No one else took Alexio's belongings that evening. I recognize the statement I gave in front of the Prosecutor on 17 August 2000 [*'... At approximately 19:00 Custódio came and threw the jacket on my bed'*]. He came by himself and threw Alexio's jacket on my bed. I said to Custódio: "you may have done your job, but please don't throw it on my bed". He kept silent. (...) I stayed at the 745 Base in Los Palos for two days. After that, I went to Com by truck".

464. When questioned by the Public Defender Beatriz Sanches, the witness said that Paulo da Costa and Alarico Fernandes were not members of Team Alfa. He confirmed that he saw Paulo da Costa together with Alexio Oliveira upon their arrival at the 745 Base. They came with other people. Some people were seated inside the minibus, but Carolino Portela was seated just up to the top of the car. When they came to the 745 Base, Joni Marques came by motorbike, followed by Paulo. Later, Horácio followed to that place. Alexio Oliveira came by car and went to a very large house where there were many refugees. So Paulo took his car over there. When the car arrived, the witness did not notice the presence of Alarico there. About the belongings of Alexio Oliveira, the witness mentioned that he kept them under a coconut tree:

465. "The owner of the belongings was no longer there. That's why I put them under the coconut tree and left to Com. I knew that he was no longer there. That is why I kept the belongings under the coconut tree. I truly did not know whether Alexio Oliveira was still at the 745 Base".

466. Finally questioned again by the Court, the witness confirmed that at a certain time Alexio Oliveira was missing. He did not try to get information about his situation because the disappearance of Alexio happened during the night and he was afraid:

467. "It was such a tense situation. Therefore I didn't go looking for him. On the night he disappeared, his jacket was thrown onto my bed. But at the time, I didn't ask anything about it because the situation was tense. I was scared because during the period there were many Indonesian military members. Therefore, I didn't go there to look for my brother-in-law Alexio Oliveira. (...) On the way from the military base to Com, I did not discuss with anyone about what had happened to Alexio Oliveira. I just traveled to Com. I didn't ask the people around me. At the time there were many refugees, many cars coming to pick up our belongings, so we were not looking for or trying to find information about our brother-in-law Alexio Oliveira. (...) Before the incident I knew all the accuseds, with the exception of João Lemorai, Mautersa and Manuel. I knew them well because we came from the same village. I do not know whether those three were Team Alfa members. I am not a Team Alfa member, absolutely".

The testimony of the witness Jacinta dos Santos:

468. The witness Jacinta dos Santos, mother of the victim Alexio Oliveira, told the Court that she does know the accuseds. ("Those who are here, we all are from Leuro, but I have no family ties with them"). She pointed at and identified Joni Marques, Paulo da Costa ("he was driving the car"), Gonsalo and Hilário. "The last one with a mustache, but I don't know his name, but he was there at the time [*pointing to the Defendant Alarico Fernandes*]. She continued:

469. "Sometimes I think of my son and I lose my memory. I lost my memory".

470. After touching again some of the accuseds in the courtroom, she testified:

471. "I saw him [*touching Alarico*], but I do not know his name. This is Gonsalo; this is Hilário [*touching him*], but I didn't see him there; this is Paulo da Costa, the driver; and this is Joni Marques, the one who was on a motorbike with Justino.

472. The witness described what happened the last time that she saw her son:

473. "We were trying to look for a graduation certificate, but we didn't find it. We went to the village of Bohtihau. While we were waiting for the bus, Joni came along. Joni shot 3 times. So, Joni Marques was riding the motorbike along and followed by the car. Joni Marques pointed his gun at Alexio saying: '*you are supposed to be a supporter of CNRT, so I'll have to shoot you*'. He also said: '*You are FALINTIL hidden in the bush and in the jungle. Everyone knew about this!*' He pointed the gun at the front part of Alexio and said: '*Give me the keys for the motorbike*'. Later, Joni Marques asked Alexio: '*Did you receive the fund money for autonomy or did you work for the autonomy group?*'. He then added: '*You are a member of CNRT. I know you are a FALITINL member. That is why you have to be quiet!*'. From there Orlando Batista came along. He put up my arm and said: '*You don't need to kiss anybody's skin*'. I said: '*But I am scared they will kill my son!*'. I said it beside Joni. Then Joni said: "*No, you have to get into the car!*". He looked at the belongings: '*Whose are those belongings?*'. Alexio replied: '*My mother's*'. '*Put them into the car*'. After that, my son got into the car and I followed him into the car as well. I tried to get on. Somebody put me off. I tried to find out who actually put me off, so I jumped down. So I jumped off the car and they took my son. I said: '*If you take his wife and children in Sawarica*'. They said: "*Don't worry, we'll give them protection.*" Later I returned. When I left the car, Joni Marques fired a shot to the ground. So when I turned around, the bike was running in the front. When the car left, I kept watching the car leaving with my son. (...) The next day, early in the morning, I

went to Sawarica. When I arrived there, people said: *'About 5:00 PM, Joni Marques and his members came along and took your son to the 745 Base'*. When I arrived I met his wife, Filipina dos Santos who said: *'Alexio was taken by Joni Marques to the 745 Military Base'*. As a mother, I decided to go to the 745 Base, but they warned that Joni Marques could kill me. All of us, including my daughter-in-law, were thinking that *'we'd probably have to go to Com because everyone knows him there'*. Later in the afternoon, we went by car to Com. Later, I met Constantino. I said to Constantino: *'Alexio has been taken away, so you must come along'*. I told him that Joni Marques had taken Alexio to the military base, so I promised him to go to Los Palos and to look after the situation of Alexio Oliveira."

474. Responding to questions from the Prosecutor, the witness said that she knew Joni Marques because at the time he was always together with Indonesian forces. "He was always around carrying guns. The day before Joni Marques came to the house of Moises, they were drinking *chopes* (local alcohol). Joni said to Alexio: *'Tomorrow we're gonna be back to burn houses! Tonight it is fine. Tomorrow we'll come back to burn houses. But if you shoot, shoot at the feet because they are children of God'*. At the time, I was with my daughter-in-law. We listened to the conversation. Joni Marques was angry when he made those statements".

475. When the witness left the village, the houses were not burned. But other houses belonging to other people were burned. She did not see who burned the houses:

476. "At the time, I could not remember properly about the houses being burned. I was thinking about my son very deeply, so I lost my mind".

477. On the following day, the witness saw Joni Marques shooting Raimundo. At the time, Joni Marques came and shot his left and right side. Joni Marques shot, but the shot didn't hit Raimundo. The wife of Raimundo was screaming and crying."

478. The witness also confirmed that Alarico was there at the time. According to her testimony, Joni Marques was standing at the side of the road, pointing his gun to Alexio and saying to him: *'You are a member of CNRT. You went to the jungle, met and talked with FALINTIL members, therefore, I'll kill you!'*. Joni Marques didn't shoot at the time; he only stated that Alexio was a CNRT member and that he went to the bush, and he would kill Alexio at that time. "Alexio didn't say anything. He just kept silent".

479. The witness stated that, when the car came to pick her son, she saw that Paulo da Costa driving that car:

480. "That car sometimes went to Leuro. I know that car. When Alexio went into the car, I wanted to go with him as well because I saw space inside the car, but I got off; I jumped off. I decided that I wanted to go with my son, That was my wish. As I mentioned earlier, my son was CNRT. I was worried. I was afraid that they could chop him into pieces. I didn't know or recognize the people who were standing beside the car, but it was my intention to go with my son because I was scared that Joni Marques would kill my son. That is why I jumped. Joni Marques never shot at me at any time. Joni Marques has never shot or tried to shoot at me. When Joni Marques came, he didn't shoot, but he didn't get me into the car. I turned around and I saw Joni Marques shooting into the ground. I was about 1.5 m or 2 m away from him."

481. When questioned by the Public Defender about the disappearance of her son Alexio Oliveira, the witness confirmed that Joni Marques threatened to kill her son Alexio:

482. Public Prosecutor: *'When you first told your story to CivPol, why did you not say that Joni Marques threatened to kill your son Alexio?'*

483. Witness Jacinta dos Santos: *'It was my intention that I didn't want to say to CivPol in Los Palos because I came directly to this courtroom and tell you what happened.'*

484. Public Prosecutor: *'You made two statements to CivPol. The first one was made on 14 May 2000. In that statement, you didn't say that Joni Marques said to Alexio that he would kill him. Is that correct?'*

485. Witness Jacinta dos Santos: *'At the time whether I made such statement or not to CivPol, I don't know. Since I lost my son, I often lose my memory.'*

486. The witness confirmed what she told to CivPol in her statement⁴² when she said that *'Joni pointed his gun at Alexio and spoke to him in a very angry and threatening manner. He was saying that Alexio supported FALINTIL and the CNRT.'* She concluded: "Joni Marques made such a statement; that is what I am passing to you and the authorities, so I am not trying to tell you lies here".

487. The witness also stated that she had the opinion that Joni Marques was going to take her son and hand him over to his wife and his children in Sawarica:

488. "Joni Marques said so. Then I thought that he kept his promise to bring my son to his family, but some time later he mentioned that my son was a CNRT member and he met FALINTIL. At the beginning, I believed that my son would be taken to Sawarica, but the fact is that my son is somewhere else. (...) I don't know what happened to my

⁴² Case File C - p. 197 in English version.

son. I know that it is been said that he was killed. We were told that he has been killed. I don't know who said that, but since he was taken away by Joni Marques, it is believed that he might have been killed. If he is alive, then Joni Marques, who took my son away, would be the person responsible. So Joni Marques would know. (...) As far as I know, my son has been killed. But if my son is still alive, then Joni Marques now should return the motorbike and my son to Los Palos”.

- 489.** When questioned by the Public Defender Beatriz Sanchez, the witness told the Court that she does know Hilário da Silva, but she does not know whether or not Alarico Fernandes and Hilário da Silva have family ties:
- 490.** “I do not know if they are related or no. (...) If I looked at him, I would recognize him, because we are from Leuro. (...) Most of them have similar faces, so I could not say who is who”.
- 491.** She declared also that, at that time, Paulo was inside the vehicle. “Paulo da Costa at the time was seated inside the vehicle; I saw his face”. She did not hear Paulo saying anything to Alexio.
- 492.** When questioned by the Public Defender Lisete Quintão, she said that she knew Gonsalo:
- 493.** “Gonsalo is from Los Palos. I know him. He was there [with my son]. I saw him. He was seated inside the vehicle. Gonsalo did not speak to my son”.
- 494.** Responding to a question from the Court, the witness clarified that she did not say anything to Joni Marques when they were together before her son was taken into the car. She did not hear anything at any moment – before, during or after – her son was taken into the car.

The testimony of the witness Basilio Fernandes:

- 495.** The witness Basilio Fernandes told the Court that he saw a man named Alexio Oliveira when he was at the 745 Base. Alexio Oliveira is originally from Foema. He saw him carrying his belongings to his room, but later he saw him being taken out:
- 496.** “Those who took him out were Gonsalo, Alarico and Eurico. They took Alexio Oliveira out to surrender him to the military 745 Base. From the 745 Base I saw him being offered or transferred, but I didn't know what happened to him.”
- 497.** The witness told the Court that he was a member of FRETILIN, but also belonged to TNI. “When I returned from the jungle, I worked together with Indonesian Army force. (...) It was from 1987 to 1988. (...) It was mandatory to be in the Army at that time. It was TNI who wanted me to collaborate in hunting FRETILIN members. In 1987, I was about 12 years old.”
- 498.** When questioned by the Prosecutor, the witness declared that he knew Joni Marques because they were from the same village. “He came during the period he was the leader of Team Alfa. (...). Friends and colleagues told me that he was the leader. (...) Joni Marques came and introduced me to KOPASSUS members. (...) I was introduced and taken by KOPASSUS members because they persuaded me how to capture my brothers in the jungle at the time. (...) The KOPASSUS members came to me and brought me to the place. They informed me to go to hidden places where my brothers were and to kill my brothers. (...) In relation to my brothers, I am not going to tell you because it happened a long time ago”.
- 499.** Before 1999, the witness told the Court that himself and Joni Marques were at the same village, so they often came across him and they talked. They met, but that was before 1999. He met him once at the place of KOPASSUS.
- 500.** The witness stated that he was involved and participated in some activities of FRETILIN: “I involved with FRETILIN by knowing the directions of FRETILIN. (...) I supported FRETILIN by providing bullets and uniforms to FRETILIN”.
- 501.** When the witness left Leuro, other villagers from Leuro were at the same time leaving as well: “The villagers wanted to go as refugees. Because it had been said that the Indonesians would come to destroy us, that is why I went as a refugee. The head of village Felisberto said that. I left my village travelling by a garbage collector truck. I didn't know who actually was driving the car. We were told to go, so it was my own risk to travel on that car. Nobody told me to go. We were told by Felisberto Sávio; therefore we had to go. The villagers from Leuro were traveling in that car”.
- 502.** The witness did not see other cars being used to transport villagers from Leuro. What he knew and saw was the garbage collector vehicle. He was at the 745 Base for three days:
- 503.** “(...) Alexio Oliveira came in the afternoon with a group of five people: Manuel, Gonsalo, Alarico, Eurico and Horácio. (...) There were some Indonesian soldiers in the group that led Alexio away. At the time, there were four soldiers at the place. Two of those group of civilians are here in the courtroom: Gonsalo and Alarico. They are the

same persons that I showed you this morning. They were carrying machetes. The machetes were covered. Eurico, Manuel and Horácio carried swords. Their swords were covered”.

504. The witness saw the group taking Alexio Oliveira away and they offered him over to the Indonesian military, but he did not know where they put him away:
505. “They took him to the 745 Base. The place where they took him was inside the base, but he was taken into the 745 Base. He was taken to the place behind the main road. From outside Alexio Oliveira was taken into the base, but it was toward the back part of the base”.
506. He did not hear anything said by the men in the group when they took Alexio away. But a day after that, Manuel told him something:
507. “Alexio Oliveira was not taken hold of; he just went away. They took him at 8:00 o’clock at night. Since then, I didn’t see Alexio anymore”.
508. But the witness met the men from the group who took him away the same night:
509. “On the same night, I met them again. I didn’t know exactly what time we met again, but we met later that night. I think one hour later we met again. In that group were Gonsalo, Alarico and Manuel. None of them said anything to me. (...) They came from inside the 745 Base. They were going to the main road.”
510. The morning after Alexio was taken away, very early, Manuel came to the witness. Manuel was holding a sword and got into the vehicle:
511. “Manuel came to the place and took out his sword. I asked him: ‘*Why is that sword bent?*’. He replied: ‘*This sword is bent because it was used yesterday to kill Alexio. Gonsalo was holding this sword and used it to cut Alexio*’.
512. The witness saw the sword. It was about one-arm’s length. The handle was white and made of aluminium. The cover was made of wood, but it was not painted. Before the Court, the witness Basilio was shown the sword (Exhibit C-001 Case file C). He looked at it and recognized it:
513. “I have seen Manuel holding that sword. I saw with my eyes that the blade of the sword was bent. (...) At that time, Manuel stated that the sword had been used by Gonsalo to cut up Alexio. Manuel didn’t mention that matter. He didn’t say anything else about what had actually happened to Alexio. Gonsalo was not present at the place when I was talking to Manuel about his sword. But Florindo was there. I was speaking to him for a short while. Florindo arrived after I had been speaking to Manuel. There were small children there who were not able to comprehend what was going on”.
514. The witness Basilio did not see any dirt on the sword at that time. “When I saw the sword it was clean, but there was a dent in the blade, but it was hidden from sight”.
515. When questioned by the Public Defender Siphosami Malunga, the witness confirmed what he said about the reason why he left his village: “The village head Felisberto Sávio advised us that if we did not leave, Garuda would come and kill us”.
516. “At the time, there was no other reason. They said that the Garuda troops would come to kill us; therefore we escaped. Nobody else, apart from Felisberto, said that.”
517. For the witness, nobody forced them to leave their village:
518. “At the time, nobody threateened us. Nobody was angry with us, but the Indonesian Army (TNI) was present there firing shots. We became afraid of those shots; therefore we left.”
519. About Alexio Oliveira, the witness recalled the day Alexio Oliveira was taken from the room. Eurico, Alarico and Gonsalo were the ones who took him. Joni Marques was not among them:
520. “Joni Marques wasn’t there, at that place. Joni Marques was not part of the group that I saw later when I had a conversation with Manuel about the sword. At the time I did not see Joni Marques again on that day at all”.
521. When questioned by the Public Defender Beatriz Sanchez, the witness confirmed that before the incidents that he described, he knew Paulo da Costa as well as Alarico Fernandes:
522. “We are from the same village. They were ordinary civilians. Paulo is a driver; Alarico is an ordinary civilian. Alarico and Paulo did not force anybody to leave their places. I was with my family when I left my village heading to the 745 Base. We all left.”
523. The witness confirmed also that he saw, at the 745 Base, Alexio Oliveira descending from the minibus by himself:
524. “I saw Alexio getting off the minibus by himself. He went by himself into the house by the building. That is what I saw. Paulo was the driver. I saw Alarico Fernandes in the company of Alexio. Alexio arrived at the 745 Base accompanied by Alarico. He was taken away after hours. At the time Alexio arrived, Alarico took Alexio and

removed him from that place. Florindo da Costa was also there with them, but whether he was involved or not, I didn't see. (...) Florindo was at the place, but I didn't see him with them taking Alexio. Florindo was there, inside the house, inside the building. They took Alexio to the 745 Base. Whether or not they wanted to kill him or not, I do not know, because I did not see. When Alexio was taken, there were four Army members. Then the Army took Alexio Oliveira away."

525. The witness explained how the group handed over Alexio Oliveira:

526. "Alexio came out of the building. Nobody was holding him; nobody was hitting him. He was taken outside. There were four soldiers outside that place. Two of them were standing at the back. Alexio was handed over to the soldiers. The people who took him were Gonsalo, Alarico, Horácio and Manuel. At the time, Alarico was carrying a large machete. On the following day, Manuel came and hit the sword and said: '*Gonsalo was holding this sword and cut up Alexio*'. That is what I heard from Manuel. (...)"

527. Responding to the questions of the Public Defender Lis ete Quintão, the witness told the Court that Gonsalo was an ordinary civilian who worked in the fields:

528. "I knew Alexio Oliveira because he was a teacher in my village. On that evening, nobody hit him; nobody was angry with him. When he went to the room, nobody was hitting him. (...) At the time that Manuel said those words to me, I was seated at the top of the vehicle. Manuel carried his sword. We came to the place. I saw with my own eyes Manuel's sword. It was the same sword that was shown to me in this courtroom".

The testimony of the witness Júlio da Costa:

529. The witness Júlio da Costa told the Court that Joni Marques is the only Defendant he knows. He recognized and touched him before the Court.

530. In September 1999, the witness was standing in the harbor and later he went to Kupang. He lived before in the village of Foema. He stated that he knew a man in his village whose name was Alexio Oliveira:

531. "I knew Alexio Oliveira. He was a teacher. (...) I know Alexio Oliveira's mother. At that time I came from the plantation, I was standing at the house. Joni came accompanying Alexio Oliveira. It was about 4 o'clock in the afternoon. I was standing at the house. Maybe it was in September or another month, but it was on a Saturday. Joni Marques came to that place and said to Alexio: "Alexio, where is your motorcycle". Alexio said: '*It is in Los Palos*'. (...) While Joni Marques was with Alexio Oliveira, there was a vehicle and some people seated inside, but I could only see their heads. Joni was carrying a gun. Joni Marques was riding a motorcycle. He came to the place and asked Alexio Oliveira: '*Where is the key of your motorcycle?*'. Alexio said: "*My motorbike is in Los Palos*". I saw Alexio Oliveira's mother with Joni. At the time, Alexio Oliveira's mother was standing beside Joni. I heard what Alexio's Oliveira's mother told Joni: '*Leave your friend here*'. I saw it with my own eyes: Joni Marques struck Alexio's mother on her chest. I could see because I was about 30 meters away. There was no incident at the time, but I saw Alexio and his mother and people inside the vehicle. From the house where I was, I saw Alexio taking the keys from his pocket and giving them to Joni Marques. Finally, Alexio got into the vehicle. Alexio's mother didn't go; she slept in my house. Joni was riding the motorcycle. That was not the motorcycle that belonged to Alexio. Alexio Oliveira's motobike was in Los Palos. Since that day, I could not see Alexio Oliveira again; he had been taken away."

532. When questioned by the Public Defender Siphosami Malunga, the witness confirmed that he was able to follow the conversation between Alexio and Joni:

533. "Joni said it in a loud voice: '*Alexio, where is your motorcycle?*'. Alexio said: '*My motorcycle is in Los Palos*.' Joni: '*I want the key!*' Alexio gave him the key. From such distance (30m), I was able to hear his voice. Do you know about who may have killed Alexio Oliveira? I do not know who may have killed Alexio Oliveira. If I knew, I would say. I did not hear anything else said by Joni".

534. When questioned by Judge Maria Natércia, the witness clarified:

535. "When I witnessed the scene in relation to the key, I didn't hear anything else stated by Joni. Nothing else, except what I said".

The testimony of the additional witness Wayne Anthony Fee:

536. "I have no additional affirmation apart from what I have already stated in my report. The body was recovered from the rear side of the 745 Base in Los Palos. Nowadays, those premises are occupied as the PKF Korean Headquarters. The premises where we recovered the body was near the PKF battalion. If you walk behind, approximately 50 or 100 meters outside the main area, the body was in the interior of a well, within a few drums. I can recognize it in the exhibit C-004. The places I went are shown by photographs 22, 23, 24 and 25. The recovered

bodies were immediately brought to Dili for forensic examination. (...). The T-shirt that is being shown to me came from one of the recovered bodies; apparently the victim's remains. It was on the body covering some bones. About this black plastic watch, I confirm that it also came from the recovered body. The body had no flesh, no articulations; the bones were separated. The watch was recovered from the part that represents the wrist. The wallet was found inside the rear pocket of the trousers. A number of identification cards and other registration documents of Alexio Oliveira were also found. An ID card of Alexio Oliveira. (...) Four of the documents have signatures, photographs and date of birth (1968). All those documents were removed from inside the wallet. The plastic comb was taken from the trouser pocket. I have shown it to the mother of Alexio Oliveira. Apart from her, these exhibits were shown to Filipina, Alexio's wife. The body was transported from Los Palos to the mortuary in Dili for anthropologist examination."

537. After these comments about the documents of the victim, the witness clarified to the Court that "the two recovered bodies were found at a depth of 2 meters. They were about 40 centimeters from each other down the well. Once the body had been placed into the well, there was a layer of soil; the bodies were separated by rock and soil. The wallet was located on the skeleton. (...) The bodies were only skeletons. It was not possible to recognize them by visual identification".

538. The Public Prosecutor requested the anthropologist's report to be considered as evidence. The Defense Counsel raised no objections.

The Prosecution's conclusions

539. The Prosecution made the following conclusions in his closing statement:

"(...) Count 5: Murder of Alexio Oliveira on 11 September 1999

To find any of the accused guilty of murder, the Court must find:

- That the accused killed or caused the death of Alexio Oliveira;
- That killing was part of a widespread or systematic attack on the civilian population;
- That the accused knew it was part of such an attack.

The Prosecution accept that there is no conclusive evidence as to who actually killed Alexio Oliveira. However, each of the men charged is said by the Prosecution to have participated in his killing.

There is no issue, however, that Alexio Oliveira was taken from the village of Foemaa. He was put onto the mikrolet driven by Paulo and taken to the 745 Base. There is no issue that whilst he was there he was killed. The Prosecution believe that following the evidence from the crime scene investigator, Wayne Fee and the Forensic Anthropologist Sofi Egan there is no doubt that his body was recovered from a well at the rear of the 745 Base.

JONI MARQUES

Joni Marques said this about his involvement in this case:

Joni Marques (10/7): "I was involved in this case. I ordered him. I forced him into the car, but at the time his mother told me I had to accompany him to the refugee camp" "I was not the perpetrator or murderer of Alexio Oliveira." "I'm not the only participant. There are other people. Therefore, I'm not the only person responsible." "The day we picked up Oliveira, we went to Foemaa and then Omokano after the incident concerning the burning in Omokano." "I pointed the gun at his head and said 'why did you waste your time waiting here because you are a member of CNRT anyway..I said it so he would not get on the bus..I didn't want him to come on the bus because he was CNRT..we didn't want any CNRT; just pro-autonomy members." "I don't know where Oliveira went at the base." "Gonsalo and Paulo were all together there." "I said 'bring him [Oliveira] over'. I meant to take him to his family, but I had no intention to give him to TNI." "I only knew he was CNRT from the time he appeared on the road."

The witnesses add the following evidence:

Florindo da Costa (19/9): "Alexio was with his mother, standing on the road in front of the school. They were there. I saw them...When we got there..I heard 2 shots by Joni. Alexio came towards Joni Marques" "Alexio told Joni 'brother, please help me to be registered at 745. I tried, but they didn't accept me. Please help so they can accept me'..Joni Marques

responded: 'I'm sorry you're behaving like a snake. I want you to move away from this road'" "Alexio wanted to go, so Joni Marques took Alexio with him" "Headed towards Sawarika." Then Joni gave Alexio's key to Alexio..and asked him to get his bike..Alexio took about 25 to 30 minutes..Joni fired shots..after that the bike was started and came towards us" " Paulo, Gonsalo together with PROVOST took Alexio Oliveira to PROVOST the house. Me and Alarico followed. PROVOST military is within the 745 Base"

Filipina dos Santos (18/9): "At that time, we were CNRT. Those who were pro-autonomy who saw us were angry with us" "I heard a gun shot. I arrived. Joni Marques did the shooting. Then I saw 4 members standing beside my husband with swords" "Joni Marques took the bike and went first..[the other men] left our house towards the road. I saw them walking away with the teacher"

Jacinta da Costa (21/9): "Joni Marques came and shot his gun in the left and right of Ralundo...shot 3 times..he came towards us. He pointed his gun to Alexio Oliveira and said 'you are CNRT members, so now I have to shoot you'..'you went to the forest and talked to FALINTIL and I know about this'" "Joni said again 'Alexio Oliveira please get onto the bus". The car started to move forward and Joni Marques shot at the ground" "Constantino went to the 745 Base. Joni Marques saw Constantino and said 'your brother in-law, we cut his neck, we chopped up his neck'" "[at Moses house] Joni said 'Alexio Oliveira, tomorrow I'll return to burn your house tomorrow'" .

Eurico da Costa (24/9): "When Alexio Oliveira came I asked him 'why did you come'..because in the past he was using his motorbike to meet CNRT members..I was surprised when I saw him arriving because his arrival would cause his death, because the situation was bad and he was working with CNRT"

Custódio Monteiro statement (18/5/00): "At Foemaa, Joni stooped the bus and began pointing his weapon at Alexio Oliveira. He then told Alexio to get on the bus. At that time Alexio's mother told him to kiss the feet of Joni and maybe he would not kill him so Alexio kissed Joni's feet. Alexio then got on the bus"

Gonsalo dos Santos (6/3): "Joni Marques gave a command to arrest Alexio Oliveira; then handed him to Oto Bere."

There is no evidence that Joni Marques was one of the men that took Alexio Oliveira behind the PROVOST house at the 745 Base and killed him there. But that is the end of the story of how Alexio came to be killed; not the beginning. The Prosecution submit that Joni Marques played his part by bringing Oliveira to the 745 Base in the first place.

The evidence shows that Oliveira was unwilling to go to the base. That was the reason why Joni Marques needed to make the threats to encourage him to go with them. There was no need for Joni Marques to take Alexio Oliveira. He could either have taken him on another journey or left him there all together. Alexio Oliveira was not a special friend who had to taken to the safety of the 745 Base.

Perhaps the most telling evidence of the fact that Alexio Oliveira was singled out to be taken to the base is that his mother was not taken at the same time. It was not due to lack of space. The fact is that Joni Marques took Alexio Oliveira from the roadside for a reason. That reason became very obvious later that evening. As Eurico da Costa said, the very fact that Alexio Oliveira was at the 745 Base risked Alexio's life. If that was obvious to Eurico it was obvious to Joni and it was obvious to Alexio.

The submission that Alexio Oliveira had been singled out by Joni to be taken to the base is supported by what happened when he got there. Within a short time Alexio was taken to the PROVOST house, and shortly after, to his death. The men who took Alexio Oliveira to the PROVOST, who took him with the Indonesian soldiers, were Joni's men - Paulo, Gonsalo, Horácio. These men were from the group of which Joni was the leader. That was no coincidence. Gonsalo is right when he says that the order to arrest Alexio Oliveira came from Joni Marques. That is why it was Joni's men who carried out the order. That is why Joni was able to tell Constantino what happened to Oliveira.."we chopped up his neck"

When considering Joni Marques's role in the killing of Alexio Oliveira, it is necessary to consider all the stages which went into Alexio Oliveira's death. He was brought to the 745 Base for a reason; he was brought there to be killed. It was Joni Marques who brought him there. That makes him criminally responsible either as a joint perpetrator or as an aider and abettor.

The reason that Alexio Oliveira was killed was because he had been supporting CNRT. That is what Joni Marques accused him of at the roadside in Foemaa. As the reports in Case File C show, across East Timor life had become very dangerous for supporters of CNRT by 11th September 1999. Life had become dangerous and life had become cheap.

When he pointed the gun to the head of Oliveira and put him onto the bus, Joni Marques knew that CNRT supporters were to be killed. He knew that killing CNRT supporters received the blessing of the Indonesians. He knew that and he played his part in it.

PAULO DA COSTA

Paulo da Costa says that he was not present at the killing of Alexio Oliveira. If that is true, then there is insufficient evidence upon which to find Paulo guilty on this charge. Although, Paulo was the driver of the vehicle which transported Alexio Oliveira's to the 745 Base, the Prosecution do not say that that on its own would make him responsible for the murder; even as an aider and abettor.

The fact that Paulo was the driver who transported Alexio must be taken together with the other evidence. This comes from one witness:

Florindo da Costa (19/9): We returned to the first place..we saw military PROVOST going with Paulo, together with Alexio. We followed behind...Paulo, Gonsalo together with PROVOST took Alexio Oliveira to the PROVOST house. Me and Alarico followed." "When we got there, PROVOST used their hand and prevented us from going in. Only Gonsalo, Paulo and Horácio went in. I saw Alexio taken away...they took him to the side of the house..to the back of the house, at the back of the 745 Base. .Alexio was with Gonsalo, Paulo, Horácio and the PROVOST..they were all carrying machetes, about one arm in length...all three machetes had a wooden triplex cover...after about 30 minutes they returned... I saw Gonsalo, Paulo and Horácio; not Alexio.."

Paulo took Alexio Oliveira to the PROVOST. To the Indonesian military police. He was seen with that group going to the back of the PROVOST house, to the back of the 745 Base. He and the others were carrying their machetes. After 30 minutes, they returned without Oliveira. The Prosecution say that during that time, Oliveira was killed and his body was put down the well at the rear of the base. That is why later that evening Custódio was able to throw Alexio's jacket onto Eurico's bed. Oliveira was already dead.

By the 11th September, Paulo da Costa had begun to associated himself with Team Alfa. Not a Team Alfa member, but a willing assistant that Joni Marques could call upon who was trusted by the Indonesians. The Prosecution submit that the evidence of Florindo da Costa is very significant:

Florindo da Costa (19/9): "We stood behind Paulo, Gonsalo and Horácio. They noticed our presence, but they prevented us from getting in except themselves..they didn't say anything to us..PROVOST gave us cigarettes. When we got there, PROVOST used their hand and prevented us from going in. Only Gonsalo, Paulo and Horácio went in".

This is no longer an ordinary citizen. These are men who have crossed over to join with the pro-autonomy group. Sufficiently trusted to be allowed to enter the PROVOST house and join with them as Oliveira was killed.

The Prosecution submit that taking these two pieces of evidence, the assistance provided as driver of the vehicle and then his actions at the 745 Base, Paulo da Costa is jointly responsible for the death of Oliveira. The Prosecution is not saying, has never said, that he struck the actual blow that killed Oliveira. But it is not only the man who strikes that blow who is guilty. All those who make a contribution to the death are guilty also. That is what Paulo did.

Alexio Oliveira, a civilian man, was taken by a group, including Indonesian soldiers. He was killed and dumped into a well. Paulo da Costa was present when that happened. He must have known that what was being done was a part of an attack endorsed by the Indonesian authorities. An attack which formed a part of what was going on around them, in Leuro, in Los Palos, in the 745 Base. By the night of 11th September 1999, anyone staying at the 745 Base must have been fully aware of a large scale plan being put into effect. The killing of Oliveira was just a part of it and Paulo da Costa, who had placed himself amongst the pro-autonomy group, must have known that.

GONSALO DA COSTA

Gonsalo da Costa said this about this charge:

Gonsalo da Costa (6/3): "I was not one of the people who committed this crime. It was others from 745. They took Alexio Oliveira, surrendered him to Oto Bere (2nd Sergeant in TNI). Joni Marques gave the command to arrest Alexio Oliveira; then hand him to Oto Bere. I was only a witness"

(2/10): "...in relation to the wells, at the time our route was at night and I was not able to know if there were any wells or not"

In addition, the witnesses say this:

Florindo da Costa (19/9): "PROVOST took Alexio, and Gonsalo and Paulo went with them to the PROVOST house. Alexio never returned after that. Paulo and Gonsalo came back to where we were...When we crossed the road, Gonsalo said 'please wait, I need to clean my sword'" "When we picked up Alexio Oliveira Paulo, Gonsalo, Alarico and Amélio were on the minibus" "When we got there, PROVOST used their hand and prevented us from going in. Only Gonsalo, Paulo and Horácio went in. I saw Alexio taken away...they took him to the side of the house..to the back of the house, at the back of the 745 Base..Alexio was with Gonsalo, Paulo, Horácio and the PROVOST..they were all carrying machetes about one arm in length...all three machetes had a wooden triplex cover...After about 30 minutes, they returned...I saw Gonsalo, Paulo and Horácio; not Alexio..I didn't see the PROVOST men..they called after us..I went with them..When we were at PROVOST and moved towards the road then Gonsalo said to us that 'brothers, wait for me, I'm cleaning up my sword'. When he was cleaning the sword he said 'do not mention this incident to anyone. If you do, you are responsible for it and not me'..he used grass or leaves, rubbish," "Gonsalo was holding the sword before going with the PROVOST"

Basilio Fernandes (20/9): "Alexio was led away by 5 men, Manuel, Gonsalo, Alarico, Eurico and Horácio... and 4 Indonesian soldiers..they took them away and handed him to Indonesian military..it was towards the back or behind the main road..inside the base...about one hour later, I saw Manuel, Gonsalo and Alarico" "Next morning very early Manuel...was holding a sword..I asked him 'what were you using your sword for'. The sword was bent. He answered: 'this sword was used yesterday to kill Alexio Oliveira causing it to be bent'. He told me it was Gonsalo that was holding the sword. He told me the sword was used by Gonsalo and he used it to cut up Alexio Oliveira" [identifies sword] "I've seen them holding this sword prior to the incident. I saw [Manuel] striking the sword to try to straighten it"

Monzurul Morshed statement (16/6/00): "Manuel told me...On the day of the incident involving Alexio Oliveira, he was in 745. That day, Gonsalo took the sword from him and next morning he gave it back to him"

By the combination of what he has admitted and what the witnesses have said, there is clear evidence against Gonsalo da Costa on this charge. The prosecution submit that:

- he was on the bus when Alexio was taken from Foemaa;
- he had taken the sword of Manuel and was carrying it;
- he was a part of the group that took Alexio to the PROVOST house;
- he was part of the group that took Alexio to the rear of the base where the well is;
- he returned half an hour later and Alexio was not with them;
- he stopped to clean his sword before returning to the building at the 745 Base;
- he said "do not mention this incident to anyone"

What incident? The killing of Oliveira. There is no direct evidence that Gonsalo actually killed Oliveira. But there is very convincing circumstantial evidence that he was not only there, but he played an active part. If nothing else, there is compelling evidence that he provided the weapon with which Oliveira was killed. Whether he was actually holding it when Alexio was killed the evidence does not reveal. But it is beyond doubt that Gonsalo played an active role which went far beyond that of a witness. The evidence clearly shows him to be criminally responsible for the murder of Alexio Oliveira.

I will not repeat my submissions about the widespread or systematic nature of this murder. What I have said about Paulo da Costa applies equally to Gonsalo dos Santos.”

Murder of Alfredo Araújo and Kalistu Rodrigues

The testimony of the witness Olavio de Jesus:

- 540.** About the murder of Alfredo Araújo and Kalistu Rodrigues on the 21 September 1999, the witness Olavio de Jesus told the Court:
- 541.** “I came from the forest to Ira-Ara. We went pass by burning houses. We were hungry. We went to get some coconuts. There were some disturbances there. So we went into the Coconut Grove. We heard a gunshot. Kalistu was shot. I was also shot. I ran in the direction of the sea, but I do not know the militia who shot us. They were inside the fences. We ran away because we were shot. After that, I ran away to the sea. I thought it was better that I died by the sea. I just became aware about what was going on and I came back to the forest. My friends hadn’t come yet about 5 o’clock, so I went to look for my friend Kalistu, and he had already died.”
- 542.** The witness did not know how many of them went to the Coconut Grove. There were a lot of people. He himself was shot when the firing started:
- 543.** “The shooting started. One of my friends ran up the hill. His name was Jonico. I was struck in the head, in my brain. It was small. My head was aching and blood was coming out. The bullet had already come out. I was also shot, so I didn’t really see Kalistu when he was shot. I walked along the beach. I didn’t go to the place where Kalistu was shot. I just ran to the forest.”
- 544.** The witness knew the Defendants, but could not see them at the Coconut Grove at the time he was shot because there were a lot of trees, a lot of coconuts. He could not see their faces. It was dark.
- 545.** When questioned by the Prosecutor, he explained to the Court that he had been shot on the 21st September 1999. The day before that incident, he was in the forest in Saranira:
- 546.** “The purpose of my journey from Saranira to Ira-Ara was to get cigarettes. We went there and got cigarettes. We went to go back. There were three of us: Kalistu Rodrigues, Jonico Oliveira and myself. They were also looking for cigarettes; then they went to get some coconuts. Then they shot them. I heard six shots. I was shot. I don’t know who was shot first. I don’t know why I was shot either. I wasn’t doing anything wrong. (...) I heard screaming: a lot of people there shouting, screaming, but I do not know what they were saying.”
- 547.** The witness confirmed the statement he gave to CivPol [*“Kalistu was shot. I heard some voices just before the shooting started and then one of the men talking stated ‘if you run away we will shoot you!’”*]⁴³. The witness stated again that he really did not know why he was shot. He was shot once and does not know the people who shot him. Apart from Kalistu and himself, Jonico was also shot at, but he wasn’t struck.
- 548.** The witness thought and knew that the people who shot him were militia, but he does not know the name of the militia group they belonged to. Those militia were living in Com and used to go to Ira-Ara.
- 549.** The witness also confirmed another quote from his statement to CivPol [*“At the shooting site, in the grove of coconut trees, there was a known area where FALINTIL used to meet with civilians who supported them by bringing them food and equipment. I think the militia was probably hiding there to try and ambush FALINTIL members”*]⁴⁴. The witness knew FALINTIL used the place. He was not there at the time, but his friends used to go to meet FALINTIL.
- 550.** For the witness, he went to Ira-Ara to get coconuts. Before the shooting, he himself with his fellows did not know that the militia were there. Once they got there, they heard shooting. He did not know why the militia went there:
- 551.** “I really do not know. Perhaps the militias went there to get some coconut milk, but after we went to the place, the militia were already there before us”.
- 552.** Responnding to the questions of the Public Defender Siphosami Malunga, the witness said that they went to the Coconut Grove because they were hungry and wanted to pick up some coconuts. He denied that they were going to meet FALINTIL.
- 553.** Questioned by Judge Sylver Ntukamazina, the witness clarified that the persons who shot them were militia members:

⁴³ Case File C - p.224, 2nd paragraph in English version.

⁴⁴ Case File C - p. 224, last paragraph in English version.

554. "It is clear that they were militia; that is why they shot us. We know that militia did those kind of things. We didn't really know whether at the time the militia were rounding out".
555. He also confirmed what he had said to CivPol: "I knew these men were militia because two or more of them had guns".⁴⁵

The testimony of the witness Eurico da Costa:

556. The witness Eurico da Costa said that he knew the Defendants because they are all from the same village of Leuro. But he never knew or met Alfredo, a man named Alfredo Araújo or a man named Kalistu Rodrigues. He does not know what happened to them.
557. Responding to the questions of the Public Defender Siphosami Malunga, the witness told the Court that after the popular vote, Team Alfa members came to their place and said to them: *'You are trained to escape and to hide. But we know where you are anywhere, even when you are shitting or urinating!'*. It was Alves, Ronaldo and Sérgio:
558. "I did not hear anything else from anybody else except those three persons. This took place when we are attending meetings in September. They passed in front of my house, so I saw them saying that."
559. The witness recognized the Defendants and said that they were with him at Com Harbor. Touching them one by one, the witness identified "Joni Marques, Manuel, João Lemorai, Paulo, Amélio, Hilário, Gonsalo, Alarico, the one who escaped to the jungle [referring to Mautersa Monis] and the last one, Gilberto Fernandes. Yes, I was with just some of them".
560. The witness stated that he went to Ira-Ara with the Defendants:
561. "We went together to Ira-Ara and by the time we went to Ira-Ara José Lemorai [*Alfredo Araújo*] died. I went just once with them. Our purpose to go to Ira-Ara was not to kill or harm anybody, but to swim and look for leaves and betel nuts. Nobody told us to go there; it was our wish. As I mentioned earlier, our purpose was to swim and collect leaves and betel nuts. I didn't use to spend time with this group of men."
562. They went to Ira-Ara by car. On their way to Ira-Ara, they were not traveling in one group, but just a number of people. There were eight of them inside the car: Eurico, Carlito, Felisberto, Horácio, Joni, Paulo, Amélio and Alarico. They were travelling in the car named *Cruzeiro*. It was a mikrolet. Paulo was driving us to Ira-Ara. It was the first time that the witness traveled in this car from Com to Ira-Ara:
563. "When we traveled to Ira-Ara we didn't stop, but we traveled to the Coconut Grove. From there we went to pick betel nuts. Everybody got out from the car. We got out of the car and we went to collect betel nuts and leaves. We didn't go there together in a group; six of us went in different ways. No one told us about the reason why we were to split into two groups. (...) Among the eight men, two members were carrying guns with them. Those two people were Joni and Felisberto. Others were carrying nothing".
564. "While they were searching for betel nuts, Alarico called Joni. I could only hear him, but not see him. Alarico called out for Joni because Felisberto was shooting at José Lemorai:
565. "I didn't see Felisberto shooting the victim, but I heard the shots. Alarico was screaming. When Alarico was shouting from a distance of about 60 meters, we were still collecting betel nuts leaves".
566. After they heard Alarico shouting, they heard other shots:
567. "We got off the betel nut tree and ran out to see why was Alarico shouting. When we ran out, we saw José Lemorai collapsed (fell down) to the ground. José Lemorai was still alive, but he had a broken leg. I knew him as José Lemorai because he told that me he was once captured, arrested by commanders, but he escaped."
568. After they reached the place where José Lemorai was lying, they stood beside José Lemorai and from there they were going to stay under a big tree. When they were there under the big tree, three young men came to the site.
569. "Those three young men were about 60 meters from me. They were coming toward us. Joni and Felisberto tried to shoot, but the gun didn't fire. The second shot was successful. One of those men was killed, but the others escaped. The one they got, they shot him in his legs, so he had his legs broken. (...) Yes, it was Joni Marques and Felisberto who did the shooting at the young man. The first to shoot both of them was not successful, didn't work. They were shooting at the same time, so I can not tell who shot first or later. After the shooting, the two young men escaped. Paulo came and took the gun from Felisberto and shot the young man on his head. Paulo didn't do anything before he took the gun from Felisberto. Paulo didn't say anything".
570. The witness did not recognize fully the paragraph of his statement to CivPol which says: *'I also observed Joni Marques shooting the young man in the leg and then Paulo da Costa walked up to him and talked with him and then*

⁴⁵ Case File A - p. 224, English version.

walked over and got Joni Marques's gun and walked back and shot the young man in the head⁴⁶. For the witness, Paulo shot the young man and Joni Marques came back and shot José Lemorai:

- 571.** “Paulo just successfully killed the man. He didn't talk to the young man. Paulo was just stood beside the young man. First of all, Felisberto shot José Lemorai in his feet. Then we walked over to a tree. We were standing under the tree. From there, we saw three young men coming toward us. Joni and Felisberto shot at them. The first shot didn't work. The second hit the young man who suddenly collapsed to the ground. Two of the boys escaped.”
- 572.** When Joni Marques went back to José Lemorai, according to the witness, he was at the distance of about 20 meters from José Lemorai when he shot:
- 573.** “Around that place there was a fence made of stones. First, José Lemorai was not in the group of the three men. He was by himself. After the three young men were shot (one got shot, two escaped), Joni Marques returned and shot José Lemorai. I didn't know for sure which part of José Lemorai's body Joni shot at. Joni shot José Lemora once, just once. The distance was about seven meters. José Lemorai died due the shot from Joni Marques. After Joni shot José Lemorai, we went straight to the car and headed to Com, so I had no chance to see José Lemorai's body. I know José Lemorai had died because he had been shot. When we heard the shots you can tell someone got killed.”
- 574.** The witness emphasized why he thinks José Lemorai died from Joni's shots:
- 575.** “Felisberto shot José Lemorai in the leg and that didn't kill him. I said that the shot from Joni Marques killed him because of the sound of the shooting; that was a sign that he was killed. Since Joni Marques put the gun between the rocks and shot him, from the sound you could tell that he was killed. Besides that, let me remind you, the distance was quite far. Therefore, I don't know whether the shot killed him. After that, I didn't hear any more shots after having heard Joni Marques shooting. We just went away.”
- 576.** The witness did not recognize totally the content of his statement. In the sentence: ‘*Joni Marques then walked over to José Lemorai and at close range, shot him in the head killing him.*’. He remarked:
- 577.** “I didn't say that the victim was shot on his head. At the time, the original translation was in English; then it was read out in Fata-luco. Therefore, this is not the original.”
- 578.** According to the witness, nobody said anything about the three men who were coming down towards him and his colleagues:
- 579.** “Joni didn't say ‘*because they were in the forest, so they must be CNRT*’. Joni Marques didn't say anything, except that he was not concerned about the three young men”.
- 580.** The witness declared again that he was present when José Lemorai was killed.
- 581.** About the murder of Kalistu Rodrigues, the witness told the Court that Paulo is the one who killed him:
- 582.** “Paulo shot him on his head. Before Paulo da Costa shot the victim, the victim had broken legs. I don't remember whether one of the persons at the place injured Kalistu by throwing a stone at him. I didn't know the victim. It has been quite some time, so I forgot in which position the body of the victim was when Paulo shot Kalistu. I remember only that when Paulo shot the victim, he fell to the ground and lied on his stomach and lifted up his head.”

The testimony of the witness Carlito Viegas:

- 583.** The witness Carlito Viegas told the Court that he knows Joni, Paulo, Amélio, Hilário, Gonsalo, Alarico and Gilberto. He told the Court that some of those Defendants are members of Team Alfa group:
- 584.** “I can say that they were really Team Alfa members because at the time they were working with the military command. (...) Joni worked for Team Alfa group. I don't know about Paulo, Amélio, Hilário, Alarico and Gonsalo. Gilberto was Team Alfa. I often saw him working together with the military command.”
- 585.** The witness told the Court he was working as an UNAMET staff member on registration for the consultation
- 586.** “But I didn't stay in my village after the elections. I was scared because I had been a worker for UNAMET”.
- 587.** The witness also told the Court that he went to Ira-Ara to take a bath, to wash. He went with Felisberto, Joni, Eurico, Paulo, Amélio, Alarico and Horácio. There were 8 people; among them Joni, Paulo, Amélio and Alarico:
- 588.** “We went from Com in a red vehicle named *Cruzeiro* driven by Paulo - the same Paulo who is here today”.
- 589.** The witness went there voluntarily to take a wash. “I went voluntary, not forced”.

⁴⁶ Case File A - p. 204, English version.

- 590.** The witness described what happened after they arrived to Ira -Ara:
- 591.** “There was a shooting. Felisberto fired the shots. He shot somebody, but we don’t know who he was. I saw that person after he was already lying on the ground. I was at a distance of about 60 meters away. After the shootings, we heard the screams. Alarico was screaming. Alarico called us regarding the person who had been shot. I went there and I saw the person who had been shot. I didn’t know either that person or the reason why Felisberto shot him.”
- 592.** The witness confirmed what he said in his statement before CivPol [*‘...and Felisberto said they shot him because he was CNRT’*]:
- 593.** “The victim was shot because he was a CNRT member. I didn’t see what part of his body the bullet struck, but he was still alive. Later, he was shot dead. I don’t know what part of the body struck him dead. Joni Marques shot him dead. I was about 8 meters away from Joni Marques. (...) I know he died because he had been shot. Joni shot him twice.”
- 594.** After the shooting, there were three men who came in front of them (the witness and others). They were shot as well. Felisberto shot them once:
- 595.** “Felisberto shot one of them, but I don’t know which part was struck by the bullet. The other persons ran away. I was about 30 meters away from the person who was shot. After the shot, he was still alive. I know that he was still alive because I saw he was still moving. I approached him to find out if he was still alive. I didn’t see exactly where he was shot. After that, he was shot dead as well. Paulo shot him. Paulo didn’t carry a weapon. He took a weapon from Felisberto and then he shot him. I didn’t see where he had been shot. The victim died. I know that because he had been shot.”
- 596.** The distance between the witness and the victim shot by Paulo was about 5 meters. The witness was about 2 or 3 meters away from Paulo and was able to hear what Paulo was saying:
- 597.** “Before he fired the shot, Paulo said to the victim: *‘Do you know me?’* The person who had been shot answered: *‘no’*. Paulo said: *‘I know you’*. After the victim died, Paulo said: *‘I do know you!’* (...) Paulo shot the victim twice.”
- 598.** The witness did not confirm this quote from his statement to CivPol: [*“I recall the following men being with us and in possession of SKS guns: Joni Maruques, Paulo, Alarico, Eurico, Felisberto and Horácio. I and Amélio did not have guns.”*]:
- 599.** “I will say what is correct: Joni Marques and Felisberto were carrying weapons (SKS rifles). The other ones, all of them, were carrying swords. I wasn’t carrying anything. Regarding Amélio, I am not sure.”
- 600.** After the shooting, the witness told the Court that he went back to Com. When questioned by the Public Defender Beatriz Sanchez about the incident that took place in the Coconut Grove, the witness told the Court that he did not see Alarico at that time. He confirmed that Paulo da Costa was the one who shot the second victim:
- 601.** “I do not know the name of the second victim shot by Paulo da Costa. (...) I saw, but I could not clearly see what part of his body was shot. (...) But I did see clearly that Paulo da Costa shot the victim. The victim was lying down on the ground. The victim was wounded before Paulo shot him. I can say that he had a wound because he got shot, that is all.”

The Prosecution’s conclusions

- 602.** The Prosecution submitted the following conclusions in his closing statement:
- “Count 6: Crimes Against Humanity - Murder of Alfredo de Araújo alias José Lemorai and Kalistu Rodrigues on 21 September 1999
- I do not need to repeat the elements that need to be proved before the court find any of the accused guilty on this count. They are same as for the murder of Alexio Oliveira.
- By 21st September 1999, Team Alfa was in Com. Some of the Indonesians had already left by boat, but many people remained waiting for further transport to Kupang. Food was being brought from Lautem and the situation was no doubt confused and tense.
- There is no dispute that Alfredo de Araújo and Kalistu Rodrigues were killed on 21st September 1999. There is no dispute over who fired the shots which killed them. There is however an issue over why they were killed.
- The Prosecution submit that the only real explanation for these killings is that Team Alfa had been given general instructions to kill those people they suspected of being FALINTIL. It was a part of what the reports in Case File C describe as a “scorched earth policy”. Once the

popular consultation had been lost and the Indonesian authorities were leaving, there were general orders given to destroy East Timor and the people who remained. To burn the buildings, particularly those which belonged to the government. To kill those people who were not gathering to leave East Timor and those who had supported the independence movement. To leave behind a devastated country, to teach the people a lesson for the result of the referendum.

That is the only way in which to understand why these two men were shot and killed as they walked through the forest outside Ira-Ara. The fact that they were in the forest and not gathered at Com no doubt identified them as being supporters of independence, a part of the population who were not leaving for West Timor - men who had fled to the forest rather than go unwillingly as refugees. It is no coincidence that in fact these two men were members of CNRT.

The Prosecution accept that there is insufficient evidence to conclude that the men from Team Alfa went to that place specifically to look for FALINTIL or CNRT men. Although there is evidence that it was a FALINTIL meeting place, there is no evidence upon which to conclude that the men from Team Alfa knew that and were there, waiting to attack. The Prosecution submit that this was a chance encounter, but that Team Alfa were under orders to attack those men they believed were FALINTIL or CNRT when they met them, however they came to meet them.

JONI MARQUES

Joni Marques said this about the killing of these two men:

Joni Marques (10/7): [about Alfredo de Araújo] "I was not the principal perpetrator; it was Felixberto...When I approached Alfredo de Araújo, he knew who I was. He was a former detainee. He said: 'Joni Marques kill me, I don't want to live in suffering'. I shot him three times to the head" "I admit my guilt because I shot him until he died" "Felixberto was the principal perpetrator. I was the second perpetrator." "I shot him because that is what the victim ordered me to do." "It was not the plan of Team Alfa. It was the plan of the political elite to kill pro-independence supporters" "I do not know [Kalistu Rodrigues]. I was involved in this case and I confess guilt because I was involved" "Paulo took the weapon and shot the victim, I think in the head. I didn't order him to kill him"

(17/7): "I knew Alfredo because he was a former prisoner..he supported FALINTIL..he was a prisoner because he was FALINTIL..He said: 'Joni, why don't you kill me. There is no hope for me'". "3 people suddenly came and we pointed our guns at them..they had spears but not guns...I tried to shoot, but my gun jammed..I didn't say anything before I tried to shoot..they were moving towards me. That's why I shot them..because once you have a victim, you must shoot the rest of them to cover up, to erase all traces." "I tried to shoot the escapees, at least six times." "I could see the man was still alive..Paulo discussed whose gun he could use so he could kill him..so I give him my gun..he shot the victim once..I took the gun back from Paulo and went back and shot Alfredo...three times in his head and those shots killed him." "At that time, no one ordered me to kill these men, but at the time the district commander told us while we were waiting for the boat and if we see CNRT or FALINTIL we need to fight, oppose them and kill them...I killed these men because of this instruction. While waiting, we got the order. After that, when we came to the Coconut Grove we accidentally came across them. That's why I killed them."

(18/7): "I committed murder to cover our trail. Dandim gave me the order. He is a military member of TNI..the order was 'before you leave East Timor eradicate all the CNRT members before you go to Kupang'"

The Prosecution submit that in his statement Joni Marques admitted all of the elements which would make him criminally responsible with others for the murders of Alfredo de Araújo and Kalistu Rodrigues. Moreover, what he stated would make him guilty of those murders as a crime against humanity.

The statements of Joni Marques are supported by the evidence from the witnesses and the others accuseds:

Alarico Fernandes (17/7): "Joni said 'I shot the guy we had at Com'. He asked the victim: 'do you know me'.. He replied: 'you are Joni Marques'. I said 'Joni we could take him to Com where there is probably a doctor'...later Joni said 'why bother about him, he is a CNRT

member.” “3 people came. Felisberto shot and Joni’s weapon did not work.” “Join gave his gun to Paulo and said ‘just shoot his head’. “Paulo returned gun to Joni. Joni walked towards Lemorai..he shot three times and he was quiet.” “Joni said ‘they are CNRT, let’s kill them.” “Joni said ‘who wants to shoot’. Paulo said ‘give it to me I will shoot”

Paulo da Costa (18/7): “Joni Marques gave me his weapon and I shot that person” “Joni stated ‘kill that person’..I shot him once..my shot killed him.”

The witnesses said:

Carlito Viegas (26/9): “Felisberto said to him ‘we killed because he was CNRT’...After that he was shot dead by Joni Marques..shot twice” “[about Kalistu Rodrigues] he was shot dead by Paulo...he took the gun from Felisberto. Then he shot him.”

Eurico da Costa (25/9): “Joni Marques and Felisberto shot at them but no sound. They shot again and hit one of the 3. 2 escaped...both guns jammed” “Paulo took Felisberto’s gun and shot his head...then Joni Marques returned and shot José Lemorai..”

There is no dispute about which man did what. The Prosecution submit that Joni Marques actually killed Alfredo de Araújo. He attempted to shoot Kalistu Rodrigues and his friends. Joni Marques says that he then gave Paulo da Costa his rifle to shoot Kalistu Rodrigues on the ground. That is not supported by the evidence of the witnesses, although it is supported by the statements of the other accuseds.

However, whether Joni gave Paulo the gun does not matter to the issue of criminal responsibility. Joni Marques took a leading role trying to shoot the group of three men. Then by his presence and support, he provided encouragement to the shooting of Kalistu Rodrigues. He had joined together with the group and contributed to the offence.

Joni Marques says that Alfredo de Araújo requested Joni to kill him. That is not supported by the evidence from the other accuseds or the witnesses. Even if it were, killing someone at their own request is not a defence to this charge. There is no provision of law which provides this as a defence.

Joni Marques has admitted the necessary context element. He explained the orders which had been given to him by the district military commander. Those orders could not be a better example of a continuing campaign against the civilian population. Given the context in which these murders took place, on the 21st September, and given the others events which Joni Marques had either seen or been involved in, he could not have failed to realize that his actions on that day were part of a widespread or systematic attack.

ALARICO FERNANDES

The Prosecution is unable to point to any evidence that Alarico Fernandes either participated in the killing of either man or contributed to their deaths. The most that can be said is that Alarico joined with a group which he knew had a criminal purpose. He had been with the groups in and around Leuro. He was ordered to burn two houses and saw the people moved to the 745 Base. He saw Alexio Oliveira taken away and not reappear. Later, he had been told to burn houses. Having seen all of that, he was still with this group of men on 21st September. Then having seen this group murder two people on 21st September, he was with many of them again on 27th September when the mikrolet was shot at.

This sequence of events shows clearly that Alarico Fernandes was a willing member of this group, not a member of Team Alfa in a formal sense, but a man who was prepared to join with them during September 1999, knowing that their actions were violent and criminal.

However, none of that is enough on its own to make a man criminally responsible for the actions of others in the group. There must also be evidence that the accused contributed to the offence. In this case, the Prosecution can not find any evidence that Alarico’s actions contributed to the deaths of either of these two men. He was present, but his presence alone is not enough.

PAULO DA COSTA

Paulo da Costa said this about this charge:

Paulo da Costa (6/3): "On 21st September, in Lautem district I was forced to commit acts by people carrying arms. I didn't want to do it. The person dies as a consequence of action, not my actions. I was not responsible for their deaths"

(17/7): "I saw he had a broken leg and 2 shots on parts of his body. Joni Marques offered me his gun to shoot him, but I said 'he is already died. Why do I have to shoot him. Joni said 'just shoot him in case he is still alive'".

(18/7): "Joni Marques gave me his weapon and I shot that person" "Joni stated 'kill that person'..I shot him once..my shot killed him..I had no intent to kill him but because Joni Marques gave me the weapon so I killed him..If I didn't do it, he'd be suspicious of me..that I'm a CNRT supporter." "It was not my wish; it was on Joni Marques' order." "If I did not obey his order he could shoot me."

(19/7): "I was forced to kill Kalistu. It was my mistake."

Paulo accepts that he killed Kalistu Rodrigues, but claims that he was forced to do so by Joni Marques. That is not accepted by Joni Marques:

Joni Marques (10/7): "Paulo took the weapon and shot the victim, I think in the head. I didn't order him to kill him"

(17/7): "I could see the man was still alive..Paulo discussed whose gun he could use so he could kill him..so I gave him my gun..he shot the victim once."

(18/7): "Paulo said: 'please give me a weapon so I can shoot him dead'. So I handed over my weapon." "Paulo yelled out: 'whoever has a weapon, give it to me so I can kill him'".

Alarico FERNANDES (17/7): "Joni gave his gun to Paulo and said 'just shoot his head'. "Paulo returned gun to Joni."

(18/7): "Joni said 'who wants to shoot'. Paulo said 'give it to me; I will shoot'. What Paulo said this morning is not true...Joni Marques did not force anyone to shoot Kalistu."

Nor do the witnesses accept this version:

Carlito Viegas (26/9): "Before he shot, Paulo said: 'do you know me or not'. The guy answered: 'I know you'..Paulo shot the victim twice" "The victim was lying down on the ground when Paulo shot him"

Eurico da Costa (25/9): "Paulo took the gun from the hands of Felisberto..Felisberto didn't say anything to him..Joni did not say anything to Paulo"

There is no evidence to support a conclusion that Paulo da Costa was forced to commit this murder. There is not even any evidence that he was ordered to do it. It is not necessary to consider the defence of duress because there is simply no evidence to support it

There can be no doubt that the two men were killed as part of a widespread or systematic attack. However, the evidence must also show that Paulo da Costa knew that. The Prosecution ask this question: given the circumstances in September 1999 and given all that Paulo had himself witnessed, how could Paulo not have known that this was part of such a campaign?"

Murders of clergy, Agus Muliawan and Izino Freitas Amaral and others

The testimony of the witness José Pereira:

603. The witness José Pereira, one of the boys who were chased by some of the accuseds reported that he was one civilian who went from Baduro to get some rice in the warehouse on that day.

604. "We got some rice and we took it to the primary school #12 about 700 meters from the warehouse. After we put it next to that primary school. It was about 9:00 AM. We heard shots from the direction of Lautem. We ran to Tamaro village to rest for a while. (...) At about 3:00 PM, we went to Gino to pick up the rice we had stored previously. On the way, we go to Baduro and there was a minibus. The name *Cruzeiro* was written on it. There was rice in the front of it. There were also militia members riding in it. About 7 of them were sitting on the top of the luggage, some sitting inside the vehicle as well. There was one militia sitting on the top of the vehicle who wanted to cut my head off. I ran away and jumped into the river. My younger brother ran away to the hills. I jumped into the

water and they threw rocks at me. Some of the rocks hit my shoulders and my head. I was in pain and looked around. Then there was 2 militiamen that I do know. I can point them out [*the witness pointed one of them as João da Costa*]. One of them is not here in this courtroom. I saw them. I was trying to get across the river. After I crossed the river, I ran away, but there was still a militia who was calling out to me. He was yelling: '*Don't run away!*'. But I didn't pay any attention to his shouts so I continued. Once I got to the village of Comaro, I heard a shot being fired from the direction I had been previously. I thought it was my younger brother being killed. After that I went home, and I escaped to the forest".

605. Questioned by the Prosecution, the witness clarified that his path from Tamaro to Lautem was on the left side, the same side of the river. The mikrolet that was coming had a red-white flag of Indonesia.

606. "I didn't have the opportunity to count how many of them were in the car. I was scared. I was scared because I saw an Indonesian flag and they were wearing a pro-autonomy T-shirts. A man in the top wanted to cut my head off. I knew that because he was carrying a sword and wanted to cut my head off. He didn't say anything to me. The mikrolet stopped when I saw the man with the sword. It had stopped only one meter from me. I ran after the mikrolet stopped. I didn't hear anybody on the mikrolet saying or shouting anything. Lots of them were throwing rocks at me. (...) Among them, I know the two of them who were carrying rifles. Their names are João Lemorai and Gilberto da Costa. João Lemorai was not one of the men who was throwing stones at me. He was on the side of the river, but he was threatening me with the rifle. He was yelling at me: '*Don't run away!*' when he was pointing his rifle at me. I ran away since I was scared that I was going to be killed. I thought that because they were carrying sharp instruments and I knew they were militia. I don't really know why they wanted to kill me. I myself was not carrying any weapon. I went in the direction of the sea which is also the same direction of the river, in the direction of Tomaro village. (...) Some meters away I heard shootings, but I couldn't see who was shoot. I was already quite far away. I also couldn't see what the men were doing by that stage. When I jumped to the river, my brother went in the other direction up to the hill. I couldn't see what happened to him. When I jumped into the river, a militia was chasing him. (...) I knew João da Costa because there was a post in my village and he was working with the commander. I don't know exactly, but there was a post in my village held by Indonesians".

607. Questioned by the Defense Counsel, the witness clarified that João da Costa was together with his friends when the witness jumped into the river. All of those people threw rocks at him. They were on the top and the witness was below in the water. They were on the main road about a dozen meters away. But he emphasized: "At the time, João da Costa didn't throw rocks at me. I was running way and he threatened me with his gun."

The testimony of the witness Octavio da Costa:

608. The witness Octavio da Costa could not give his testimony since he was not allowed to give his oath. This is because of his close family ties with the accused Alarico Fernandes and Hilário da Silva, his blood brother.

The testimony of the witness Gilberto da Costa:

609. The witness Gilberto da Costa lived in Malahara in September 1999. From there, he fled as a refugee to Kupang. These were his first initial words to the Court:

610. "I know and recognize in this courtroom Gilberto da Costa, João Lemorai, Manuel da Costa, Joni Marques, Paulo da Costa and Amélio da Costa. At the time, I was guarding the post. The commander named Hadi, from the Indonesian Army, told me to go to guard the military post. I was supposed to carry a weapon to be on guard. I left my village to go flee to Los Palos because I was scared: I had been ordered by the Army forces to go and guard the post. However, after the popular consultation, I was scared and then I left. I stopped at Los Palos and I stayed at the base camp. Then we traveled to Com. At that place, we stayed at the Indonesian military base, but I didn't keep doing guard duty. We were arrested there and then we traveled on to Com. At Com, we sometimes went to Lautem and sometimes to Ira-Ara. [Our purpose] was to run out for vegetables, especially leaves, since there were not sufficient supplies. We went to Lautem because we were running out of rice. We usually traveled by car, but I can't remember now how many times. There were four cars at the time: sometimes we traveled by truck, sometimes by *Cruzeiro*, sometimes on ambulance. (...) There were many people inside the car. I can only remember that the driver was Paulo and the other two, but they are not here. (...) [About the death of the nuns], I came and I saw the nuns and I noticed that there was a death, and a car was parked. (...) I noticed that one of the nuns was still alive. She was sitting with wounds on her leg. Near the nun, a body was lying, with underwear trousers. After that, we were ordered to push that car, but I didn't do it and then we moved a further ten meters away. After that, the car was pushed. We kept walking and we heard some shots. Later we heard the sound of a grenade. We were traveling near a school building. As we came to the school, there was a car approaching. That car delivered us to Com. (...) Our purpose was to go to Lautem to collect rice. When we arrived at Lautem, close by the cemetery of Lautem, we got down and did some guarding. At that place, we guarded the location and we traveled backwards and forwards to pick up rice. It was around 4:00 PM. From that place, we then changed to a larger car and traveled to Com. From the bigger car, we

traveled by smaller car to small sub-villages. At small sub-villages, we moved to smaller cars. Since the preference was for small cars, the big car stopped. Joni then stopped the big car and called Manuel da Costa. He called Manuel da Costa to get off the car. There was a conversation and we were told to get off the car, so some of us got off the car. We got off the bigger car to get into the smaller car in order to go to Lautem to pick up rice. In fact, when we came to the warehouse, the car didn't stop but kept on moving. So the car kept on moving and David said: "*It's getting dark now. Where are we going?*". Nobody replied to that answer. So, we kept on moving to the crime scene. Then we noticed the presence of two young men who were pushing a cart. Exactly at that point, there were 2 children pushing that cart. We chased those 2 children. One jumped into the river; one climbed around there. The child jumped to the river. We didn't take any notice. The one who was climbing the hill, we successfully arrested him. The boy was arrested. We were asked to go and to guard him at the place. From there, we went up to the hills and took guard. Soon after that, we heard the sound of a car coming. As we heard the sound of the car, suddenly there was a continuous sound of gunshots. There was a kind of sound. After that, the militia members were shouting. I don't know whether both of them or only one. From there, we went down and we went to the corner of the main road. We saw the car. Then we kept going. As soon as we approached the car, David questioned Joni Marques: "*Joni, what are you doing? Those people are unarmed!*" Joni Marques said: "*Shut up!*". I followed them. I noticed a nun sitting beside a shallow gutter. There was a body beside the nun. I noticed the pleading of the nuns. I noticed the cap of the nun was on her shoulder. The nun talked to me in Tetum. I could not remember the words, but I remember she was saying '*Oh! God!*'. After that, we were ordered to push the car. But we refused to do that, so we kept on walking about 10 meters. Then they pushed the car into the river. So we kept on walking. Soon after that, we heard the sound of a firing of a grenade. After approaching the school building, a car approached and picked us up. That car delivered us to Com".

611. Questioned by the Prosecution, the witness provided some other details:

612. "I had not seen the nuns earlier on that day. Also I don't know whether anyone had spoken about the nuns. (...) From that place to Com, Manuel was with us on the way in the vehicle. I only knew Manuel, but there were many people in the car. It was a large-sized car. (...) We were on the way from Santa Cruz to Lautem. We were waiting at the cemetery for the car. The car had gone to the warehouse to pick up the rice. On the way back, that car delivered us to Com. I was sitting in the cabin, exactly at the side of the driver. The small vehicle was a mikrolet called *Cruzeiro*. Paulo was the driver. João Lemorai, Pedro da Silva, Joni Marques were in the car. Amélio, Paulo's younger brother, was sitting at the top of the car. (...) Everyone inside the car possessed a weapon, except the driver Paulo. It was a type of SKS rifle. From the bigger vehicle to the smaller vehicle four people descended: myself, Manuel, Ernesto and David. David was also a Team Alfa member. After the mikrolet had gone through Lautem and continued down the road, it then stopped by the 2 young men. The ones chasing the two boys were the ones who were sitting on the roof of the car. (...) That young man was taken to a certain place. I don't know what happened to him afterwards. I was not there anymore. Joni Marques was the one to order us to take guard. We were just told to go and to keep guard. We didn't know what we were guarding for. We were only told to keep guard. I didn't see what the rest of the men did when I was on guard. From the position I was guarding, I couldn't see the mikrolet. There were only two of us at that place. About ten minutes after I went up to the hill, I could hear the shooting. The shots continued for about ten minutes. We didn't see anyone else when we were going down the hill. When I came back and saw the nuns, I saw three people who were earlier with me in the mikrolet – they were Manuel, Joni and João Lemorai. They were just on the main road. There were some of those young men, but since I don't know them, I would not recognize them. But I saw those men moving or walking around. Joni ordered us to push the car. But I refused. I was not sure. I was just reluctant to do that. I saw those who were pushing the car into the river. I didn't notice their names, since I left that place and walked away in the direction of Com. Nobody said anything to me. [About the shootings], yes, I heard the shots, but I don't know who was shooting. I went to Com and stayed there about 3 or 4 days. When we came back to Com Harbor, we stayed very close to one another. Therefore, we saw again the men who had been in the mikrolet on that day. I saw Joni Marques after the day the nuns had been killed. [He] was in Com, but he didn't say anything about the attack. The others also didn't say anything."

613. To the Defense Counsel questions, the witness confirmed that he was guarding at the place of the incident and that he got off from the big car and went into the small car. Manuel had ordered him to get off. "There was not enough space in the car. That is why we got off. I wanted to get off because there was not enough space. If there had been enough space, I would not have got off. There were four people armed with rifles. We were there and some people had left earlier, so they left their rifles to look after. The people who had left earlier said to us: '*You hang on to these rifles to protect them until the ships come to pick you up*'. They said they had been given the rifles by Alfa Members. But remember: those rifles were not our property. When the ships came to pick us up to Kupang, we had to surrender the rifles. The rifle that I got was given to me by Tomaz, a Team Alfa member, who had left earlier to Kupang. Tomaz had been an ordinary public servant. Then he became the commander; then after that just an ordinary citizen. I don't know whether he was still the commander when he left. That rifle was not provided to me in particular, but we were all given rifles because they had left earlier to go to Kupang. That is why they gave the rifles with us. At the time, there were many belongings on the ships; that is how I got this gun. I was not a member of Team Alfa. I was ordered to be a member of Fratira. (...) Once we passed by the warehouse, I didn't know anything from there. I was not a full member of Team Alfa, but just like a FRATI member, together with Team Alfa members. We were told that we were RATIH, but we went together to do the guarding. Sometimes I joined Team Alfa; sometimes I

was with Team Alfa members. I was a member of RATIH. I was together with Team Alfa to take guard, but I was not a member of Team Alfa. [When David said in the mikrolet: *'It's getting dark now, where are we going?'*], he was in the position as one of the commanders and he could not get any reply. What could we do? We were there because many people came to pick up rice. Our task was guard the people there. I was ordered to do the guarding, but we don't know the reasons for the guarding. We were told to guard, to go up the hill. We didn't know the reason for that guarding. We were just told to go, so we went. I was supposed to go about more than 100 meters. It is our own decision to go to that distance. David was not the commander, but he was a team leader only, the leader of the platoon only. Team Alfa was structured into a number of divisions. (...) I myself and David Lopes went up the hill and sat there. We didn't say anything. We didn't know the intention. We just stood guard. We were not forced, but we were told to go and stand guard, so we went. Later we were asked to go and push the car. Joni Marques didn't say anything to me, but we were ordered to push the car, turn around and go away. As far as I could see and hear, Joni Marques never threatened and forced anybody. Manuel was the commander of Team Alfa on that day. The leader of Team Alfa was José. During the murder of the nuns, there was no higher rank among the Team Alfa members. Manuel da Costa was platoon commander, the one responsible for us, but with no particular rank or position. At the time, regarding the position between Joni Marques and Manuel da Costa, there was no rank. At the time, everybody had gone and left East Timor. Joni Marques actually had taken back the responsible for us. Since the leader of Team Alfa had already gone, therefore Team Alfa members stayed back, and it was agreed together that Joni Marques should be appointed to be responsible for us. The agreement involved all the Team Alfa members that were at that place. Manuel held the same position. [I refused to push the car into the river] because at the time I was not particularly ordered to do that, but there were many of us to do that. That is why I walked away. At the time I didn't want to refuse, but from the place where the car was parked, I just walked away, and I didn't know why. Joni Marques was my commander at the time, but I could not tell how it could happen at that place. I just walked away. I can not analyze it myself. Joni Marques didn't do anything to me [when I refused his order]. I just walked away, but I don't know why. Joni didn't do anything either when David Lopes refused to push the car. I did not see the perpetrators of the killing of the nuns, but I saw the nun sitting and a body lying there. (...) Whoever killed them, I don't know (...) [About the getting out of the car], Manuel told us that there was not enough space. Therefore we went together to the smaller car. He only advised us because we were seated on the roof; therefore we decided to go together to the smaller car."

614. Finally questioned again by the Court, the witness clarified that nobody said anything to him when the red *Cruzeiro* minibus stopped and picked him up. "Inside that car the members of Team Alfa were: Joni Marques, Manuel da Costa, Ernesto, David Lopes and myself. Joni Marques didn't say anything to me when I got into that car. [About standing guard] I repeat: when we heard the sound of the car, we were just sitting there. We didn't do anything. (...) [When I got down and saw a nun and Joni, João Lemorai and Manuel], but whatever they did, I didn't witness it. When they came, I stood there. [When I was on the top of the hill] I was guarding the children, the people who were screaming out there. I heard the screaming, but whatever they said I don't know. [About the journey in the truck], Manuel was traveling behind us. I was on the roof. We went back to Com in the same car as the one we had been traveling in to the place the nuns were killed. Paulo was the driver. The people in the car were the same as those who had come in the car earlier. [About the continuous shots when he was on guard], I want to clarify that when we were guarding, there was no shots. After guarding the place, we heard some shots. I only heard the shots and stayed seated there. I went down after hearing the shots and also after hearing the screaming of the people. At that time, then I went down. Nobody called us at the time."

The testimony of the witness João Soares:

615. The witness could recognize in the courtroom Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva and Gonsalo dos Santos. Here are some quotes from his initial responses:

616. "I was living in Leuro during September 1999. I remember having seen those men in my village at the time. BRTT shot, but I cannot remember what those men were doing. They came to my village after the consultation; we are from the same village, but they didn't do anything. I heard about the killing of the nuns at the time. At the time, we were at Com. We went to Lautem to pick up the rice. So we picked up the rice. There were four cars. We picked up the rice. We returned to pick up more rice. It was getting dark. We returned there. A red car was coming. They intended also to pick up some rice. We turned to Lautem. Suddenly, two young men came from our side. They were pushing a cart. I don't know from which direction. We arrived at the time. We stopped there and we chased them, but I don't know who exactly chased them. We returned to the car. One went to the river; another escaped. I don't know where we were going, but Horácio tied him up. I saw that. Soon after, the car moved forward, but I got off already. We were asked to put stones on the carriageway. Four people walked up to the hills. We were hiding. Very soon a car appeared. They were calling out *'there is a car coming, let's hide!'*. Then we went to hide. Three of them shot in the direction of the car. Then we came. I noticed that the car windows were broken, but I stood there. I came and I stood there. Horácio went off and stabbed people inside the car. I knew Horácio used his sword to stab people in the car. Then Horácio opened the car; the victim in the car fell to the ground. The nun stepped down and walked off. Another person was standing there. Horácio poured the petrol over them and they burned. One jumped to the river, still alive. There was one running up to the hill, but Horácio caught her. After Paulo took the petrol, I was still

standing on the track. We stood there. Joni said: '*Get fucked, push this car!*'. I pushed the car into the river. After that, the nun was still there. She was praying, but Horácio went off, grabbed her arms and threw her in the river. Joni Marques was shooting at her; I don't know which part of her body. After that, the boy who had been tied was taken and his ear was cut off. While he was standing beside the river, Joni cut the boy's neck and threw him in the river. After throwing him into the river, Joni got the grenade and Paulo da Costa took the car and returned to Com. We didn't pick up any more rice."

617. Questioned by the Prosecution, some other details came out:

618. "From Leuro, I didn't go straight to the Com Harbor. I stayed at the 745 Base prior. They said we were going to Kupang. That is why we stayed at the 745 Base. I went there voluntarily because my mother and my children were there. At the time, there were members shooting in my village, so I was scared. I went to the military base by a garbage car, but I don't know who the driver was. Hilário, Gonsalo, Amélio and Paulo also traveled from my village to Leuro and from there to the 745 Base. Paulo was the driver when we went to Com. I went with many people. I can not remember, but they were refugees at that place. I was willing to go to Com. I don't know how many times I went to pick up rice in Lautem. On the day of the killing of the nuns, I traveled many times to Lautem in order to pick up rice. I didn't mention to CivPol that it was four times. But I went many times in a red mikrolet driven by Paulo. Paulo didn't carry a weapon at those times. Joni Marques was not in the car. [About the last trip together with Paulo on that day], we picked up rice in Lautem and went to Com. We were asked to travel to Com and Lautem and we stopped there. We were asked by people in another car. Six of us got off. (...) We passed by the warehouse, but we were not told to get off. (...) I don't know about other people's opinions about whether we were supposed to pick up any more rice. We went to the river. We traveled to that river I mentioned earlier. At that place where we met the two young men pushing the cart. (...) I didn't hear from all those men any other plan apart from picking up rice. As far as I know, in the mikrolet Joni Marques, João Lemorai and Manuel were Team Alfa members. They carried rifles with them. I am not a soldier, so I can't tell exactly what type of weapon. There were four other men carrying weapons, but I don't know their names. We were ordered by Joni Marques to put bricks on the road. I didn't know why we were ordered to put the stones to block the road. We were involved [in collecting and picking up the rocks on the road]. I am not so sure whether we were forced, but we were told to pick up stones to block the road. Before we put the rocks on road, the two young men that I mentioned came and passed there. We arrived there and they were running. One went up the hill; the other to the river. They ran because they were scared because the car stopped there. Many people chased them, but I don't know who exactly got them. Horácio took both of them and tied them. No one else was involved in capturing them. In the statement to CivPol, I said only Horácio, not Paulo, tied up one of the boys. '*Only Horácio brought him*'; that is what I said. Paulo didn't do anything to the boys. I was inside the car at the time I heard the shootings, but I don't know who did the shootings. I could only hear the shootings; not see them. Joni Marques ordered us to push the car in which the nuns had been traveling. Paulo, myself and others that I don't know participated in pushing the car. There might have been someone else helping in steering the car into the river, but I was on the left side, so I could not see who was steering the car. [After the car had been pushed] I saw Horácio holding and grabbing the nun's arm and dragged her to the river. Joni Marques shot the nun. After that, about the boy who was tied up, Horácio took him, cut off his ear and chopped his neck, and threw his body into the river. Only Horácio murdered the child. After that, Joni Marques threw the grenade into the river. After that, Paulo took the car, stopped there and took us to Com. On our way back, we didn't do anything. At Com, we stayed two days. After that, we returned to Lautem to pick up rice. We were hungry. We went in a red car driven by Paulo. We went around. We got shot. Paulo lost one arm. Paulo was shot by FALINTIL members.

619. After shooting us, eight people of our members were killed in Lautem. I myself, who was participating, Paulo, Amélio, Gonsalo, Hilário and Alarico".

620. Questioned by the Defense Counsel, the witness confirmed that he was not forced to go to the 745 Base. Accordingly, he refused having said to CivPol that "*during September 1999 in the war crisis the commander of the militia Joni Marques came to our village and forced all the people to go to the TNI 745 batallion camp*". "No one in the *Cruzeiro* vehicle was forced by Joni either to go in the bus on the day we met the vehicle in which Manuel and the others were traveling. (...) I have no idea about who gave the instruction to some people to get off the truck going to Lautem to collect rice and ordered them to go into the minibus. I also don't know who gave the instructions to chase the boys. We were also told to put the stones on the road. I didn't ask anybody why we were blocking the road. I just kept quiet because I didn't know what was going on. I was told to put the rocks on the bridges without questioning Joni Marques. I was told to push the car, that is all. Joni ordered us to do it. I know the difference between *to force* and *to order*. I was only ordered to do it. I was not forced. I was only an ordinary citizen. Because I was only an ordinary person, I was told to do it. If I didn't follow the order, the members could carry guns. I was only carrying a machete, so I could not do anything. We were told to block the road with the stones, so I just did what I was told to do. Joni threatened us when we were pushing the car. He said: '*Mother fucker*', so this is a kind of threat. In Indonesian language, if somebody calls you a '*mother fucker*' ('*puki mai*'), that is a threat. This is an insult, because you are forced. In our daily meetings, he usually talked like that, so I consider that as a threat. We were told to push the car and they were carrying rifles, so, being an ordinary person, if I didn't obey, I could be killed. (...) Therefore, I had to follow his orders. He said: '*mother fuckers, push the car!*'. (...) Other persons, apart from Joni, committed the crime on that day: João Lemorai, Manuel and Horácio. (...) I don't know if they committed the crime as a result of

threats made by Joni. (...) The car stopped at that place and they opened fire. (...) When the car came we were hiding. I didn't hear any order from Joni Marques to these people on that day. João Lemorai, Manuel da Costa, Joni Marques and four others whose names I don't know were armed with rifles on that day. I was just told to push the vehicle. (...) I don't know who threw stones at the boy who jumped into the river. João da Costa shot at the car of the nuns. He shot one of the nuns, but I didn't see the way he shot. I was a little bit far away. I saw the shots, but I didn't see where they went. [Since João da Costa was close to the nuns] of course she was hit by the shots. I was on the top of the truck at the time. I was close to João da Costa, about 3 or 4 meters. (...) I didn't count how many times I took rice from the warehouse to Com until late afternoon. (...) At the time the car stopped, we got off. I don't know who ordered us, but the order came from somebody in the red car. I was seated inside in the vehicle. Inside the vehicle, apart of me, were Hilário, Gonsalo, Paulo and Amélio. They said: '*Get out!*' I just got out because I didn't want to get any more rice. [After the car passed by the warehouse and didn't stop] I didn't do anything; I was just hungry. (...) I didn't know what the purpose was of putting the rocks across the road. I was just an ordinary citizen. I didn't say anything. I was hungry. Others were carrying guns. We were told to hide and the others went up the hill, so we got down. Three men were standing on the road. They were shooting. Those three that were shooting were Manuel, Joni and João Lemorai. I didn't see any of the rifles. I was behind them. I am sure they were shooting. I know those three people were shooting. (...) [When] Joni Marques said: "*Mother fuckers, push the car*", I didn't see Manuel da Costa doing anything at that time. (...) I was hiding in the bush with Octavio, nobody else. Hilário wasn't hiding together with me. I didn't see him at the time. I was together with Paulo when Joni Marques ordered us to push the car. (...) I saw Hilário only when we got off the vehicle. That means before the incident. He was in the *Cruzeiro* vehicle. At the time of the killing of the nuns, I didn't see Hilário. I never saw Hilário there. About Gonsalo, I remember that when we got off the vehicle, yes, I saw him there. (...) The vehicle stopped; we got off there, so that is how I saw him. I don't know whether Gonsalo was there at the time when Joni ordered us to push the car. I didn't see Gonsalo doing anything. (...) I don't remember how long I kept hiding in the bushes at the time the vehicle carrying the nuns arrived. After the killing of the nuns, I just pushed the car."

621. Finally questioned by the judges, the witness repeated that another four people had guns as well on that day.

622. "They were up the hill, so I don't know if they were also firing toward the car of the nuns. The seven people with guns were not together in the same place. João da Costa, Joni Marques and Manuel da Costa were hiding. But I don't know if the other four men were also firing. I couldn't recognize those four other men. (...) When we got off the vehicle [to get other transport in other direction] I thought we were going to pick up rice; not to kill the nuns. They just told us to get off and we got off. I didn't know what its destination was. The ones that I know who helped me to take the rocks were Hilário, Gonsalo and Amélio. Horácio was the one who poured the petrol over the nuns, and he also burned them. I don't know where the fuel came from, but I saw Horácio pouring it on them. The can was already there, but I don't know how much petrol was there. I was carrying a machete because we used it everyday as a tool to work in the plantations. I wasn't going to kill nuns. I was going to Kupang. I wasn't going to kill any nuns. Horácio was also carrying one. That is all I know. He used it to stab the nuns. I don't know about anybody else using machetes on that day. [When I said that I was behind João Lemorai, Joni and Manuel] I remember that we were behind a large tree. (...) They released all their bullets. After the shooting stopped, we got down. Then Joni cried out: '*Mother fuckers, come down and push the car*'. I didn't see the corpse that fell from the car. I don't know if anyone refused the order by Joni to push the vehicle".

The Prosecution's conclusions

623. The Prosecution presented the following closing statement about this count:

"Count 7: Murders of Clergy, Agus Muliawan and Izino Freitas Amaral and others

This is the count for which this trial is best known. It is the count which most shocks the consciousness of the public. It is the count which raises the strongest emotions. It is the count which marked out the name Joni Marques and Team Alfa.

It is important therefore that this count is considered with objectivity. It is tempting to judge these actions with the emotions, but this temptation must be resisted. The manner of these killings and its victims raises the strongest desires for judgement. But those desires can not be satisfied if the injustice is perpetuated and any accused is allowed to carry a responsibility for this offence which he does not deserve.

The facts of this count are, however, really not in dispute. There is no issue that Joni Marques led the group to the scene of the crime and gave the orders to carry out the attack. It is not disputed that the two young men were chased and there is little dispute about who did so. It is not disputed that a roadblock was built; nor is it disputed who assisted in building that roadblock. It is not disputed who aimed their guns at the vehicle, who fired the shots, who used their sword to kill the victims. There is no dispute that the car was pushed into the river and little dispute about how that was done. There is no dispute that only one person escaped

from the attack and that nine people were killed. There is no dispute that this attack was part of a widespread and systematic attack directed against the civilian population.

What is in dispute however is:

- At what point each of the accused became aware of what he was involving himself in;
- The extent to which each accused's actions constitute criminal responsibility for the murders;
- Whether each accused knew, at the time he carried out the actions which constituted his participation, that this was part of a widespread or systematic attack on a civilian population.

The first of these issues can be answered in general, in respect of all the accuseds. It is important not to forget the nature of the group of men on the mikrolet. Team Alfa had already shown itself to be a violent, criminal group. Capable of murder and other serious actions against innocent civilians and their property. Notwithstanding that each one of these accuseds chose to join with the group and make the journeys to the Lautem warehouse.

Clearly, Joni Marques had the plan to ambush the vehicle carrying the clergy before he stopped the truck in which Manuel da Costa was driving. If he did not already have that plan and was only intending to get more rice, there was no sense in putting more people into the mikrolet when he hoped to get as much rice as possible into it. The Prosecution asks in the first place; why was it not obvious to anyone else that the less people in the mikrolet, the more rice it could carry? And if that was obvious why did no one question the purpose of the journey?

The mikrolet however did not stop at the Lautem rice warehouse. It continued on the road towards Baucau. A number of the accuseds claim that at this point they still believed that the intention was to get rice. Why? There was no other rice warehouse nearby.

About one kilometer outside Lautem, Joni Marques gave the order to stop the mikrolet and to chase the two young men. They were chased. Both of them fled, one jumping into the river. We have all seen what jumping down that river bank involves; it is a drop of about 25 metres. We can imagine then just what sort of danger this young man thought he was in from this group. And yet, some of these accused claim they still did not know the intentions of Joni Marques. It must have been perfectly obvious by this stage that those intentions were not only bad; they were criminal.

The boy who was caught was tied to a tree. So by that stage, what did these accuseds think was going to happen?

Then a road block was ordered. The men with Joni Marques were instructed to get rocks to block the road. Can there have been any doubt in the minds of any of these men that now it was clear that Joni Marques had very bad plans? Consider the events that all of these men had experienced over the previous twenty-one days since the result of the popular consultation was announced. Consider what they had seen happening in the previous few minutes. Put yourself in that situation. No one could surely have doubted that the roadblock had a sinister and evil purpose.

What followed thereafter was the unfolding of that evil purpose as guns were aimed at the road and the group waited for the sound of the approaching car.

What then followed does not need repeating. It was the brutal killing of the people in the car, by gunshots, by sword and by blows. When those killings were nearly complete, Joni Marques called again upon the men with him to assist in pushing the vehicle into the river. Inside the car, there was still someone alive. The car was pushed down the bank and that person managed to escape into the water, only to be shot and killed.

Anyone of the accuseds who pushed the car was playing an active part in this attack and a direct part in the killing of that person who was still alive inside the car.

Some of these accuseds claim that they had no choice but to push the car into the river. They say that Joni Marques forced them. But there is a witness who shows the nonsense of this statement by those accuseds. Gilberto da Costa refused that order to push the car. Not only that, he walked away from the scene. With no consequence at all. Joni Marques did not challenge him or shoot at him. And if that was not enough, whilst walking back towards Com, Joni Marques and his group picked up Gilberto da Costa and took him back to Com with them. Was he punished for refusing the order? No. No one said anything. And once they got

back to Com, still no one mentioned to Gilberto da Costa the fact that he had defied the order of Joni Marques without repercussions.

It is also worth considering that Joni Marques had the power to choose who came with him on this operation. He was the leader of Team Alfa in Com and no doubt had sufficient control to decide who went on the mikrolet. The fact that he chose these men is significant. Given that he was planning an attack of the most shocking kind he needed men he could trust. As the accuseds and witnesses told us, on the return journey to Com Joni told everyone that they should not tell others what had happened. It is therefore significant who he chose. The men who joined him would have to be trusted, first to carry out his orders and second, not to tell anyone what had happened and who was to blame.

I turn then to each of the seven accused.

JONI MARQUES

Joni Marques has admitted his guilt on this charge. He admitted that he knew the killings were part of a widespread or systematic attack directed against the civilian population. He said:

Joni Marques (10/7): "I will confess I was the principal perpetrator. I am guilty... I agree I killed those people, it was my most fatal mistake...I took them there so I was the commander. I wasn't leader, but all the other leaders had gone to West Timor, so temporarily I was in charge of all Team Alfa at Com."

His admission is supported by the statements of the other accuseds and by the evidence of the witnesses. I will not read out any passages from that evidence as I have set out the most important parts in the Table which the Panel has.

The prosecution submit that there are proper grounds based upon his admissions and the evidence to find Joni Marques guilty of the offence charged.

MANUEL DA COSTA

Manuel da Costa said the following:

Manuel da Costa (6/3): "I was ordered by Joni Marques. He gave orders and I carried it out. I am also to blame because I was ordered by Joni Marques"

(19/7): "Joni Marques ordered us to get out and chase the 2 young men." "Joni said 'now we will wait for the sisters who will be coming towards Baucau' 'we will wait for them here and when they come we will kill them all' I said 'how are we supposed to kill those people' 'do you understand if we do this we will have to leave East Timor and go to West Timor'. He replied: 'If you don't follow my command, you will die before those sisters die' I said 'do you know whether if we do this, we will have the opportunity to leave East Timor..If there is no ship at Com, where will we go?' Joni said: 'If you want to die before the sisters then go ahead'." "I took up my position with Joni Marques to my right, João da Costa took up position to the right of Joni Marques." "The vehicle arrived in front of us and stopped. Prior to that, Joni ordered me to fire the first shot. I aimed my weapon, but I did not fire a shot... Joni fired in the direction of the vehicle. I aimed my rifle, but there was no sound so I pulled back a part of the rifle as it was jammed. Then I aimed my weapon and tried to fire again, but it would not fire. Then I fired again, but it was not aimed at any people. Then I fired again at the vehicle."

(24/7): "I only received the rifle on 14th September and the name was already there. "I had a grenade from 14th September. I got a weapon, but my purpose was different. It was to guard myself and my family in Com." "When I carried the grenade, I didn't bring it for any particular purpose. The community actually didn't need any security, but we were the ones with the armed forces to provide security..not to fight anyone but to give protection. In my opinion, the risk might be attacks from FALINTIL... We saw 2 youths. Then I thought to myself, something bad is going to happen, particularly when we came to the bend... Joni ordered Paulo to stop the minibus. He ordered me to chase the 2 youths, but I didn't."

(25/7): "At the time I was ordered, I fired the first shot, the bullet jammed" "At the time I took up position I knew the plan" "I pointed the gun because Joni ordered me." "When I released my gun, it jammed again. I was afraid Joni Marques would shoot me because my gun was continually jammed, even if it was not my fault..if I said 'my gun is jammed' Joni would shoot

me...I didn't take the opportunity not to shoot because Joni was more violent than his normal self." "I shot 2 shots I aimed at people rather than the vehicle. The people in the car; none was hit"

The other accused said about Manuel:

Amélio da Costa (19/7): "After the road was blocked, Joni, João Lemorai and Manuel da Costa took up positions behind gutter or small wall" "A shot was fired by Joni Marques...then João Lemorai and Manuel da Costa opened fire"

Hilário da Silva (26/7): "[On 25th] Team Alfa said 'Before we met with a sister'... , it was a member of Team Alfa that say it... ..Manuel said it, he should know...Manuel said 'Before we met up with some sisters and they were going to help us'..Manuel told us that the sister took a picture" "I didn't hear Joni Marques say to Manuel da Costa 'you will die before the sisters'. There was no talk like that... I didn't hear Joni Marques threaten Manuel da Costa. I was next to them. I could see them. There were no questions, answers or threats. They just prepared to set up the roadblock"

The witnesses say this:

João Soares (28/9): "Three of them shot: Manuel da Costa, Joni Marques and João Lemorai..I didn't see any of the guns were jammed...I was directly behind them."

Manuel da Costa admits that he was told by Joni Marques what the plan was before the roadblock was built. He knew that the sisters were traveling by car to Baucau and that Joni was waiting to kill them.

Manuel da Costa may have been ordered to shoot at the car, but he was not forced. He was a platoon commander with Team Alfa. He was armed and carrying an SKS rifle and a grenade. Manuel was not in such immediate risk of harm that his actions were committed under duress. What is more, he was presented with the perfect opportunity not to shoot. His gun jammed. But instead of using that as an excuse, he tried to release it and he fired again. Again the gun jammed, but still he persisted. On the third attempt, he was able to shoot. The fact that Manuel did not make use of this excuse not to fire his gun, shows the very limited extent to which he was an unwilling participant. He claimed that Joni Marques would have shot him if he had said he could not shoot because his gun was jammed. There no evidence of Joni Marques killing people who did not carry out his orders. When Manuel's gun jammed the first and second time, Joni Marques did not threaten him. There was no reason to think that he would have done so if Manuel had continued to say that he was unable to shoot. Joni Marques may have been the leader on that day, but he was not the only man who was armed. There were six others. To give the impression that he could not be challenged about what was happening by those six armed men does not make sense. The orders of Joni Marques could have been refused, but in fact no one except Gilberto da Costa chose to.

Manuel da Costa's took an active part in what happened at the scene and gave support to the plan of Joni Marques. Manuel da Costa was the leader of the group of men who had come from the truck and onto the mikrolet. As a platoon commander, he had authority amongst the other men. By his continued participation, he supported and encouraged Joni Marques. That continued all the way to the end, when Joni Marques took the grenade from Manuel da Costa. At no point during the time on the road did Manuel give any real resistance to what was being done. By behaving in that way, he gave the indication to those men who looked to him for guidance, that Joni Marques was being supported.

When Manuel da Costa fired at the vehicle, he knew he was taking part in Joni's plan to kill the sisters traveling to Baucau. He clearly knew that this was part of a widespread or systematic attack and he chose to take part.

JOÃO DA COSTA

João da Costa said this:

João da Costa (6/3): "We didn't know what would happen. Joni Marques commanded everything"

(19/7): "2 young men running away..one of us arrested him. The person who ran into the water I saved." "Joni ordered us to set up a roadblock. I was pursuing one of the people running away." "Manuel da Costa and Joni Marques took their positions. Joni called out and said to stand beside him. I stood beside Joni Marques and not long after the vehicle came,

the sisters emerged...Joni was the first to fire a shot. Then he ordered Manuel and I to shoot." "Joni said push the vehicle into the river..he told us to push vehicle into the river." "I killed one person and I confess to that. I don't know their name. The person was running and fell into river and I shot that person."

(23/7): "I shot 1 person..person I killed was due to order from Joni Marques." "I followed Joni Marques' order; we were not under force." "I killed the person who tried to escape to the river. I shot him in the back."

The Prosecution submit that João da Costa has already admitted enough to be found guilty of this charge. He admits to chasing one of the two young men, although he says he did so to save him. He admits to firing shots at the car from behind the roadblock. He admits to killing one of the passengers from the car as they tried to run to the river to escape.

João da Costa says he did all this on the orders of Joni Marques. He said he was not forced. In fact, he said "we were not under force". As previously stated, carrying out the orders of others is not a defence to these crimes.

The account given by João da Costa is supported by the other accuseds and by the witnesses:

Amélio da Costa (19/7): "A shot was fired by Joni Marques...then João Lemorai and Manuel da Costa opened fire. After the firing stopped, we were ordered by Joni Marques to approach the vehicle...One victim fell out of the vehicle. The victim ran and jumped into the river...João Lemorai shot the victim who ran to the river three times."

Hilário da Silva (19/7): "One ran to river and Lemorai said 'don't run; I will shoot'".

João Soares (28/9): "João Lemorai shot at the car..and one of the sisters, João Lemorai shot her" "Three of them shot, Manuel da Costa, Joni marques and João Lemorai"

José Pereira (1/10): "Then I ran away and I jumped into the river. My brother ran towards the hill...they threw rocks at me. Some hit my head; some hit my shoulder. I was in pain..there were 2 militias whom I knew, João Lemorai..the other one is not here..I crossed the river and ran away." "I saw lots of them throwing rocks at me. João Lemorai..was on the side of the river, threatening me with the rifle..he yelled 'don't run away', he pointed the gun towards me...I ran away..I was scared I was going to be killed." "João Lemorai was standing beside the people throwing rocks"

João da Costa played a significant part in what happened on that road. He was one of the Team Alfa who carried a gun to the scene. He was one of the men who chased José Pereira. He was one of the three men who started the shooting. He was one of the men who killed the passengers as they fled from the car.

For his part in this murder João da Costa is criminally responsible as a joint participant. He may have been following orders, but he followed those orders willingly and with enthusiasm. He made no attempts to distance himself from this violence. He must have known this was part of a widespread or systematic attack against the civilian population.

PAULO DA COSTA

Paulo da Costa was, yet again, the driver on the 25th September 1999. Not affected by what he had seen in and around Leuro. Not put off by what he saw on 21st September in the Coconut Grove. Paulo was out with Team Alfa driving them to their next crime scene. He had by this time really become 'one of them'. His mikrolet draped with the Indonesian flag, packed with armed militia. It must have been an intimidating site.

About this charge, Paulo da Costa said this:

Paulo da COSTA (6/3): "I did not commit any acts in this charge"

(19/7): "Joni asked Horácio to grab the sister by the arm. Before grabbing her arm, I said "she is a sister, don't kill her'. Before the sister was killed, I yelled 'Don't kill a sister'. Joni replied 'Kill them all. They are all CNRT'. All I did was push the vehicle into the river and I was forced to do that. I was forced by Joni Marques himself. He said 'if you don't push the vehicle, I will kill you all'"

(23/7): "25th September was the first time Joni Marques asked me to get rice. He had a gun with him...he threatened me, if I didn't follow I didn't know what could have happened to me"

"I didn't catch the boy." "I was only helping in pushing the car" "I didn't know what the roadblock was for." "I didn't do any checking before I pushed the car...at the time that I pushed I didn't know if anyone was alive or dead. Only when it fell into the river, someone got out." "I was not shocked by what happened on 25th September; I was afraid."

Other accuseds say this:

Manuel da Costa (25/7): "Horácio and Paulo chased the boys. Paulo caught one of them." "Paulo steered the vehicle. 4 were pushing including Gonsalo."

Amélio da Costa (24/7): "Paulo was one of the men who chased the two boys." "Paulo and Horácio were the ones who chased the young man to kill him. The one who caught him was Paulo...after that Paulo surrendered the boy to Horácio."

Gonsalo Dos SANTOS (27/7): "I saw Paulo open the door and one sister got out of the car."

The witnesses say:

João Soares (28/9): "Paulo also pushed the car"

The evidence shows Paulo to have been more involved in this charge than he is admitting.

As for his suggestion that he was forced, it simply does not make sense. How could he having acted as the Team Alfa driver for at least the last two weeks claim now that he was still acting under force. Had he not in those two weeks had any opportunity to get out of this job, to distance himself from what was happening? Not only did he not break away from this group in the two weeks before the 25th September 1999, he did not even break away from them afterwards. Let us all for one moment stop and think about the significance of that. Imagine for ourselves having seen the horror of what happened on 25th September. Imagine that we were an unwilling participant in what happened, as Paulo and others suggest. Now try to imagine what could possibly persuade you to join that group in anything again. The answer is surely, that nothing would persuade you to spend a moment longer with them than you had to. Yet four of these accused were on the mikrolet two days later.

If you want to know how a man is thinking at the moment of a crime, look to see what he does afterwards. Look to see his reaction. Does he run in horror? Does he turn and reject those who committed the offence? Or does he stick with them. For everyone of these accuseds who was still with Team Alfa on 27th September consider that fact. The Prosecution submit that it is very significant. Innocent men would have recoiled in horror; those who participated would stick with the group.

Paulo da Costa was an active participant in the events on 25th September 1999, guided and directed by Joni Marques no doubt. But willing to carry out what he was asked to do.

AMÉLIO DA COSTA

Amélio da Costa said this about the charge:

Amélio da Costa (6/3): "25th September, this was a consequence of a plan by people carrying weapons, the leaders of team Alfa group. I admit I am guilty of committing offences, but I did not commit any acts which caused harm to any of the clergy. I implicated myself in their murder. I did not plan the crime. I was ordered to do so."

(24/7): "I spent time with Team Alfa in Com..I sometimes went with them to get rice...I was with Team Alfa in the Coconut Grove when the two men got shot." "Joni ordered the people to build the roadblock and I helped." "When the roadblock was built, I no longer knew the purpose of the trip..I thought the block in the road had a bad purpose or intent, but I didn't know the exact purpose...I knew there was something bad..I couldn't go anywhere. We were ordered. It was not a force, but it was an order...it was such a strict order." "I pushed the car..I didn't check to see if anyone was alive inside." "I pushed the car because I was ordered by Joni Marques" "Joni didn't force me. He just ordered me in a strict manner...I don't think you can refuse an order like that in that situation. I thought I would be killed if I didn't accept the order."

The other accuseds say this about Amélio's involvement :

Manuel da Costa (25/7): "I didn't do anything regarding the roadblock...Horácio and Amélio..were ordered by Joni Marques..they used rocks."

The witness says this:

João Soares (28/9): "The next day, we returned to Lautem to get rice..we got shot..Paulo was injured..FALINTIL did the shooting..8 people died/got killed..Paulo, Amélio, Gonsalo, Hilário and Alarico were there"

(29/9): "Hilário, Gonsalo and Amélio helped to take rocks"

Although Amélio da Costa is only charged on this count, it is significant that he was present at the scene of other charges that we have heard about. Of course, the fact that he was present at other crimes does not make it more likely that he committed this one. But, the fact that he was there and saw what this Team Alfa group was doing is relevant to considering his own state of mind on the 25th September 1999. Amélio knew that this group was violent and destructive. He had seen what had happened in Leuro. He had seen the villages burnt at Nan Curo and Lali. He had seen Alfredo de Araújo and Kalistu Rodrigues killed on 21st September . And still, he is with this group on 25th September. He saw what they did on 25th September and is still with them on 27th. How could an innocent man allow himself to be in that situation? If nothing else, what he saw happen in the Coconut Grove should have cut his ties to Team Alfa forever. But it did not. If that was not enough, how could he continue in their company after the 25th. But he did.

What Amélio did on 25th was to carry out the order given to him by Joni Marques to build the road block, knowing as he must have done that it had a criminal purpose. Then he did as he was asked and helped push the car into the river. Both of those actions gave assistance to the rest of the group as they prepared and then killed these victims. Both of those actions make Amélio da Costa criminally liable.

Given what Amélio had seen in the previous weeks, he must have known that this attack was a part of a wider attack. Knowing that he still played his part and for that reason he is guilty of the charge.

HILÁRIO DA SILVA

Hilário da Silva said this about the charge:

Hilário da Silva (19/7): "It was all the members of Team Alfa who set up the roadblock, it wasn't Amélio or somebody else...they were ready and waiting and the civilians ran off, I was about 100 meters away." "the others were told to push the car into the water." "I am not guilty. I didn't burn anyone's house, it was the only time I was around one of those incidents."

(26/7): "The four Team Alfa were on guard on top; only three on the road. They were to wait for car to come; they are to guard Joni Marques. Team Alfa originally set up the roadblock and they called out to the rest to help. I last of all placed a piece of wood" "I just helped to build the roadblock" "Joni Marques ordered 'mother fuckers come and push the car', he told us all, not me alone...it was a big car..the car was near the river, quite steep, just pushed it and it fell into the river..I didn't look inside the car before I pushed it" "My only involvement was to put a piece of wood on the roadblock and help push the car into the river...That piece of wood wouldn't have killed all those people and pushing the car because everyone else did it, with all my friends. I wasn't ever involved with such evil plans" "João da Costa said 'hey you, why are you just standing there waiting when other people are carrying rocks' so I put one small piece of wood onto the roadblock. I didn't know the car would be stopped" There was no questions, answers and threats. They just prepared to set up the roadblock" "I didn't run away because there was no one chasing me. Why would I run away?...I was afraid but I didn't run away" "He ordered and we pushed the car. I don't know what would have happened if I had not obeyed the order to help build the roadblock. Everyone pushed the car; about ten of us" "On 27th September I went to Lautem to get rice. Team Alfa was fired upon" "[On 25th] Joni Marques said 'to those of you who just joined this group, if you say anything we will shoot you when we get back'"

(27/7): "The three Team Alfa here ordered the roadblock and they asked us to join. I did not hear anyone give an order to those three; they just did it" "I had never seen anything like this before. When they shot them, I was shocked. I had never seen someone shot before. I could not erase it from my memory"

The witnesses say:

João Soares (29/9): "Hilário, Gonsalo and Amélio helped to take rocks"

It is accepted by the Prosecution that Hilário da Silva's involvement in this charge was limited to placing material on the roadblock and assisting in pushing the car into the river. Both actions were at the order of João da Costa and Joni Marques respectively. Although his actions were limited, the Prosecution still submit that what he did contributed to the commission of this crime. It was a contribution which played a part in the attack upon these victims. Of course, it is possible to say that even if Hilário had not done what he did the victims would still have been killed. That is certainly true. But that is not the proper test of a person's participation. Did Hilário's actions support, contribute or assist the actions of the other more involved participants? The Prosecution say that they did.

I remind the court of the submission I made about the significance of an accused being with Team Alfa on the mikrolet again two days later. Hilário said to the Court that he had 'never seen anything like this before. When they shot them I was shocked...I could not erase it from my memory'. And yet within two days he was traveling with them again.

It is clear from Hilário's own words to the Court that he understood the nature of the actions which Team Alfa took against FALINTIL and CNRT. It must have been obvious to him on 25th September that what was being prepared by Team Alfa was a part of their campaign against those people they considered to be against autonomy. It was with that knowledge that Hilário joined in with the attack.

It may be argued that Hilário da Silva is in no different position from some of the other people present on that day. In particular the witness João Soares. But that is no defence to the charge. Just because another man behaved in a similar way, but is not before this panel, does not provide any excuse for his actions.

GONSALO DOS SANTOS

Gonsalo dos Santos said this about the charge:

Gonsalo dos SANTOS (19/7): "Joni said to Paulo to stop the vehicle and immediately capture those 2 children...the other hid in water. I joined in and threw something at that kid. It wasn't just me, but all of my colleagues who joined in throwing something." "Joni Marques ordered all of us to block the main road" "I am not guilty. I had no relation to them and no plan to set up the blockade against the sisters...Every day Joni Marques gave orders to us young men, to go with that vehicle to get rice...My mistake was throwing something at that first kid..I threw stones at him. None of the stones hit him. It was purely to scare him away from people carrying weapons. I had no intention to murder anyone."

(27/7): "Before the 25th September, I had been to the warehouse once to get rice...Young men were always escorted by Team Alfa members." "This was the first time I made the journey with Joni Marques." "I threw stones at the boy who jumped in the river...If I didn't Joni Marques could have shot him dead." "Joni Marques ordered all the young men to build roadblock..no one can say they didn't participate...I didn't know the meaning and the purpose. For 24 years, there was a war in East Timor and I never participated in any bad acts" "After everyone was killed, Joni ordered 'all the young men and Team Alfa, mother fuckers push this car'...I helped to push the car at Joni's command..Nobody steered the vehicle..the car was pushed sideways, side first" "I was on the minibus on the 27th September, with Paulo, Horácio, Hilário, Amélio..I went with Team Alfa on the 27th to get rice. On the 25th we didn't get any rice." "I didn't know the intention when I built the roadblock."

(30/7): "I did not hear any threats from Joni; only orders." "If I did not obey the commands of Team Alfa, I would be killed."

The other accuseds said this about his involvement:

Manuel da Costa (25/7): "Paulo steered the vehicle; 4 were pushing including Gonsalo."

The witnesses said this:

João Soares (28/9): "The next day, we returned to Lautem to get rice..We got shot..Paulo was injured..FALINTIL did the shooting..8 people died/got killed..Paulo, Amélio, Gonsalo, Hilário and Alarico were there"

(29/9): "Hilário, Gonsalo and Amélio helped to take rocks"

Gonsalo dos Santos joined in the group's attack on these victims as soon as the mikrolet stopped. The Prosecution submit that his suggestion that he threw stones at the boy in the

river in order to scare him away is weak and untrue. He describes it as 'my mistake was throwing something at that first kid..I threw stones at him, none of the stones hit him'. That statement does not make sense. If he was intending to scare the boy away, it was not a mistake at all; it was successful. The Prosecution do not accept that Gonsalo dos Santos was so quick thinking that he was able to devise a plan to scare the boy aware whilst the other men in the group were trying to kill him.

Gonsalo then did what he was asked to do and built the roadblock and helped push the car. Carrying out the orders which Joni Marques gave him.

In relation to the car, Gonsalo says that 'nobody steered the vehicle..the car was pushed sideways, side first". We saw on the photograph exhibit E-039 and on the sketch plan exhibit E-072 where the car ended up. We saw the scene for ourselves in August. Gonsalo is not telling us the truth about the car. There is no way that the large four wheel drive vehicle could have been pushed sideways by these men. No way it could have ended up in the river in the position it did had they pushed it sideways.

Gonsalo participated with the others in carrying out the orders of Joni Marques. He is criminally responsible for committing this offence with others. Gonsalo dos Santos associated himself with Team Alfa before and after these events. He can not claim that he was forced and was acting under duress. He knew what this group did and he joined in with them.

At the time, he must have known this attack was a part of wider attacks. He had seen crimes committed elsewhere. The Prosecution say he had already committed crimes elsewhere. This was the latest part of that attack. "

B.The Defense case evidence

624. The Defense did not present evidence, but addressed in its closing remarks its appraisal on the evidence, as follows.

The Defense of Joni Marques

625. The Defense on behalf of Joni Marques brought the following assessment and conclusions about the evidence:

"Count 1 and Count 2

In support of its allegations of the torture and murder of Evaristo Lopes as a crime against humanity, the Prosecution called 8 witnesses.

The testimony of Moises Lopes

Moises Lopes testified that on 21 April 1999 he was with Evaristo Lopes when they were stopped by a group he identified as members of Team Alfa. He testified that he did not know the accused Joni Marques and could only recognize João Lemorai (João da Costa). In relation to Joni Marques, he stated that he did not know his name or his role. The witness stated in cross examination by the Defence Counsel of Joni Marques that on 21 April 1999 he did not see the accused Joni Marques, but just recalled seeing João Lemorai.

70. Comments regarding the testimony of the witness

The testimony of this witness in relation to the accused, Joni Marques clearly does not take the Prosecution anywhere. He neither identified the accused nor implicated him in any of the offences alleged by the Prosecution.

The testimony of Domingos Ribeiro

Domingos Ribeiro testified that on 21 April 1999, he was with the deceased Evaristo Lopes when they were stopped by a group of persons, which included the accused João Lemorai. In examination by the Court, he stated that he did not know any of the accused except João Lemorai (João da Costa). The witness did not identify the accused Joni Marques as one of the persons that had taken the deceased away on that day. In examination by the Prosecutor,

the witness stated that he did not recognize any of the men that took the deceased Evaristo Lopes away on that day.

Comments regarding the testimony of the witness

The testimony of this witness does not prove any of the allegations against the accused in relation to the torture and murder of Evaristo Lopes. Not only did the witness fail to identify the accused as one of the people who took the deceased away on the day in question, none of his testimony proves any of the essential allegations by the Prosecution or any of the elements of the offences charged. The testimony of this witness does not take the Prosecution case any further.

The testimony of Gonsalo da Costa Sanchez

During examination by the court, the witness testified that he joined Team Alfa in 1998. He identified the accused Joni Marques as a member of Team Alfa. He testified that he (the witness) was present at the roadblock when the deceased members of Team Alfa took Evaristo Lopes and that the accused Joni Marques was not present at this occasion. In relation to Joni Marques, the witness testified that when he first saw the deceased Evaristo Lopes at the post, Joni Marques was not present but was instead having a meeting with Rahmat Joaquim in Rahmat's room. He stated that at this time, he saw Mautersa Monis and João Lemurai hit Evaristo Lopes from the front and back respectively. He also stated that he saw that Evaristo Lopes' body was covered in blood. At this time, he went into the room where Evaristo Lopes was, and he was kicked out of the room by Cesar Augusto and he (the witness) went outside. He stated that when he (witness) went back in, Evaristo Lopes was cut up by João Pinto. According to the witness, at this time, Joni Marques and Rahmat were having a meeting in Rahmat's room. After that, the witness went off to watch television and asked his friend to take over (his guard duties). He stated that after that he heard Evaristo Lopes scream out three times that Team Alfa was killing him, and thereafter, he (Evaristo Lopes) was kicked by João Lemorai (João da Costa), Mautersa Monis, and Martinho from BRTT. He testified that all 5 of them kicked Evaristo Lopes to death. The witness went on to state that Evaristo Lopes was not dead yet, so João Lemorai stabbed him through the mouth and into his neck and "after this he was dead". He stated that Joni Marques told them to take the body. The witness testified that those who took the body away included, Joni Marques, João Pinto, Mario Ribeiro, Augustina da Costa, Martinho and Armindu from TNI. He also stated that Syaiful Anwar (Wagirem) was also present. He testified that he was present when the body was taken away for disposal and buried at Sarikulu.

In examination by the Prosecutor, the witness testified that when he saw Evaristo Lopes in the room he had his clothes off, was sitting down with his hands and feet tied up to a spear. He stated that Joni Marques was present together with Cesar Augusto, João Lemurai, João Pinto, Oscar Pinto, Martinho, Gilberto Fernandes, and Mautersa Monis. The witness testified in examination by the Prosecutor that only João Lemorai and Mautersa Monis used an iron bar to beat Evaristo Lopes. He testified that he saw the accused Joni Marques kick Evaristo Lopes in the stomach. In response to a question from the Prosecutor regarding how many times Joni Marques kicked Evaristo Lopes, the witness stated that it was not long. In response to the question whether Joni Marques was present for the whole time in the room, the witness testified that Joni Marques was coordinating with Rahmat in Rahmat's room and that the witness did not know what they were coordinating. He stated that at the time that João Lemorai was asking Evaristo Lopes about his support for FALINTIL, Joni Marques was in Rahmat's room. In response to a question from the Prosecutor regarding whether the witness had seen the moment when Evaristo Lopes was killed, he (the witness) answered in the affirmative:

Prosecutor: "Did you see the moment Evaristo Lopes was killed?"

Witness: "Yes".

Prosecutor: "How was he killed?"

Witness: "After Joni Marques came out of the room, Syaiful Anwar killed him".

Prosecutor: "Did Joni Marques and Joaquim (Rahmat) say anything before they left the room?"

Witness: "They made plans in the room, but don't know what it was about".

Prosecutor: "How do you know they made plans?"

Witness: "Not sure what plans, but they went into the room and came out and ordered Evaristo Lopes to be killed".

Prosecutor: "Did you hear them give that order?"

Witness: "Yes"

Prosecutor: "Who gave the order?"

Witness: "Joni Marques and Rahmat came out of the room and said to kill him. I'm not sure which one gave the order".

Prosecutor: "But one of them gave the order?"

Witness: "Not sure which one but yes".

Prosecutor: "How long after they left was Evaristo Lopes killed?"

Witness: "They came out and said kill him and straight away João Lemurai put a knife through his mouth and it came out here".

In cross-examination by the Defence Counsel of Joni Marques, the witness stated that he was not sure who had given the order to kill Evaristo Lopes and that Joni Marques had not been present when Evaristo Lopes was killed though the witness has seen him kick Evaristo in the stomach. He testified in cross-examination that Evaristo Lopes had not been killed by Joni Marques, but had instead been killed by João Lemorai (João da Costa).

Comments regarding the testimony of the witness.

It is submitted on behalf of Joni Marques that this witness is not credible and that his testimony is unreliable and should be discarded by the Special Panel for the reasons that follow.

The motive to lie

The witness was himself an active member of Team Alfa. He was present and involved in the beating of Evaristo Lopes at the roadblock and participated in his apprehension. He was on this day traveling with one of the accuseds, Syaiful Anwar, the Deputy Commander of KOPASSUS. He was the personal bodyguard of Lieutenant Colonel Rahmat and even shared the same room with him and by his own words (a friend of both Syaiful and Rahmat). He was by his own admission on guard duty on that night and even had his friend take over his guard duties when he went to watch television. The witness has himself not been charged with the torture and murder of Evaristo Lopes, although the evidence clearly shows that he was a participant. In cross-examination, the witness admitted to beating up Evaristo at the roadblock. In order to avoid liability for his own participation in the torture and/or murder and the disposal of the body, the witness clearly has a motive to falsely implicate the accused persons. This is further confirmed by the numerous material inconsistencies and contradictions in the witness testimony.

Inconsistencies in the witness' testimony

The perpetrator of the murder of Evaristo Lopes

The witness testified firstly that Syaiful Anwar killed Evaristo Lopes. He testified that after Joni Marques left the room, Syaiful Anwar killed Evaristo Lopes. Shortly thereafter, he testified that it was João Lemorai who killed Evaristo Lopes following an order from Joni Marques and Rahmat. He stated that although he was not sure who gave the order, Evaristo was killed by João Lemorai ("straight away") immediately following the order. The witness did not explain this inconsistency nor did the Prosecution clarify it through this or any other witness. The identity of the perpetrator of the murder is a most crucial issue that the court must decide upon. It cannot be decided upon on the basis of this witness, who has in the same testimony stated that both Syaiful Anwar and João Lemurai killed Evaristo Lopes as separate acts. This inconsistency is material to the assessment of this witness' evidence.

The presence of Joni Marques during the murder of Evaristo Lopes

The witness gave a conflicting account regarding Joni Marques' presence during the murder of Evaristo Lopes. In the first instance, he (witness) stated that after Joni Marques left the

room, Syaiful Anwar killed Evaristo Lopes. Shortly thereafter, the witness stated that Evaristo Lopes was killed “straight away” after Joni Marques or Rahmat came back into the room and gave the order for him to be killed. The inconsistency is material in that the presence or absence of the accused at the scene of the murder is a most crucial element in deciding his culpability and the form of his participation. In this case, the witness, whilst claiming to have been present at the time, has given conflicting accounts on this important issue. He cannot thus be believed at all. The Special Panel is referred to the cases of Bagilishema, Furundzija, and Akayesu on the issue of presence and its relevance.

Assuming that the testimony of this witness is accepted as credible by the Special Panel

The Special Panel has already been urged to find that the testimony of this witness is not credible and therefore not reliable. In the event that the Special Panel finds the testimony as credible and reliable, it is submitted that the testimony reveals only the following:

That the only participation of Joni Marques in the alleged torture of Evaristo Lopes was to kick him in the stomach “not for long”. This evidence falls far short of satisfying the requirement of torture as a crime against humanity that the accused intentionally inflicted severe pain and suffering to the victim.

The testimony of the witness does not establish the essential element of torture as a crime against humanity that the torture must be perpetrated as part of a widespread or systematic attack against the civilian population.⁴⁷ The concept of widespread has been defined as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of “systematic” may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public and private resources. There is no requirement that this policy must be adopted formally as a policy of a state. There must be some kind of preconceived plan or policy”⁴⁸. Clearly in the present case, it has not been shown that the alleged act of torture was committed as part of a broader policy or plan. In addition, the Prosecution has not shown from the evidence of this witness that the accused Joni Marques was aware that his actions were part of a widespread and systematic attack on the civilian population.⁴⁹ The evidence of this witness did not reveal that the alleged torture of Evaristo Lopes was pursuant to a massive, frequent, large-scale action.... and directed at a multiplicity of victims. The alleged torture was an isolated incident. The legal requirements of widespread or systematic attack are discussed below.

In the circumstances, it is submitted that the evidence of the witness does not take the case of the Prosecution further.

The testimony of Domingos Ribeiro

The witness testified that on the day in question, 21 April 1999 he was with the deceased Evaristo Lopes. He stated that he did not know any of the accused persons in court except João Lemurai. In his testimony, the witness did not implicate the accused in any way.

The testimony of Armindo Suarez

The witness testified that on the day in question (21 April 1999), he was at the Command Post at about 9. 00 p.m. He stated that at the time, he was a member of Team Alfa. The witness stated that he saw through a window at the Command Post, Evaristo Lopes being hit on the genitals. He witnessed João Lemorai cut the head of Evaristo Lopes and Joni Marques cut his hair. He saw João Lemorai tie up the deceased with a plastic cord and then hit him on the back with a white cable. He saw Cesar Augusto stab the deceased on the genitals area

⁴⁷ Akayesu Judgement paragraph 595 which stated that: “The Chamber finds that torture is crime against humanity if the following further elements are satisfied: (a) Torture must be perpetrated as part of a widespread or systematic attack...”

⁴⁸ Akayesu Judgement at para. 580, see also The Prosecutor vs. Ignace Bagilishema ICTR-95-1A-T at para.77 -78

⁴⁹ See Trial Chamber finding in the Bagilishema case.

with an iron rod. As he was afraid, after an hour, he went home to sleep. He returned to the room at about 12.00 midnight and saw Evaristo Lopes dead.

In examination by the Presiding Judge Marcelo da Costa, particularly in response to a request to show the Court the people who were *there*, the witness pointed to Joni Marques, João Lemorai and Gilberto Fernandes.

In examination by the Prosecutor, the witness stated that he did not know the deceased prior to 21 April 1999. The witness testified that in relation to Joni Marques all he saw him do was to cut Evaristo Lopes' hair. He however testified that he saw other persons separately and collectively beat Evaristo Lopes that is, João Lemorai, Joaquim Januari, Gilberto Fernandes, Mautersa Monis and Cesar Augusto. In response to the question from the Prosecutor, the witness stated that all he saw Joni Marques do was to cut the hair of Evaristo Lopes:

Prosecutor: "Did you see Joni Marques beating Evaristo Lopes?"

Witness: "I saw Joni Marques cut the hair of Evaristo Lopes, that's what I saw".

Prosecutor: "Did you see Joni Marques do anything else?"

Witness: "I only saw him cut the hair; I don't know about anything else". (emphasis added)

The witness testified that at approximately 12.00 midnight, he heard a scream and upon going back to the room saw that Evaristo Lopes was dead. He stated that at this time he saw Joni Marques, João Lemurair, Oscar Pinto, and Martinho with Evaristo Lopes. In examination by the Prosecutor, the witness stated that he now recalled that Gilberto Fernandes had told him that Syaiful Anwar had killed Evaristo Lopes:

Prosecutor: "In your statement to CivPol, you said that you were informed by Gilberto

Fernandes that Evaristo Lopes had been killed by Syaiful Anwar who had cut Evaristo Lopes' throat while João Lemurair and Oscar Pinto had helped Syaiful Anwar by holding Evaristo Lopes from behind".

Witness: "The person who said that to me was Gilberto Fernandes. It's been a long time and I have forgotten about what I said".

Prosecutor: "Do you remember that Gilberto Fernandes said those words to you?"

Witness: "Now that you mention it, I remember that Syaiful Anwar is the one who killed Evaristo Lopes. I heard this from Gilberto Fernandes."

Comments regarding the testimony of the witness

The witness testified that he witnessed the "torture" of Evaristo Lopes. He stated that the accused Joni Marques was present in the room and *all* he saw him do was to cut Evaristo Lopes' hair. He (the witness) did not see him do anything else for the entire time he (witness) watched. In considering whether the witness' testimony proves the commission of the crime of torture as a crime against humanity, the Special Panel must in essence consider the elements of the crime and decide whether the evidence shows satisfaction of all the elements. In particular, it is necessary for the evidence to show that:

1. Joni Marques *intentionally inflicted severe pain or suffering whether physical or mental* upon Evaristo Lopes. Clearly, all that the evidence of this witness showed was that he Joni Marques simply cut Evaristo Lopes' hair. The witness did not testify as to any infliction of severe pain or suffering as a result of the cutting of the hair.

2. Evaristo Lopes *was in the custody or under the control of Johni Marques*. This requirement has not been proved in evidence by the testimony of this witness. The witness stated that Syaiful Anwar and Lt. Col. Rahmat Sukanin were present in the room on the day in question. They were clearly the most senior ranking members of KOPASSUS in Lautem District. It is inconceivable that the accused Joni Marques, who was an ordinary member of Team Alfa, would be in charge of the custody and control of Evaristo Lopes.

In conclusion, the testimony of the witness does not show that accused Johni Marques committed the offence.

Testimony of Mario Ribeiro

87. The witness testified that at the time in question (21 April 1999), he was a member of Team Alfa. He had joined Team Alfa in 1987. He testified in examination by the Prosecutor that as members of Team Alfa, their primary responsibilities were to look for FALINTIL and that they received their orders from KOPASSUS. He stated that he was paid Rp. 75,000 per month and also received a 5kg bag of rice for his role as Team Alfa member from KOPASSUS.

The witness stated that on the day Evaristo Lopes was killed, Mautersa Monis, João Lemorai, Joni Marques, Gilberto Fernandes and Oscar Pinto had all gone to arrest Evaristo Lopes. In response to a question from the Prosecutor, how he knew all this, the witness stated that "because they (the accused) were all there and then they went to arrest Evaristo Lopes". During examination by the Prosecutor, the witness stated that he had first heard the name Evaristo Lopes when he was brought to the room. This version was different from the earlier testimony of the same witness who stated that he had first heard the name in the morning when they (accused) had mentioned it. The witness testified that the accused Joni Marques was also in the room and that João Lemorai was the first person to beat Evaristo Lopes. He stated that he did not know on which part of the body, João Lemorai beat Evaristo Lopes, but that "all he knew was that the people in the room beat Evaristo Lopes to death". The witness stated that João Lemorai beat Evaristo Lopes from 10.00p.m to 12.00 a.m. He also testified that Mautersa Monis, Syaiful Anwar and a person named Luis had also beaten Evaristo Lopes. In response to a question from the Prosecutor on whether Joni Marques had beaten Evaristo Lopes, the witness stated that Joni Marques had kicked and beaten Evaristo Lopes to death:

Prosecutor: *"Did Joni Marques beat Evaristo Lopes?"*

Witness: *"Joni Marques also beat him".*

Prosecutor: *"What did Joni Marques do?"*

Witness: *"He kicked and beat that person to death".*

In response to a question from the Prosecutor as to whether Joni Marques had said anything to Evaristo Lopes during the beating, the witness stated that it had been a long time ago, so he did not really know. When the witness was asked whether he had stated to CivPol in his statement that Joni had told Evaristo Lopes that he (Evaristo) was lying and that he had already had contact with FALINTIL, the witness denied that Joni Marques had said those words. In further examination by the Prosecutor regarding why he had said that to CivPol, the witness first said that it had been a long time ago, so he had forgotten and went onto say that Joni Marques had said those words three times. The witness stated that Joni Marques and Rahmat came and woke them up to take Evaristo Lopes and bury him. The witness participated in the burial of Evaristo Lopes.

Comments regarding the witness' testimony

The Special Panel is urged not to rely on the testimony of this witness for the reasons provided below:

Firstly, the witness testified under oath that Joni Marques had formed part of the group that had gone to arrest Evaristo Lopes. This is in spite of conflicting testimony from Moises Lopes and Gilberto da Costa Sanchez and others who stated that he was not present.

Secondly, the witness gave conflicting evidence relating to whether Joni Marques had said to Evaristo Lopes that he was lying. Initially, the witness said that Joni had not said such a thing. Then the witness said that it had been a long time ago and finally changed again and stated that Joni Marques had said this three (3) times. Clearly, the testimony of this witness cannot be relied upon. If the court is to accept the testimony of the witness, which version of the witness' testimony will the Court accept and on what basis? The evidence is manifestly unreliable.

Thirdly, the witness gave very broad and sweeping accounts of what he witnessed. He stated without being specific "they (the accused) were all there and that they beat Evaristo Lopes. He again stated, without being specific, that the accuseds were all inside the room and that they kicked and beat Evaristo Lopes. Most importantly, the witness stated that Joni Marques

had kicked and beaten Evaristo to death. This is all in spite of the fact that the witness stated that he did not witness the murder of Evaristo Lopes and was only woken up to go and bury him. In cross-examination by Defence Counsel Márcia Sarmento, the witness stated that he had watched for 30 minutes and had then gone to sleep. This witness was clearly not a truthful witness. He attributed the death of Evaristo Lopes to the actions of Joni Marques without any basis, as he was not present at the time of the death. In any event, the testimony of the witness conflicts seriously with other witnesses (Armando Suarez, Gilberto da Costa Sanchez and the accused persons on who killed Evaristo Lopes). No other witness other than this witness has testified that Joni Marques killed Evaristo Lopes. This is a serious mistruth, which should affect the witness' credibility and cannot be ignored. He also failed, while "pinpointing" that it was Joni Marques who kicked and beat Evaristo Lopes to death, to say on what part of the body he (Evaristo Lopes) had been beaten. This would be most unlikely for someone who claims to have observed these events from such a close range.

Nevertheless, assuming that the Special Panel accepts the testimony of the witness as reliable, it constitutes proof of commission of the offences alleged:

It is argued on behalf of Joni Marques that even if accepted as reliable, the testimony of the witness does not prove that the accused Joni Marques committed the offences charged. Joni is charged with the torture and murder of Evaristo Lopes as a crime against humanity. The arguments made in relation to the testimony of Armando Suarez are reiterated here. According to the witness, Joni Marques beat Evaristo Lopes. On what part of the body, with what severity, and whether physical or mental injury resulted was not disclosed by the witness. These are crucial issues in a charge of torture as a crime against humanity, which cannot simply be assumed by the Court or inferred. Otherwise, there would be no point in requiring the elements of the offence to be satisfied. In the present case, the testimony of the witness falls far short of satisfying the elements.

In relation to the charge of murder as a crime against humanity, the elements have already been extensively discussed above. It is necessary for the Prosecution to prove as has been held in Akayesu that:

The requisite elements of murder are:⁵⁰

- the victim is dead;
- the death resulted from an unlawful act or omission of the accused or a subordinate;
- at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.

*Murder must be committed as part of a widespread or systematic attack against a civilian population. The victim must be a member of the civilian population. The victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds.*⁵¹

89. These requirements have been reaffirmed in the case of Kayishema and Ruzindana case:

"84. In Kayishema and Ruzindana, the Trial Chamber found that:

"murder and 'assassinat' [the word used in the French version of the Statute] should be considered together in order to ascertain the standard of 'mens rea' intended by the drafters and demanded by the ICTR Statute. When murder is considered along with 'assassinat', the Chamber finds that the standard of 'mens rea' required is intentional and premeditated killing. The accused is guilty of murder if the accused, engaging in conduct which is unlawful:

causes the death of another;

by a premeditated act or omission; and

intending to kill any person or,

intending to cause grievous bodily harm to any person"

⁵⁰ *Id.* 589.

⁵¹ *Id.* 590.

85. *The Chamber concurs with the above description.*"

From the above two decisions of the Rwanda Tribunal, it is clear that the testimony of the witness falls far short of fulfilling these requirements. There is no evidence from the witness's testimony that he (the witness) witnessed the murder of Evaristo Lopes. On the contrary, the witness testified that he was asleep when Evaristo Lopes was killed and that he was only woken up afterwards. The witness was clearly unable to say who exactly killed (*caused the death*) of Evaristo Lopes and by what act (*by a premeditated act or omission*) and that Joni Marques intended to kill Evaristo Lopes. These requirements have clearly not been satisfied. The Special Panel is therefore urged to find, even if it decides to believe the witness's testimony, that the testimony does not disclose that the accused Joni Marques *caused the death* of Evaristo Lopes as is required by the law and that he did it through a premeditated act. In addition, it has not been shown through evidence that he had any such deliberate intent to kill Evaristo Lopes. He cannot therefore be found guilty of the crime of murder.

Testimony of Salvador Amaral

This witness testified that he was present when Evaristo Lopes was killed. He stated that he had joined Team Ratih in 1995. In examination by the Court, he stated that he was there when Evaristo Lopes was beaten and saw João Lemorai carrying a knife and stabbing the victim. He stated that he had himself kicked Evaristo Lopes because he was scared. The witness stated that João Lemorai kicked Evaristo Lopes and beat him with an iron bar and an electric cord/wire. He (witness) testified that he saw Evaristo Lopes bleeding and Syaiful Anwar drinking his (Evaristo Lopes' blood). The witness had at that time walked out of the room, leaving the "torture" going on. The witness testified that the following morning, he asked João Lemorai who had captured and killed Evaristo Lopes and had received information that Oscar Pinto had held his (Evaristo's) head whilst Syaiful Anwar cut his throat. The witness testified that he had participated in the burial of the body. In his initial statement to the Court, the witness testified that the persons who had beaten Evaristo Lopes were João Lemorai, Oscar Pinto, Salvador Amaral (witness), Martinho, Augustinho, and Syaiful Anwar.

During examination by the Prosecutor, the witness stated that on the night in question he had heard a scream coming from a room, which was approximately 5 metres from the room where he was staying.

In response to a question from the Prosecutor regarding who he saw beat Evaristo Lopes, the witness stated that they had beaten him for some time so he did not know who beat him up first. In response to a question from the Prosecutor regarding whether Joni Marques beat Evaristo Lopes, the witness answered that he (Joni Marques) was *involved* in the beating and besides that he cut Evaristo Lopes' hair. The witness stated that he did not see how many times the accused Joni Marques had beaten Evaristo Lopes, although he saw that he Joni Marques had pushed the victim and hit and kicked him all over the victim's body. He testified that they had beaten the victim for a while so he did not know how many times Joni Marques had hit Evaristo Lopes. The witness testified that he saw João Lemorai try to stab Evaristo Lopes and Joni Marques had refused to give him the knife and he (João Lemorai) had kicked Joni Marques. The witness testified that he saw Joni Marques successfully cut Evaristo Lopes' hair. He testified that he was outside when saw Syaiful Anwar cut Evaristo Lopes' throat and he saw Evaristo fall to the ground. He stated that he was 5 metres away from this incident. The witness reiterated that he had personally witnessed Syaiful Anwar cut Evaristo Lopes' throat and that he (Syaiful Anwar) was with João Lemorai and Oscar Pinto. He stated that João Lemorai had held Evaristo's hands whilst Oscar had held his head. In cross-examination by Defence Counsel Siphosami Malunga (on behalf of Joni Marques), the witness testified that Syaiful Anwar had killed Evaristo Lopes:

Defence Counsel (Siphosami Malunga): "*You witnessed the murder of Evaristo Lopes?*"

Witness: "Yes"

Defence Counsel: "*Do you mean you were told or saw it with your own eyes?*"

Witness: "*I saw it with my own eyes.*"

Defence Counsel: "*How far away were you?*"

Witness: "*5 metres away.*"

Defence Counsel: *"Who killed Evaristo Lopes?"*

Witness: *"João Lemurai held his hand; Oscar held his head and Syaiful Anwar cut his throat".*

Defence Counsel: *"Who else was present in the room with Evaristo Lopes when this happened".*

Witness: *"Syaiful Anwar, João Lemurai and Oscar".*

Comments regarding the testimony of the witness

The relevant aspects of the witness's testimony in so far as it relates to Joni Marques are as follows:

In relation to the charge of torture

The witness stated that he saw Joni Marques push, hit and kick the victim all over the body. In spite of the witness testifying that he was only 5 metres from Evaristo Lopes, he could not say how many times or for how long Joni Marques had beaten Evaristo Lopes. He also did not testify about the severity of the beating by Joni Marques or whether it resulted in the infliction of severe pain or suffering. These are essential elements for the crime against humanity of torture. Assuming that this witness is believed on this point, his testimony does not disclose satisfaction of the elements of the offence charged. Indeed, not all beatings constitute torture and the facts must be strictly applied to the law.

The witness testified that he saw Joni Marques cut Evaristo Lopes' hair. It is submitted on behalf of Joni Marques that this *per se* does not constitute torture. For the act to constitute torture there must be infliction of severe pain or suffering whether physical or mental upon the person in the custody of or under the control of the accused. The argument that Evaristo Lopes was not in the custody of or under the control of Joni Marques but Syaiful Anwar and Rahmat is reiterated.

It is argued on behalf of the accused Joni Marques that the requisite legal elements provided by law and further expounded by the International Tribunals for Rwanda and Yugoslavia are not met in the present case. This is, of course, subject to the qualification that in relation to the cases of torture as a war crime in the Tribunals for Yugoslavia, there is an additional requirement for the existence of an armed conflict as well as the existence of purpose; that is, the torture must be committed with the aim of obtaining information. The Defence has already stated that it does not subscribe to the argument that this requirement of purpose in particular forms part of our law.

In this regard, the Special Panel is referred to the case of *The Prosecutor vs. Furundzija-IT-95-17/1 "Lavsa Valley" Appeals Chamber Judgement*. The Defence argues that the acts imputed to the accused Joni Marques are not serious enough to amount to torture. In the Furundzija case, the Appeals Chamber held that:

111. The Appeals Chamber supports the conclusion of the Trial Chamber that "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention", and takes the view that the definition given in Article 1 reflects customary international law. The Appellant does not dispute this finding by the Trial Chamber. The Trial Chamber correctly identified the following elements of the crime of torture in a situation of armed conflict:

(i) *....the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition*

this act or omission must be intentional;

it must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person

it must be linked to an armed conflict;

at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.

Under this definition, in order to constitute torture, the accused's actions or omissions must give rise to "severe pain or suffering, whether physical or mental."

In light of this case, it is not sufficient to constitute torture that the accused merely cut Evaristo Lopes' hair. It may certainly be an unpleasant thing to do, but not all unpleasant things constitute torture.

Testimony of Valério Valente

The witness testified that he was arrested at Tito's shop by some people and taken to the Team Alfa base where he was beaten. He stated that João Lemorai had an instrument and took a knife and asked him (witness) if he was from the forest. He testified that Syaiful Anwar took a cable and beat him with it. The witness stated that he did not admit anything in spite of the beatings. The witness did not identify Joni Marques as one of the persons who beat him. This witness did not testify that he witnessed the torture and murder of Evaristo Lopes and that Joni Marques was a perpetrator in both offences.

Comments regarding the testimony of witness

In relation to the charge of torture and murder of Evaristo Lopes, this witness' testimony does not take the Prosecution case any further. His evidence does not prove the allegations of the Prosecution and has no relevance to the issues.

Count 3 and 4: Crime against humanity of deportation or forcible transfer of population and crime against humanity of persecution respectively

Count 3: Deportation: general remarks

The Prosecutor has charged the accused Joni Marques with the crime against humanity of deportation or forcible transfer of the civilian population from Leuro and other villages. In support of its case, the Prosecution called 11 witnesses. It is most important to note that *none* of the witnesses implicated the accused in this offence.

Count 4: Persecution: general remarks

The primary issue is that none of the Prosecution witnesses implicated the accused Joni Marques in any way relating to this count. Of all the 11 witnesses called, none testified to seeing the accused Joni in his village committing any of the acts alleged. On the other hand, most witnesses called spoke of seeing Carolino Portello committing the alleged acts of burning houses and intimidating the villagers.

In relation to the charge of persecution, it is argued that the Prosecutor failed to distinctly identify which witnesses he was calling to testify on his behalf in each respective count. The Prosecution assumed that all witnesses from Leuro and surrounding villages were testifying in relation to either Count 3 (deportation or forcible transfer as a crime against humanity) or Count 4, persecution as a crime against humanity, without specifying this. The undesirability of this approach cannot be overemphasized. The elements of deportation or forcible transfer are clearly distinct from those of persecution. The Prosecution did not attempt to classify witnesses from Leuro and surrounding villages according to the allegations. As such, the Defence of Joni Marques will analyse the evidence given by the witness as if given in relation to both the count charging deportation or forcible transfer and the count charging persecution. In its motion raised at the commencement of presentation of evidence in relation to Count 3 and 4, the Defence of Joni Marques sought an order from the Special Panel directing the Prosecutor to specify the underlying offences giving rise to the persecution allegations and to outline the rights allegedly deprived by the accused and the names of the victims. The Prosecutor responded by stating that the rights deprived included:

The right to shelter/private dwelling house;

The right to personal property;

The right to physical well-being.

In relation to the identity of victims, the Prosecution stated that they were supporters of CNRT and thus their rights were deprived on this discriminatory basis.

The Defence will analyse the evidence of the witnesses from Leuro and surrounding villages as seeking to prove the deprivation of the rights specified by the Prosecution and enumerated above.

Testimony of Anselmo Correia Pinto

This witness testified that at the time he lived in Leuro Village. The witness testified that his village was attacked by militiamen and his house burnt. He identified the persons he knew in court as Paulo da Costa and Amélio da Costa. He did not identify the accused Joni Marques. The witness however identified the main principal as one Carolino Portello who forced the accused Alarico Fernandes to burn down the witness' house.

In examination by the Prosecutor, the witness testified that on the day on which his own house was burnt, he saw one militiaman, Carolino Portello who was armed with a sword. He stated that he (Carolino) was the only militiaman he (witness) saw on that day:

Prosecutor: "Was he (Carolino Portello) the only militiaman you saw on that day?"

Witness: "He's the only one I saw - and he's the one I saw burn the house. Carolino was militia - he ordered Alarico and Gonsalo to burn houses. The witness stated that Carolino had come to his village at 1 p.m in the afternoon. The witness testified that nobody else had burnt houses and that he (the witness) had not seen what had happened in Soro Kecil as he was afraid to go there.

Comments regarding the testimony of the witness

In relation to Joni Marques, this witness' testimony is exculpatory. He did not identify accused Joni Marques as one of the people who burnt his house or forced any of the villagers out of Leuro. Indeed, the witness did not testify regarding any forcible deportation or forcible transfer of the civilian population (himself included) from Leuro. This witness' testimony did not prove the allegation of the Prosecutor that there were in fact deportations or forcible transfers of civilians from Leuro and other villages and that the accused Joni Marques in any way participated in any of these acts.

The Preparatory Commission has defined the elements of deportation or forcible transfer as follows:

The perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts;

Such person or persons were lawfully present in the area from which they were so deported or transferred;

The perpetrator was aware of the factual circumstances that established the lawfulness of such presence;

The conduct was committed as part of a widespread or systematic attack directed against a civilian population;

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Clearly, the evidence of the witness Anselmo Correia Pinto falls far short of satisfying these elements. The evidence does not prove the first element that the accused Joni deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts. This is the *actus reus* for the offence and it is glaringly lacking.

These elements have been discussed by the Trial Chamber in the case of the *Prosecutor vs. Krstic*:

E. Deportation or Forcible Transfer

The Chamber has found that, on 12 and 13 July 1995, about 25,000 Bosnian Muslim civilians were forcibly bussed outside the enclave of Srebrenica to the territory under BiH control. The transportation of these Bosnian Muslim women, children and elderly from Potocari to Kladanj forms the basis of three counts in the indictment. It is included under the count of crime against humanity for persecutions (count 6). In addition, the Prosecution characterises the act as a deportation constituting a crime against humanity (count 7) or, alternatively, as an inhumane act constituting a crime against humanity (forcible transfer) (count 8).

General Considerations

The Prosecution defines deportation as the “forced displacement of civilians from the area in which they are lawfully present without grounds permitted by international law”. The Prosecution submits that it is “not necessary [...] for civilians to be forcibly removed across a national border in order for the offence to be established”. The Defence defines deportation as the forced removal of a person to another country, and emphasises that not all forcible transfers of civilians are criminal offences.

Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.

On the basis of this decision, the *actus reus* for the crime of deportation in customary international law is the actual involuntary and unlawful movement of civilians from their place of residence. These findings clearly require some positive act on the part of an accused towards the fulfillment of the criminal objective.

Testimony of Olivio Lopes

The witness testified that he was related to the accused Joni Marques in that his (Joni's) father was his father – brother-in-law. He stated that sometime in September 1999, he was standing on the highway when Carolino Portello came and burnt his (witness's) house. The witness stated that Carolino Portello asked him if he wanted to leave and he agreed. The witness stated that after this Carolino Portello had gone to burn Antonio Soriano's house and using the fire from this house burnt other houses. In response to a question from Presiding Judge Marcelo da Costa, the witness stated that he had only seen Carolino Portello on that day:

Presiding Judge (Marcelo da Costa): “*Who did you see on that day?*”

Witness: “*Just Carolino*”.

The witness testified that Carolino had stabbed Antonio Soriano, whilst Paulo stood next to him doing nothing. He testified that apart from Antonio Soriano, he did not know of any other target of Team Alfa. He stated that Antonio Soriano was the only person that was stabbed by Carolino Portello. The witness testified that he was not forced to go to KOM by anyone. He stated that the Village Chief had said that whoever wanted to go to KOM could go and whoever wanted to stay could stay. In response to a question as to whether he himself had wanted to go to Kupang, the witness stated that if there had been a ship he'd have gone to Kupang. The witness testified in examination by the Prosecutor that a total of 6 houses had been burnt in Leuro Village and the reason was that the houses were close to one another:

Prosecutor: “*Why were only 6 houses burnt?*”

Witness: “*The houses were close to one another*”.

The witness testified in cross examination by Defence Counsel Siphosami Malunga on behalf of Joni Marques that the request to go to Kupang was that those who wanted to go could go whilst those who wanted to stay could stay:

Defence Counsel (Siphosami Malunga): “*Were some people asked to leave the village or all people asked to leave?*”

Witness: “*The request was that those who wanted to go could go and those who wanted to stay could stay*”.

The witness stated that the houses belonging to Angelina Soriano, Florindo Soriano, Antonio Soriano, Faustino Fernandes, Laurinda Fernandes and Olivio Lopes (his own) had been burnt. All these houses were very close to each other.

Comments regarding the testimony of the witness

The most significant aspect of this witness's testimony is that it does not implicate the accused Joni Marques in any way. The witness knew Joni Marques prior to the alleged incident and testified that the only person he recalled seeing on that day was Carolino Portello. Thus as regards Joni Marques, this witness does not take the Prosecution case anywhere. The Special Panel is however urged to rely on the evidence of this witness in so far as he testified about the alleged burning of the houses (including his own) and the motive behind this as well as the alleged deportation of villagers from Leuro.

In short, the witness testimony revealed that:

1. In relation to the burning of houses as a form of persecution

The 6 houses that were allegedly burnt by Carolino Portello had caught fire in succession to houses next to them that had caught fire. The relevance of this evidence is that the Prosecutor is alleging a discriminatory intent in the targeting of persons whose houses were subsequently burnt. The allegation is that the houses were burnt because they belonged to CNRT supporters. This witness testified that the reason why the 6 houses (including his own) had been burnt is simply because they were next to each other and as such they caught fire.

It is submitted by the Defence that "persecution" is defined in section 5.2(f) of UNTAET Regulation 2000/15 as follows:

"Persecution means the intentional and severe deprivation of fundamental rights

contrary to international law by reason of the identity of the group or collectivity".

According to the Preparatory Commission's Finalised Draft Text of Elements of Offences, the elements of the crime against humanity of persecution are:

The perpetrator severely deprive, contrary to international law, one or more persons of fundamental rights;

The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such;

Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7, paragraph 3, of the Statute (which is in pari materia with Section 5.1(h) of UNTAET Regulation 2000/15) or other grounds that are universally impermissible under international law;

The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court;

The conduct was committed as part of a widespread or systematic attack directed against a civilian population;

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Thus, the second and third element is not satisfied where an act is indiscriminate in its target and the victims do not constitute one of the recognised protected categories. In addition, it has not been shown through the testimony of this witness that the underlying act of the persecution forms or was committed in connection with any act in Article 7 (Section 5 in UNTAET Regulation 2000/15) paragraph (a) to (k). Finally, the evidence of the witness did not prove that the act was committed as part of a widespread or systematic attack against a civilian population.

The testimony of Lucia Perreira

This witness testified that she was in Leuro during September 1999 and that she only saw Carolino Portello and did not identify anyone else except Paolo da Costa and Amélio da Costa in the vehicle. This witness did not in any way implicate the accused Joni Marques. Her testimony in so far as the case against Joni Marques is concerned does not advance the Prosecution case in any way.

The testimony of Angelina Soriano

The witness testified that on the day in question, Carolino Portello had come to her village in Leuro and beaten and stabbed her husband Antonio Soriano. She stated that she saw Paolo da Costa carrying a sickle. She testified that Carolino Portello had wanted to kill her and her family, but the Village Chief Filisberto Sávio had protected them. She stated that prior to her husband's stabbing by Carolino Portello, she did not see anyone carrying weapons in her village.

Clearly, this witness does not mention Joni Marques in her testimony. Her testimony does not implicate the accused Joni Marques in any wrongful conduct at all.

The testimony of José dos Santos

The witness stated that in September 1999, he lived in the sub-village of Soro Kecil. He stated that the soldiers who were there had come and told them to go to Kupang. He stated that as a result, they had to take refuge in Kupang. The witness testified that the village chief had told them that if they stayed in their villages, the armed forces would come and kill them. He stated that he did not see any of the accused on the day in question, but had only seen Carolino Portello hit Antonio Soriano. In examination by Presiding Judge Marcelo da Costa, the witness stated as follows:

Presiding Judge: *"Did you see any of these people here in court?"*

Witness: *"No. I did not see the people here on that day".*

Presiding Judge: *"Did you see anybody that you recognise on that day?"*

Witness: *"At that time, Carolino hit Soriano and I saw it from my house".*

Presiding Judge: *"Did you see Carolino with anyone?"*

Witness: *"I only saw Carolino; nobody else".*

The witness testified that Paolo da Costa had driven the vehicle that had taken them to KOM and that he did not see anyone else.

Comments regarding the testimony of the witness

The witness did not implicate Joni Marques in any manner whatsoever.

The testimony of Aurito Rodrigues

The witness testified that on 9 September 1999, he received information from Team Alfa that on 9 September 1999, militia would come from Leuro village to Foema and Amokano. The witness stated that in order to avoid this they ran away leaving only the old people in the village. He stated that after he and others had run away to the forest, they continued to assist in the organisation by going back to the village to check on the situation and to prepare themselves and to report to the villagers.

The witness stated that after 13 September 1999, they had noticed that there were several members of Team Alfa and BRTT burning houses in Foema. He stated that 48 houses had been burnt in Foema, whilst 38 had been burnt in other villages. The witness stated that the persons who burnt the houses included Joni Marques, Gilberto, Alarico, Paolo, Amélio and Manuel. He stated that the group forced several families to leave their homes. He testified that after the attack they had evacuated some people to the forest and formed 9 groups to secure the situation. They took dead livestock and distributed it to the villagers in the forest. He testified that several days later, a group from Team Alfa entered Suoro Village and burnt 21 houses. He himself did not witness this incident and was merely informed about it. He stated that he was told to go and check out the situation and found that Chaibacha Village was burnt.

In examination by the Prosecutor, the witness testified that he was the head of the Juventude pro- independence youth group, which was under the umbrella group of CNRT and was responsible for gathering information about what was going on. He stated that he on 9 September 1999, he received information from John da Cruz who had been to Los Palos that the members of Team Alfa from Leuro had a plan. He testified that he knew Joni Marques, Horácio, Carolino, Alexio, and Filisberto, the former head of Leuro Village and also knew from Pam Swakarsa and BRTT, Gonsalo, Alarico, Octavio, Júlio and Carolino. He testified that whilst he knew Joni Marques, he knew about his elder brother Manuel da Costa, who had come to Foema to burn the village of Foema. All together, he had seen 22 people. He stated that in September 1999, he was elected as the Secretary of his Village and he held that

position to date. He stated that on 8 September 1999, at about 7p.m at night, he had witnessed 15 people belonging to Team Alfa, BRTT, and ABRI (TNI), burning the village of Nanakuro. He identified the people as Gonsalo, Júlio and some people from ABRI (TNI). The witness later stated that apart from these three, the other accused persons had not gone to Nanakuro but had gone to Foema. In response to a question from the Prosecutor, the witness stated that he had had only recognised Lamberto, Júlio, Carolino with their heads tied in Foema and after that they had gone to Omokano:

Public Prosecutor: *"Did you see with your own eyes people forced to move in Nanakuro and Foema?"*

Witness: *"Yes, I saw with my own eyes".*

135. And again later in response to a question from the Prosecutor:

Prosecutor: *"Did you see any of the men here move in Nanakuro?"*

Witness: *"I was 100 metres away so could not move from my hiding place".*

Prosecutor: *"Did you see the men in the village of Foema?"*

Witness: *"We recognised KODIM members, but kept hiding there".*

Prosecutor: *"Did you recognise any of the people who went to Foema?"*

Witness: *"It was Lamberto, Júlio, Carolino. They tied their heads and after Foema they went to Omokano".*

Prosecutor: *"What happened in Omokano?"*

Witness: *"They burnt 38 houses"*

Prosecutor: *"Which people?"*

Witness: *"Same people, Lamberto, Juliano and Carolino".*

Prosecutor: *"Were any of the men in Court today in the group that burnt houses in Omokano and Foema?"*

Witness: *"I did not see these people. Maybe Juliano is still in Kupang".*

Prosecutor: *"In statement you said Johni Marques was there".*

Witness: *"He was there in the afternoon at 12 o'clock - between Foema and Omokano".*

Prosecutor: *"What was Joni Marques doing?"*

Witness: *"Júlio said 'let's burn the chickens' and Joni Marques said 'no , don't, leave it like that'".*

Prosecutor: *"Did you see Joni Marques shooting or burning anything?"*

Witness: *"Yes, I saw him".*

Prosecutor: *"What did he shoot at?"*

Witness: *"He did not shoot, but his friends did".*

Prosecutor: *"Did you see Joni Marques burn anything?"*

Witness: *"After the burning, he went with Carolino".*

Prosecutor: *"You said to Court Joni Marques was involved".*

Witness: *"I just mentioned to CIVPOL the names of the people who were in the group".*

Prosecutor: *"Did you see Joni Marques burning houses?"*

Witness: *"Yes, he was walking with group and Júlio said 'let's burn the chickens and Joni Marques said no'".*

Prosecutor: *"Which village did you see Joni Marques in?"*

Witness: *"At the time, I did not see directly with my own eyes, but the group burnt 46 houses".*

During cross-examination by Defence Counsel Siphosami Malunga on behalf of Johni Marques, the witness stated that the people who had come to Foema were Joni Marques, Júlio, Lamberto and Carolino. He stated that in Foema 46 houses had been burnt and he

knew the number because a Non-Governmental Organization had come later and registered the damage. The witness testified that he did not see Joni Marques burn any houses and he only saw him with Carolino heading in an unspecified direction. He stated that all he saw Joni Marques doing was walking away from the village towards the road and onwards to Joni Totito:

Defence Counsel (Siphosami Malunga): "How many houses did you see Joni Marques burn?"

Witness: "I did not see him burning any house. He was with Carolino, heading in an unspecified direction".

Defence Counsel: "So you saw Joni Marques walking away".

Witness: "I saw Joni Marques walking away from the houses being burnt to the main road heading towards Joni Totito where other houses *were to be* burnt – they had not yet been burnt".

Defence Counsel: "Was any house in Joni Totito burnt?"

Witness: "Joni shouted out: 'follow me to Joni Totito'".

Defence Counsel: "But no house was burnt in Joni Totito?"

Witness: "Yes, *not a single house was burnt there*".

Defence Counsel: "Who did you see in *Nanakuro*?"

Witness: "Gonsalo, Xalio with 5 members of TNI carrying magazines".

Defence Counsel: "Did you see *Omokano* burning?"

Witness: "I did not see *Omokano* being burnt".

Defence Counsel: "So you do not know who burnt *Omokano*?"

Witness: "No, I do not know".

Comments regarding the testimony of the witness

Contradictions in the testimony of the witness

This was the only Prosecution witness to implicate the accused Joni Marques in any way. His testimony is at most times shallow and unconvincing. In the first instance, he stated that it whilst he knew Joni Marques, it was his elder brother Manuel da Costa who had come to burn Foema village. He later contradicted himself by saying that it was in fact Joni Marques who had come to the village earlier with other persons. He stated that he watched the burning of the village from a distance of 100 metres and was able to hear a conversation between Joni Marques and Carolino. It is hardly plausible that from that distance, the witness could clearly hear this conversation as he states or let alone clearly establish the identity of the persons there. The witness himself contradicted himself placing Joni Marques and his brother at the scene. The witness stated that from 100 metres away, he heard Joni shout out that he should be followed to Joni Totito and that he saw him walk away. The testimony of this witness is incredulous. The testimony of this witness should be regarded by the Special Panel as unreliable. The witness testified in examination by the Prosecutor that he had only recognised Lamberto, Júlio and Carolino in Foema on that day and these three had their heads tied and went to *Omokano* afterwards:

Prosecutor: "*Did you recognise any of the people who went to Foema?*"

Witness: "*It was Lamberto, Júlio, and Carolino. They tied their heads. After Foema they went to Omokano*".

He later changed his story and said that he had also seen Joni Marques in the afternoon at around 12 o'clock when the village of *Omokano* had been burnt. This version conflicts with his own version in the same testimony that the village of *Omokano* had been burnt by Lamberto, Júlio and Carolino shortly after Foema village at around 7 p.m on 8/9 September 1999. These inconsistencies are material as the presence and participation of accused Joni Marques in the crimes imputed can not be inferred, but must be established beyond reasonable doubt. It is also argued that the witness later testified in cross-examination by the Defence Counsel Siphosami Malunga that he had not personally witnessed the burning of *Omokano* and *Nanakuro*. All his testimony regarding these two villages is therefore unreliable and should be regarded by the Special Panel as such. Interestingly, this witness did not state

to the Court that he had not personally witnessed the burnings of Omokano and Nanakuro until Defence Counsel Siphon Malunga asked him in cross-examination. This is in spite of his sworn testimony relating to events in Omokano and Nanakuro.

Assuming that the court accepts as reliable the testimony of the witness

Without prejudice to its argument that the testimony of this witness should be held to be unreliable, the Defence of Joni Marques submits that in the event that the Special Panel holds that the testimony is credible, this testimony does not disclose any wrongdoing by the accused Joni Marques, and in particular, to the wrongful conduct imputed to him in the charge. The pertinent aspects of the witness' testimony if believed are:

(a) That Joni Marques was part of a group that went to the village of Foema and burnt down some houses. The witness stated several times that Joni Marques did not burn any house. On the contrary, he prevented Carolino Portello from killing a chicken and then walked away from the scene in the direction of Joni Totito Village. Joni Totito Village was not burnt. The witness did not see Joni do anything else. Secondly, the witness stated that a good number of houses were burnt, but did not show that each house burnt had been burnt because its owner was targeted as a member of CNRT. Indeed, for the crime of persecution to be committed, there must be evidence of selective targeting of a group or collectivity on one of the grounds prohibited by international law. Thus, in the present case the evidence led would have to show that the 58 house burnt in Nanakuro belonged to persons specifically targeted as CNRT members. The witness testified that 10 houses were not burnt in Nanakuro/Lali. The evidence would have to prove that the 10 houses selectively not burnt were left out because their owners were "not part of the targeted group"; in other words members of CNRT. This has not been fully established by testimony of the witness even if believed by the court. Needless to say the evidence would also have to satisfy the further elements of crimes against humanity of widespreadness or systematicity and knowledge and intent by the accused Joni Marques that his actions formed part of such an attack.

Taking into account the limited proven participation of Joni Marques - his mere presence at the scene, it can hardly be said that this evidence satisfies the requirements of the law. It is argued by the Defence of Joni Marques that mere presence at the scene of a crime does not give rise to criminal culpability. That presence must have the effect of contributing in some way to the commission of the crime. This assertion is supported by the finding of the Trial Chamber in the case of the *Prosecutor vs. Ignace Bagilishema*⁵² where it was held that:

36. The approving spectator must therefore not have an insignificant status if his or her presence is to have the required effect on the perpetrators, such as encouragement, moral support or tacit approval. As long as the accomplice has the requisite mens rea, which includes knowing that his presence would be seen by the perpetrator of the crime as encouragement or support, all acts of assistance that lend encouragement or support will constitute aiding and abetting, even where the "act" is mere presence. However, liability for aiding and abetting as an "approving spectator presupposes actual presence at the scene of the crime, or at least presence in the immediate vicinity of the scene of the crime. The mens rea of the approving spectator may be deduced from the circumstances, and may include prior concomitant behaviour, for instance allowing crimes to go unpunished or providing verbal encouragement."

The Special Panel is also referred to the dissenting opinion in this case where it was stated that:

B. Presence of a respected authority at the scene of the crime - form of complicity by encouragement.

17. This form of indirect participation in the crimes alleged in the Indictment raises some questions as to the assessment of the requisite link between the presence of the accused and the crimes, which assessment, to date, has hardly been considered by the courts, but which, in my opinion, must be applied to the events that occurred at Gatwaro stadium.

18. In Common Law, the laid down principle is that mere presence of a person at the scene of the crime is not sufficient to entail his criminal responsibility. However, in Regina v. Coney, the High Court (Divisional Court of the Queen's Bench) [14] found that the presence of a spectator at an unlawful prize-fight constituted a sign of encouragement by the accused persons who were among the crowd of spectators, even though they did not directly

⁵² ICTR-95-1A-T

participate in the crime, or verbally encourage it. The Court, accordingly, held that, even if presence in itself was not sufficient, it was evidence of aiding and abetting because, without these spectators, there would have been no incitement to fight. In that case, Judge Hawkins [15] made the following statement, which became a leading opinion in Common Law jurisdictions :

"In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expression, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposefully present witnessing the commission of a crime, and offered no opposition to it, although he might reasonably be expected to prevent it and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

On this basis, it is argued on behalf of Joni Marques that his mere presence in Foema on that day would not give rise to criminal liability.

The testimony of Vito da Costa Almeda

This witness testified that he was born in Nanakuro Sub- Village and that in September 1999, people had come to his village and burnt 58 houses. The witness stated that he knew the people who had come to burn his village and they included Gonsalo, Alarico, Amélio, Paulo, Sérgio, and Horácio. He stated that of the people sitting in the courtroom, none had come to burn his village other than the ones he mentioned. The witness did not implicate Joni Marques so not much time will be spent on his testimony. Needless to say his testimony does not take the Prosecution case anywhere in so far as the case against Joni Marques is concerned. The witness gave relevant testimony that 7 houses had not been burnt in Nanakuro and that he did not know why they had been burnt. He testified that the 58 houses had been burnt because the owners did not want to go to Indonesia. This conflicts with the allegations of the Prosecution that the houses were targeted because their owners were CNRT or pro-independence supporters. The witness testified that, on the contrary, the owners of the 7 houses that were not burnt namely, Vito da Costa Almeda, Domingo Paicheco, Francisco, Nuno, Adriano, Albano, and Cancio were all supporters of CNRT. This evidence negates the allegations of the Prosecution that the only houses targeted for burning belonged only to CNRT supporters as some houses belonging to CNRT supporters were not burnt. An essential element of persecution, being discriminatory intent, is clearly lacking from the testimony of this witness in this regard.

Testimony of José da Costa Nunes

This witness stated that on 10 September 1999 Alarico, Gonsalo and Carolino had come to his village in Luturula. He stated that he did not see anyone else. His testimony does not in any way implicate the accused Joni Marques.

Testimony of Antonio Soriano

The witness testified that he knew Joni Marques, but that he (Joni Marques) did not do anything on that day. When asked what Joni Marques was doing on that day, the witness reiterated that he was just there, doing nothing.

Testimony of Florindo da Costa: regarding Count 3 and 4: Deportation or forcible transfer of the civilian population and persecution respectively.

The witness testified that he saw Carolino burning houses. He stated that Carolino was his brother and that whilst he had not burnt his own house (the witness'), he had burnt other people's houses. He stated that his own house had been burnt after he had left for Kupang. Thus, he did not know who had burnt it.

In examination by the Prosecutor, the witness stated that he had left his village in Leuro because the former head of the village ordered them to go. He testified that the villagers were told that if they did not leave their village, the military of Rajawali would come and wipe them

out. He stated that apart from the village head, only Júlio had told them to leave. The witness stated that the village head had organised people to leave Leuro Village. The witness testified that none of the accused had been involved in organising the villagers to leave Leuro Village.

In cross examination by Defence Counsel Siphosami Malunga on behalf of Joni Marques, the witness stated that Joni Marques did not force the people to leave Leuro Village and that they had already gathered up their belongings and they left.

Comments regarding the testimony of the witness

The witness's testimony excused Joni Marques from any participation in the offence alleged. The witness clearly stated that it was the village head that had told them to leave and that they had been told that Rajawali would come and wipe them out. The witness stated that the people had already voluntarily gathered when Joni Marques had come along in the *Cruzeiro* and ferried some people to 745 Base. This witness's testimony does not take the Prosecution case anywhere.

Testimony of Basilio Fernandes: regarding Counts 3 and 4: deportation or forcible transfer and persecution

The witness testified that he had left his village because the village head had told them that a military force called Garuda would come and kill them. The witness testified that he had seen Joni Marques carrying a gun, although he did not specify on what date. He stated that he did not see anyone burning houses in the village. The witness stated that Joni Marques had not threatened him. He reiterated that nobody told him to go except Filisberto Sávio and that the car he left in was a garbage truck driven by some person unknown to him.

Comments regarding the testimony of the witness

The witness did not implicate the accused Joni Marques in the participation of the alleged crime. Instead, he stated that the only reason why he and others had left the village was because of the Village Head's warning that Garuda would come and kill them. Thus, his testimony does not in any way substantiate the allegation of deportation or forcible transfer by the accused. In addition, the witness stated that he did not see anyone burning the house in the village. His testimony does not in any way support the allegations of persecution.

Count 5: Alleged murder of Alexio Oliveira

151. The accused Joni Marques is charged with the murder of Alexio Oliveira. The allegations are that:

"On or about 11 September 1999, in Los Palos Sub-District, Lautem District, Joni Marques, Paulo da Costa and Gonsalo dos Santos did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Alexio Oliveira, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of Section 5.1(a) UNTAET Regulation 2000/15."

152. To prove the allegation, the Prosecution called 6 witnesses. It is significant to note that none of these witnesses actually witnessed the alleged murder of Alexio Oliveira. As a matter of fact, most of these witness with the exception of Filipina dos Santos and Wayne Fee, were not so sure about what had actually happened to Alexio Oliveira and merely speculated that maybe he was dead.

Testimony of Florindo da Costa regarding Count 5: Alleged murder of Alexio Oliveira

The witness testified that he had seen Alexio Oliveira on or about 11 September 1999. He (witness) had been traveling on the roof. He stated that Joni Marques was riding a motorcycle with Justino. The witness stated that Alexio Oliveira had insisted on coming with Joni and Joni had taken him to the car. The witness stated that he had helped Alexio by placing him in the car. The witness stated that they had all gone to Sawarica where they collected Alexio Oliveira's motorcycle, which Alexio handed over to Joni and they all proceeded to the 745 Base. He stated that at the 745 Base, Joni Marques returned the keys to Alexio Oliveira's motorcycle to him. The witness stated that Joni Marques had gone off to solve a matter involving his (Joni's) brother and a TNI soldier who had assaulted Joni's brother. The witness stated that the PROVOST who had been accompanied by Gonsalo and Paulo had taken Alexio Oliveira. He stated that Alexio had not returned, but Gonsalo had reported later that

night that he was cleaning his sword. He stated that he did not see the sword, as it was already dark. The witness confirmed that the keys to Alexio's motorcycle had been returned to him and that PROVOST had come to take him (Alexio).

The witness did not implicate the accused Joni Marques in the alleged murder of Alexio Oliveira.

Testimony of Basilio Fernandes regarding Count 5: Alleged murder of Alexio Oliveira

The witness testified that he knew Alexio Oliveira as they lived in the same village. He stated that on or about 11 September 1999, he was at the 745 Base in Los Palos when he saw Alexio Oliveira being taken out of the room by Gonsalo, Eurico and Alarico. He stated that he saw him (Alexio) being transferred to the military 745 Base but did not know what happened to him (Alexio). The witness stated that he had seen some Indonesian soldiers in the group that had taken Alexio Oliveira. He identified Gonsalo dos Santos and Alarico Fernandes as the two accused persons in court who had led Alexio Oliveira away on that day.

The witness did not implicate Joni Marques in the alleged murder of Alexio Oliveira.

Testimony of Filipina dos Santos

The witness testified that she was married to Alexio Oliveira and lived in Sawarica Village, Los Palos Sub-district, Lautem. She stated that she knew the accused Joni Marques. She testified that on or about 11 September 1999, she had seen members of Team Alfa surrounding a motorbike. She stated that Joni Marques was sitting on the motorbike. She stated that Joséphine had asked Joni to allow their brother to remain there, so that they could bring him to West Timor. The witness stated that Joni had asked her what was better, to leave him there to be killed or to save him. She testified that after that Joni Marques had left on his motorbike leaving members of his group there with Alexio Oliveira. She testified that she had then asked her husband if she could accompany her and he had refused saying that Team Alfa would come and pick her up on the following day.

During examination by the Presiding Judge Marcelo, the witness stated that she did not know what happened to her husband after he left Sawarica on the motorcycle. The witness testified that as far as she was concerned, Joni Marques had wanted to save her husband and protect him. She stated that the last time she had seen her husband, Joni Marques had already left and he (Alexio) was with members of his group.

Comments regarding the witness's testimony

The witness testified that it was not Joni Marques' intention to harm her husband. She stated that Joni Marques had left her husband in Sawarica and the last time that she had seen him (Alexio), he was in the company of members of Team Alfa, but Joni had already left. She stated that she did not know what had happened to Alexio. The witness did not implicate the accused Joni Marques in the murder of Alexio Oliveira.

Testimony of Jacinto dos Santos

The witness testified that she was the mother of Alexio Oliveira. She stated that she had been with her son Alexio Oliveira when he had been taken by Joni Marques and his colleagues. She stated that she had not seen her son since that day and did not know what had happened to him. Her testimony did not in any way implicate Joni Marques in relation to the offence of murder alleged.

Testimony of Júlio da Costa

The witness testified that he had seen Alexio Oliveira leave with Joni Marques and his group. He stated that he did not know what had happened to Alexio, had not witnessed his alleged murder and did not know who had killed him. The witness testimony did not implicate the accused in any way in relation to the offence charged.

Testimony of Eurico da Costa

The witness testified that he knew Alexio Oliveira before he disappeared. He stated that he did not see Alexio Oliveira being killed and only knew that he had disappeared. The witness stated that he had spoken to Alexio on that day and Alexio had told him that Joni was to be trusted. He stated that he later saw Alexio Oliveira with Gonsalo, Alarico, Amélio and Paulo. He testified that he did not see Alexio with Joni Marques at all on that day. The testimony of

this witness did not in any way implicate the accused Joni Marques in relation to the offence charged. The witness did not witness the alleged murder of Alexio Oliveira and could not say who could have committed it.

The testimony of Wayne Fee

The Prosecution called Wayne Fee who attended the alleged crime scene and conducted an exhumation of the suspected body of Alexio Oliveira. The Defence of Joni does not controvert the testimony of this witness.

Conclusions regarding the testimony of the witnesses

It is submitted that none of the evidence given by any of the witnesses proves that Joni Marques committed the murder of Alexio Oliveira. It should be recalled that in order to be found guilty of this offence, it is necessary to establish all the elements of the offence of murder as formulated in the Preparatory Commission's finalised draft and held in the cases before the Rwanda and Yugoslavia Tribunals. According to the Finalised Draft Text, the relevant elements for murder as a crime against humanity are:

1. *The perpetrator killed⁵³ one or more persons.*
2. *The conduct was committed as part of a widespread or systematic attack directed against the civilian population.*
3. *The perpetrator knew that the conduct was part of or intended to be part of a widespread or systematic attack against a civilian population.*

In order to be found guilty of this offence, all these elements must be proved. It must be shown that the accused participated in any of the prescribed forms relating to individual acts set out in Section 14 of UNTAET Regulation 14 and as discussed in by the International Criminal Tribunal in Rwanda and former Yugoslavia, discussed above, in the murder of Alexio Oliveira by either committing the murder, ordering, soliciting or inducing the commission of the murder, aiding abetting or otherwise assisting in the murder or in any other way contributing to the commission of the act.

The evidence led by the Prosecution does not satisfy any one of these forms of participation. There is no evidence that Joni Marques committed the murder of Alexio Oliveira as required by Section 14(a). There was also no evidence led to prove that he ordered, solicited or induced the murder as required by Section 14(b). There was no evidence led to show that Joni Marques aided, abetted, or otherwise assisted in the commission of the murder as required by Section 14(c). Finally, there was no evidence led to show that the accused Joni Marques in any other way contributed to the commission of the murder of Alexio Oliveira as is required by Section 14(d).

In the absence of evidence showing one of these forms of participation, the accused Joni Marques must be acquitted of this charge.

Count 6: Alleged murder of Alfredo de Araújo and Kalistru Rodrigues at the Coconut Grove

The Prosecution allegations in this count are that:

On or about 21 September 1999, in Los Palos Sub-District, Lautem District, Joni Marques, Alarico Fernandes and Paulo da Costa did, with deliberate intent and premeditation, commit, aid, abet or otherwise assist in the murder of Alfredo de Araújo alias José Lemorai and Kalistru Rodrigues, knowing that it was part of a widespread or systematic attack directed against a civilian population in violation of Section 5.1(a) UNTAET Regulation 2000/15.

The Defence of Joni Marques submits that in relation to the killing of Alfredo de Araújo, the accused Joni Marques admitted to shooting Alfredo de Araújo. It is, however, disputed that such killing constituted murder a crime against humanity and that the evidence establishes this allegation.

In relation to the killing of Kalistru Rodrigues, it is submitted that all the Prosecution witnesses testified that Paulo da Costa had killed him. Joni Marques was not implicated in his murder.

⁵³ The term "killed" is interchangeable with the term "caused death".

Count 7: Alleged murder of the nuns

The accused Joni Marques admitted this charge and not much more will be said about it at this stage. The Defence will seek to address the Court later following its decision on the accused's admission of guilt.

The Defense of Manuel da Costa

"III. ANALYSIS OF THE FACTS.

In accordance with the facts that emerged in the hearing it is necessary for me to provide a critical appraisal of these facts. This analysis or critical appraisal can be conducted on the testimony of several Defendants, namely Paulo da Costa, Manuel da Costa, Hilário da Silva and the Defendant Amélio da Costa with the testimony of the witness João Soares, therefore I state that there was not the slightest intent that crossed the mind of my client Manuel da Costa to commit the murder of the group of nuns, this matter can be compared with the statement of the Defendant Hilário Da Silva which in essence stated *'I went out in the morning until the afternoon with Manuel da Costa collecting rice in the Lautem Rice Warehouse using 4 vehicles going back and forth from Lautem to Com. Manuel da Costa was there to escort the group collecting rice, that is, us ordinary civilians who were starving at the Com harbor; in the afternoon I went with Manuel da Costa while waiting on a truck bearing the name Pulau Jaya we met another vehicle on the road, a minibus bearing the name Cruzero, Joni Marques asked Manuel da Costa to get down and a moment later Manuel da Costa suggested for 3 team Alfa members and 2 civilians to get down and go with the minibus to collect some more rice, as we civilians were yet to get our share of rice we intended to go back and get our share of rice, recalling that the Rice Warehouse was visible so that we went with that minibus to get additional rice.'* (excerpts from Hilário's testimony dated 26th July 2001).

From the aforementioned indications we can deduce that the plan to set up the road block with the intention of killing the group of nuns with deliberate intent belonged to Joni Marques. From the testimony of all the defendants and witnesses taken throughout the trial we were reminded of the tragic murder of people without political affiliations that was committed deliberately. The plan was only known by the sole actor, namely Joni Marques who involved others in the murder, including my client Manuel da Costa who is one of the defendants, who knew nothing of the intention and purpose of that killing. In addition it can not be denied that my client Manuel da Costa was ordered by the Defendant Joni Marques to take up a position behind the road block and point the muzzle of his rifle at the vehicle carrying the victims on the 25 September 1999 at approximately 16.30. However the testimony of the Defendant heard on the 25th July 2001 must be considered, in which it was stated that Joni Marques gave an order in a threatening tone to shoot at the vehicle after Joni Marques had stopped firing at the group of nuns. However my client tried to shoot at the vehicle without aiming at the victims, two bullets jammed and my client tried to stop firing but because he was afraid he would be shot or the lives of his family or himself would be threatened, meaning whether he wanted to or not he had to carry out that order. In military regulations any order from a superior, even if the person giving that order is not a regular commander but in the field can take control of an operation, must be carried out by all the men under his control.

In the case of the murder of the group of clergy on the 25 Sep 1999 Joni Marques was the superior or the person in control of the operation, not a single person opposed orders issued by him even if they too had guns, especially members of Team Alfa including my client Manuel da Costa who was just an ordinary civilian following Joni Marques' group and merely intending to collect rice to keep him and his family alive at the Com harbor. Therefore the order issued by Joni Marques was binding for each person under his authority and those carrying out the order to commit the murders can not be made accountable, the person giving that order must be accountable and that person is no other than Joni Marques himself. This argument can be supported with the fact that at the scene of the murders of the group of clergy, a moment before the group arrived, my client Manuel da Costa was ordered by Joni Marques to take up a position in the middle but when the vehicle arrived the first and second shots jammed and the third shot was fired but was not aimed at the vehicle. The puzzle or mystery in relation to this incident is did the shot fired by my client cause the death of the nuns, priests and ordinary civilians who were traveling with them? My client's first two shots

jammed and one bullet was released but fired indiscriminatory, this occurred after Joni Marques fired shots. After the firing stopped there was not a single person who could proved that there were any victims who died when the first shots were fired. However the testimony of the defendants and the witness Gilberto da Costa João Soares stated that *"after the shooting the deceased Horácio examined the vehicle with his samurai sword in hand then Horácio took out his sword and went to every corner and side of the vehicle against the victims who were in the vehicle. The deceased took petrol and poured it on the victims who were still alive and burnt them alive, these actions can be considered more sadistic and inhumane in comparison with those of the other defendants, nevertheless the person who gave the order to perform those acts is the one responsible for those actions."* After that there was the killing of the nun who was still alive and the other victim, a young boy who was captured before the road block was set up, namely Izino Freitas Amaral, and the car was pushed into the river by the defendants and other young men at the command of Joni Marques. The grenade carried by my client Manuel da Costa was taken by Joni Marques to be thrown at the vehicle that was in the river, my client tried to stop him but he threatened to break my client's leg so that he had to allow Joni Marques to take the grenade and throw it at the vehicle. My client was not implicated in the events that took place after shooting at the vehicle. I argue that this shooting only burst the tire of the vehicle without killing anybody in the vehicle, it was the following sequence of events that killed all the victims who were traveling with the group of nuns. Recalling that from the evidence submitted by the Public Prosecutor there was not one piece of evidence that could prove specifically who committed the murder. The only facts that emerged in the hearing were statements of the witnesses and the defendants who gave credible testimony and evidence that can be used by the Special Panel for Serious Crimes when they hand down their decision.

EVIDENCE

The evidence submitted by the Public Prosecutor consisted of three rifles, one of which had the name Manuel on it and according to the Public Prosecutor that weapon belonged to Manuel da Costa and the Public Prosecutor believed that he admitted such, however we have to remember that my client said that he had possessed an SKS rifle but it had no bayonet, and the court must accept the admission of my client during the final hearing. However, this does not mean that my client denies owning an SKS rifle. Rather my client denies that the aforementioned SKS rifle belonged to him, namely the one with the bayonet and the name Manuel on it which was submitted as evidence, unless the Public Prosecutor proves this by fingerprints that shows that the aforementioned SKS rifle belongs to my client Manuel da Costa, however it is apparent that the Public Prosecutor can not prove this. I feel that the SKS rifle with the name Manuel on it can not be used as evidence by accepting it as the rifle belonging to my client Manuel da Costa. Therefore I reject the evidence in the form of the SKS rifle with the name Manuel on it and request to the Special Panel for Serious Crimes to reject that the aforementioned evidence belonged to my client Manuel da Costa.

MITIGATING CIRCUMSTANCES:

My client has a wife and child and he needs to provide sustenance for them and finances for the education of his children

My client has been polite during the trial

My client has admitted that his actions were at the order of Joni Marques which is supported by the statements of the defendants and witnesses

My client regrets the aforementioned actions but does not admit that these actions were because at his own desire and intent but rather he was ordered by Joni Marques.

DEFENCE

Pursuant to the analysis and facts, consisting of the testimonies of witnesses and other defendants and the mitigating circumstances, therefore I request to the Honorable Special Panel for Serious Crimes to consider and decide the following:

To state that my client Manuel da Costa fired in the direction of the vehicle carrying the group of nuns not at his own desire but at the order from the Defendant Joni Marques

Find that my client Manuel da Costa had no plan to set up the road block and kill the nuns, rather that this plan was that of Joni Marques as the chief of the operation in the field, therefore Joni Marques must be responsible for the actions committed under his command as specified in Section 16 UNTAET Regulation 15/2000

Find that my client Manuel da Costa must receive the fairest possible sentence that is appropriate

Find that pursuant to Section 16 UNTAET Regulation 15/2000 my client Manuel da Costa is acquitted from the charge of premeditated and deliberate murder of the group of nuns on the 25th September 1999

The cost of the case shall be borne by the state”

The Defense of João da Costa

626. The Defense on behalf of Gilberto Fernandes weighed up the evidence as follows:

“In order to clarify the defence of João da Costa Lemorai, we will examine separately each one of the charges.

2.1. The murder of Evaristo Lopes

The General Prosecutor included João da Costa Lemorai in the first count of the Indictment, charging him of murder, a crime against humanity, consider that he participated in the killing of Evaristo Lopes. The Prosecution considered that the conduct of João da Costa Lemorai towards Evaristo Lopes was such that he intended to cause his death and he knew that he was going to be killed. However the Prosecution must have misunderstood the factual elements, otherwise João da Costa Lemorai would never be charged with this crime.

For João da Costa Lemorai to be accused and be convicted for the murder, as a crime against humanity, of the victim Evaristo Lopes the following requisites have to be fulfilled:

1st - João da Costa Lemorai caused the death to of Evaristo Lopes.

2nd - His conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3rd - João da Costa Lemorai knew that his conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.

The long roll of witnesses that stand before the Court to testify about the murder of Evaristo Lopes proved that what happened that day is still unclear. Reading those statements is the best illustration of the thought «each witness each story». Who will the Court trust to establish the factual elements? The Court will trust Moises Lopes, Rudi de Jesus and Domingo Ribeiro that betrayed Evaristo Lopes by handing him over to the Kopassus commanders? Or will trust the former Team Alfa militias Gonçalo da Costa Sanchez, Armindo Soares, Mario Ribeiro and Salvador Amaral, since as militia members were present in the crime scene and some of them helped in the beating of Evaristo Lopes? Moreover, what can be taken out from the witnesses' statements if those statements don't match each other?

João da Costa Lemorai recognized that he was present at the roadblock when Evaristo Lopes was captured and taken to the Base, following the Kopassus commander Syaful Anwar orders, who was also present inside a car watching and controlling the arrest. João da Costa Lemorai also admitted that at the Base he did hit Evaristo Lopes with an electric cable.

What the Prosecution didn't prove is that with his conduct João da Costa Lemorai aided, abetted or assisted in the murder of Evaristo Lopes. It was clear that who committed the murder was the Kopassus commander Syaful Anwar. But who knew at that time that Syaful Anwar' intention was to kill Evaristo Lopes?

For João da Costa Lemorai to be convicted for aiding, abetting or assisting in the murder of Evaristo Fernandes, is necessary to prove the *mens rea*, the mental element. According to Section 18 of the UNTAET Reg. No. 2000/15, the conduct of João da Costa Lemorai must have been carried out with intent and knowledge of the killing, despite the fact that the perpetrator was another person. In other words, João da Costa Lemorai must have acted with intention to cause the death and should have been aware that the killing was going to occur in the ordinary course of the events. Only in those circumstances can João da Costa Lemorai

be convicted with the murder of Evaristo Lopes. However the prosecution failed to prove the mental element. No witness during the hearings showed that Evaristo Lopes was captured to be killed. There was no previous similar situation occurred in the Kopasus Base that could be a sign or a precedent capable of showing the intention of the Kopasus commanders regarding Evaristo Lopes. Nothing was brought to Court proving that the Kopasus commanders said to or shared with the members of Team Alfa that they intended to kill Evaristo Lopes.

2.2. The torture of Evaristo Lopes

The second count set forth against João da Costa Lemorai in the Indictment is the torture of Evaristo Lopes as a crime against humanity.

For João da Costa Lemorai to be accused and convicted for torture, as a crime against humanity, of the victim Evaristo Lopes the following requisites must occur:

1st - João da Costa Lemorai inflicted severe physical or mental pain or suffering upon Evaristo Lopes.

2nd - Evaristo Lopes was in the custody or under control of João da Costa Lemorai.

3rd - Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

4th - The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5th - João da Costa Lemorai knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

According to the definition foreseen in Section 5.2 (d) of UNTAET Reg 2000/15, torture «means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent or incidental to, lawful sanctions».

João da Costa Lemorai didn't use any weapon or instrument to beat Evaristo Lopes. Recalling his statement João da Costa Lemorai never denied he had beaten Evaristo Lopes, and only use an electric cable. The beating of Evaristo Lopes was ordered and supervised by the Kopasus commanders Syaful Anwar and Rachmad.

Furthermore, Evaristo Lopes was not in the custody or in the control of João da Costa Lemorai. He was in the custody and control of the Kopasus commanders. In accordance with the definition of torture, it is a requisite to convict someone for the crime of torture to have the control over that person, what was clearly not the situation of João da Costa Lemorai.

2.3. The murder of the clergy group

The last incident in which the Team Alfa was involved as perpetrator in September of 1999 was the brutal and atrocious attack carried out against a car transporting a group of clergy women and men. What happened that day is impossible to forget and hard to describe. And the same can be said about what happened two days later, as revenge, with the ambush organized and executed by the Falentil soldiers against the Team Alfa members. Unfortunately the events of the 27th of September will never be taken before a Court and the ones responsible for them will never be accountable for their actions. Different criteria for similar situations. However, is undeniable that the events occurred the 27th of September don't change the shocking nature of the crimes committed the two days before, the 25th of September.

João da Costa Lemorai participated in the roadblock set up to oblige the car with the clergy group to stop. João da Costa Lemorai told the Court his version of the incident and described his role in the operation commanded by Joni Marques. João da Costa Lemorai freely admitted to have killed one of the men travelling in the jeep.

When doing the statement before the Court regarding this count, João da Costa Lemorai tried to plea guilty assuming the facts of the incident. The plea of guilty could not be accepted by the Court because João da Costa Lemorai didn't recognize and refuse to acknowledge all the elements of crimes against humanity. In other words, João da Costa Lemorai tried to plea

guilty of murder, as foreseen in the Penal Code of Indonesia, but could not plea guilty of crimes against humanity.

In this count, when considering the individual responsibility of the other accused, the Court cannot ignore the plea of guilty made by Joni Marques, and accepted by the Court. In that plea of guilty Joni Marques recognized that he planned alone the ambush and that at the road he gave all the orders to the men travelling with him in the red minibus. Joni Marques, as he admitted before this panel, is the principal perpetrator, the main responsible. And that fact shall be taken into consideration in assessing the responsibility of the other men involved, including João da Costa Lemorai.

3. Conclusion

3.1. The murder and torture of Evaristo Lopes

In conclusion, and taking in consideration all the facts brought before Court by the accused statements and the witnesses testimony, João da Costa Lemorai cannot be convicted for any crime against humanity, since the mental element of those crimes is absent in this case. In relation to the murder of Evaristo Lopes, João da Costa Lemorai must be acquitted since he did not participate in the murder, nor he knew that his actions were part of a scheme prepared by Kopasus to kill Evaristo Lopes. Finally, the only conduct that can be attributed to João da Costa Lemorai is the beating of Evaristo Lopes at the Base. So, if the law is to be applicable in a correct and strict mode, João da Costa Lemorai can only be convicted in this incident for the crime of maltreatment of Evaristo Lopes foreseen in the Penal Code of Indonesia.

The Defence of João da Costa Lemorai requests the Special Panel for Serious Crimes of the Dili District Court, taking into account the evidence brought to Court:

To decide the acquittal of João da Costa Lemorai regarding the first count of murder of Evaristo Lopes;

To consider the beating of Evaristo Lopes by João da Costa Lemorai as a crime of maltreatment in the terms of the Penal Code of Indonesia, and consequently to acquit João da Costa Lemorai from the charge of torture.

3.2. The murder of the clergy group

In conclusion, João da Costa Lemorai did not commit any crime against humanity, considering all the elements of such category of crimes that must be proved in Court by the prosecution. The mental element demanded by law is lacking in João da Costa Lemorai conduct, and the prosecution failed to prove it simply because it does not exist such knowledge. João da Costa Lemorai participated in the ambush, and his role was freely explained in Court and corroborated by the other co-accused. João da Costa Lemorai tried in Court to plea guilty for his direct responsibility in the death of one of the victims. And we cannot forget that João da Costa Lemorai saved the life of José Pereira, telling him to escape when he jumped to the river.

The Defence of João da Costa Lemorai requests the Special Panel for Serious Crimes of the Dili District Court, taking into account the evidence brought to Court:

- To consider the circumstances in which the crime was committed, the global responsibility accepted by Joni Marques in the plea of guilty, and the free and willingness of João da Costa Lemorai in telling the court his involvement, when deciding the sentence to be imposed.”

The Defense of Paulo da Costa

627. The assessment on the evidence on behalf of Paulo da Costa came as follows:

“(…) We submit that all of the witnesses’ testimony demonstrated that none of the accused persons threatened, ordered or forced the people to leave their homes or villages, and that no accused was a militia member or carried weapons, as charged in the count against them. This information are proved by the testimonies of Anselmo Correia Pinto, Lucia Pereira, Olivio Lopes, Angelina Soriano, José dos Santos, José da Costa Nunes and Joaquim Fernandes.

It is remarkable that just one witness testified that the accused Paulo da Costa and Alarico Fernandes burned all the houses in their villages. Nevertheless, the credibility of this testimony is promptly challenged, given that one of the witnesses gave a general description only and failed to describe or specify the facts in relation to the conduct of Paulo and Alarico at the time. The witness only said in general that all of the accused persons burned the houses and his car. There is no actual likelihood that the witness could have seen, during night time or in the light of day, who set fire to 58 houses from the site where the witness allegedly was watching the whole scene of the village – according to him, from the garden of his house. Thus, his testimony has no legal value since the witness is not telling the truth at all.

We may only treat testimony as reliable and as humanly realistic if it has no inconsistencies. Otherwise it must be considered as untrustworthy and not impartial. Here in this case, it is not true that Alarico Fernandes, on that night, was burning houses at the witness' place, since he was in another village, according to what was stated by the accused and other Defendants.

It is also not true that Gonsalo dos Santos, Amélio da Costa and Paulo da Costa burned houses on that night, simply because they were on the road under orders from Sergio, Carolino and Horácio - these latter persons being the actual perpetrators of the burning.

The principle of the presumption of innocence must not be set aside. We may not assume that Alarico and Paulo committed all the offences with which they are charged simply because they were unwillingly following some Team Alfa members. Still regarding this principle and considering that the statements of the accused are trustworthy, it has to be highlighted that the testimony of the witness is not impartial and is aimed at incriminating people, regardless of whether or not they directly participated in some of the acts.

Furthermore, that witness – Pinto da Costa – is the one who is directly incriminating the Defendants Paulo and Alarico in the burning of the houses, a testimony that does not match any of the other testimonies. Instead, other witnesses never mentioned that the accused had burned houses.

Some witnesses report:

About Paulo da Costa: that he was driving a red minibus, but they remarked that he did not participate in forcing the people to get on the vehicle.

About Alarico Fernandes: that he burned two houses, but that there were no victims in this event. This fact is acknowledged by the accused with the caveat that he did so unwillingly. He was forced to do it; otherwise his life would have been at risk. Thus, the accused was in the same position as the villagers. He also was a victim; not the perpetrator of the crimes.

It has to be highlighted that there is no conclusive evidence showing that the Defendants were armed. On the contrary, all the witnesses' testimonies are decisive in concluding that they were unarmed. They stated that the Defendants were holding machetes, but inside the cover. These instruments can not be seen as weapons, since they are regularly used by the Timorese people in countryside as a basic working tool. It cannot be deemed, therefore, that the accused were carrying machetes for the purpose of committing crimes and or for self-defense.

The Defense rejects this charge against the Defendants, since all the witnesses' testimonies clearly show that they did not release any order. Nor did they force the population to leave their homes or help or collaborate in the militia activities. Neither were they armed during these events. The testimonies explain that the Defendants never forced or ordered people to leave their homes or villages.

For the aforementioned reasons, the counts relating to my clients are challenged based on the evidence produced at trial. The facts as shown by the evidence do not satisfy the elements of the crime referred to by the Prosecution.

COUNT OF MURDER OF ALEXIO OLIVEIRA – THE CHARGES AGAINST PAULO DA COSTA

The Defense absolutely rejects the full charges against Paulo da Costa, since the testimonies and other evidence during the trial have demonstrated that the Defendant was not involved in the death of Alexio Oliveira. He did not commit the crime of murder, and he certainly did not

commit, a crime against humanity. The Defense for Paulo da Costa makes the following submissions:

Paulo da Costa was neither a militia member, nor belonged to any Indonesian military organization. Therefore, he was unarmed. He just drove the car used by the militia and Indonesian soldiers to carry food and sometimes the population.

Similarly, it has to be emphasized that the Defendant was not empowered to make decisions in relation to the acts of other military or civilian persons. The evidence produced during the trial demonstrates that the Defendant was a civilian and was always known to be so.

The Prosecution makes a mistake in alleging that Paulo da Costa committed the crime of murder as a crime against humanity in relation to the death of Alexio Oliveira since there is no evidence leading to the conclusion that such a crime was committed by the accused.

The evidence produced at trial, as confirmed by the Defendant, only shows that, at the time of the death of Alexio Oliveira, Paulo da Costa was driving the vehicle which moved several people, among them Alexio Oliveira, to the 745 Military Base. What has been proved is only that the Defendant was present at the moment the Indonesian soldiers led the victim to the back of the base, but there is no evidence that the Defendant had been present, in the company of Indonesian soldiers, at the time of the disappearance or killing of Alexio Oliveira. On the contrary, all the witnesses unanimously stated that Paulo was present just until the moment the Indonesian soldiers went indoors at the Base facilities in the company of Alexio.

From the testimony before the Panel given by Filipina dos Santos, Jacinta dos Santos and Julio da Costa, it was proven that none of them saw Paulo da Costa at the time Alexio Oliveira was taken indoors at the 745 Base. Neither could they testify about what happened at the Base from that time onwards, since, at the relevant time, they were already at home.

I will now take the opportunity to comment about the people who were present at the time Alexio Oliveira was at the 745 Military Base: Florindo da Costa and Eurico da Costa

The testimony of Florindo da Costa:

The first point to clarify and to be concluded from the testimony of the witness Florindo da Costa is that, when Alexio Oliveira arrived at the 745 Military Base, Alarico Fernandes had already been at that place.

Alarico Fernandes did not follow the Indonesian soldiers. Gonsalo dos Santos, Paulo da Costa and Horácio remained together with Alexio Oliveira and the Indonesian soldiers at the entrance to the building. And Alarico, in the company of the witness, went to the other site inside the Base for the purpose of following Joni Marques, who was supposed to deal with an affair related to his brother. Alarico Fernandes did not witness the facts relating to the death of Alexio.

This witness' testimony matches with the statement of the accused on the point related to the persons who followed the Indonesian soldiers together with Alexio Oliveira: Paulo, Gonçalo and Horácio. The witness also states that these three men returned later, but no longer in the company of the Indonesian soldiers and Alexio. However, the witness does not know whether Gonçalo, Paulo or Horácio killed or was in attendance at the killing of Alexio.

This witness' testimony is clear and consistent, and is in harmony with the versions presented by the Defendants involved in the count of the death of Alexio Oliveira, in concluding that Paulo da Costa was not the person who ordered or forced Alexio Oliveira to be taken from his village to the 745 Base. Given that Florindo followed Joni Marques to another site inside the base, he could no longer testify in relation to the facts from the moment Alexio remained in the company of Paulo, Goncalo and Horácio, and before being taken by the Indonesian soldiers. About 20 minutes after those events, Florindo witnessed the arrival of those persons at the previous site, but no longer in the company of the soldiers or Alexio.

In summary, this witness indeed cannot say anything about what happened to Alexio Oliveira.

The testimony of the witness Basilio Fernandes

This witness' testimony does not deserve any credibility because it is full of inconsistencies, as we can see from the following:

Once asked questioned about what Alarico Fernandes exactly did upon his arrival at the Base, the witness replied that he did not know. However, he later testified that Alarico, with Eurico, Gonsalo, Horácio and Manuel, went to hand over Alexio Oliveira to the Indonesian military.

Really? If the witness does not know exactly what Alarico Fernandes did when he arrived at the Base, how can he state later that Alarico handed over Alexio Oliveira to the Indonesians?

The witness stated that Alarico Fernandes and Eurico da Costa were two of the persons who led Alexio Oliveira and handed him over to the Indonesian soldiers. As stated above, those two persons went together with Joni Marques to another site before the Indonesians took Alexio Oliveira to the back of the Base.

Another inconsistency is found when the witness states that no one in the said group committed any act to force Alexio Oliveira to go with the Indonesians, like pushing or grabbing him violently; he was not forced. Therefore, under such circumstances, one can not describe Alexio as having been "handed over".

It has to be pointed out that the Defendants Paulo and Gonsalo stated that this witness, Basilio Fernandes, said to an Indonesian soldier named Otobere that Alexio Oliveira was CNRT member and FALINTIL supporter. The soldier replied to him that he should go to the back to register Alexio for security reasons.

Thus, the witness' contradictions are an attempt to silence the truth of his own participation.

This witness' testimony is barely clear. It does not describe in detail the circumstances and is continuously in discrepancy with the Defendants' statements and other testimonies. Furthermore, he was not an eyewitness to what happened to Alexio Oliveira after the Indonesian soldiers took him to the 745 Base backyard.

Given the above facts, it is easily deduced that Paulo da Costa had nothing to do with the facts and the death of Alexio Oliveira. It is unfair to charge someone with murder or participation in such a crime based only on the fact that he was driving the vehicle in which many different people were traveling. Specifically in the case of Alexio Oliveira, it has yet to be proved whether he was in the car of his own free will or forced by the Team Alfa commander. It is very clear that Paulo da Costa did not force Alexio to get in the vehicle and did not hand him over to the Indonesian soldiers.

Based on these grounds, the Defense requests to the Court to acquit the Defendant of the count of murder.

COUNT OF MURDER OF ALFREDO ARAUJO AND KALISTU RODRIGUES – THE CHARGES AGAINST PAULO DA COSTA AND ALARICO FERNANDES

The Defense of Alarico Fernandes rejects the charge of murder of Alfredo Araújo and Kalistu Rodrigues.

The witnesses and the statements of all the other Defendants agree on the fact that Alarico Fernandes was present at the time of the killing of Alfredo Araújo and Kalistu Rodrigues.

But they are very conclusive, on the other hand, in showing that Alarico Fernandes did not commit the crime, did not assist in committing the crime, and had no participation in these events at all.

On that day, Alarico Fernandes was forced by the Team Alfa militia members to go to the scene of the incidents, in order to collect food for the refugees in Com. Therefore, he was only an eyewitness to the facts, and had no direct participation in them.

Thus, it can not be said that Alarico Fernandes, with deliberate intent and premeditation, took the life of those two persons. Likewise, it can not be said that he had any involvement in the crime, since he did not know the militia commanders' plans that he was ordered to follow. The reason for the accused going to the site of the incident was not directly linked to what actually took place there.

This assertion can be proved through the statements of the Defendants and other witnesses who were present during the facts, like Joni Marques, Paulo da Costa, Eurico da Costa and Carlito Viegas, whose testimonies match the assertion that Alarico Fernandes did nothing at the time of the killing of Alfredo de Araújo and Kalistu Rodrigues.

This was proven during the trial sessions and is grounded in Section 18 of Regulation 2000/15, which provides: *“A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panel only if the material elements are committed with intent and knowledge”*.

Alarico Fernandes was present during the facts related to this count only because he was forced and taken by the people who were leading the militia group by ordering the refugees to follow them; not because it was his intent or knowledge to do so. Therefore, his conduct can not be deemed as participation, collaboration or deliberate intent or premeditation.

About this same issue, we have to consider that the word “knowledge” means *awareness that a circumstance exists or a consequence will occur in the ordinary course of events*. Section 18.3 Ibidem.

Therefore, Alarico had no knowledge about what was going to happen when he was ordered by the commander of the militia group to look for food in the Coconut Grove. In accordance with what Paulo da Costa and he himself stated, Alarico was only a witness to the events on that day and had no direct participation in them.

In summary, it has not been proved, during the trial hearing, that the Defendant Alarico Fernandes committed the crime of premeditated murder, or had any participation in the events.

In the case of the Defendant Paulo da Costa, it must be concluded that he had no involvement with the killing of Alfredo de Araújo.

The same witnesses’ testimony proved that Paulo da Costa did not hurt or shoot at Alfredo de Araújo.

The Defendant Paulo da Costa was present during the events because he was ordered by the militia commander to follow them in searching for food for the families staying at the 745 Base.

As his occupation was a driver, he was ordered by the militia commander to take the population to different locations.

The Defendant Paulo was taken by the militia to work as a driver.

Come now! The Defendant could not refuse his assigned tasks; otherwise he would risk having himself or his family killed or physically harmed by the Indonesians and the militias, similar to what had happened to other persons who refused to collaborate as ordered.

Paulo da Costa was the last one to shoot at Kalistu Rodrigues, but he definitely did not act of his own free will as can be seen from the following:

It has already been stated in these closing remarks that Paulo was unaware of the planning of the actions being tried and of the criminal activities of the militia. He acted under pressure and duress from the militia commanders when he had to shoot at the victim Kalistu Rodrigues.

It should also be noted that the files do not contain any medial report about the cause of death of Kalistu Rodrigues. Therefore, it is not possible to determine which wounds caused the death of Kalistu.

The statements of the accused Amélio, Alarico, Carlito Viega and Paulo himself are unanimous in reporting that the victim was already hurt before Paulo shot him. Nevertheless, none of them knew exactly about the real condition of Kalistu before Paulo shot him.

Thus, there are still doubts remaining about who is actually responsible for the killing of Kalistu Rodrigues.

Similarly, the testimonies given by the witnesses Carlito Viegas and Eurico da Costa, are only partially reliable, since they, like the other Defendants, were present during the events and, regardless their involvement, are obviously afraid to speak up and report about the true sequence of the events because they might suffer the same fate as Alarico, Hilário and Amélio, who have been under arrest for more than 2 years and are deemed as highly dangerous persons, in spite of having no participation in the crime.

By assessing all these inconsistencies, it is easy to conclude that the conduct of Paulo da Costa in relation to these events is unclear and no conclusive evidence was produced at the

trial hearing. On the contrary, only doubts were raised about the crime and who was responsible for it.

It is unavoidable to refer, in this case, to the general legal principle of reasonable doubt – if a doubt exists, the benefit of that doubt must always be given to the Defendant.

In this case, it can not be said for sure which one of the wounds caused the death of Kalistu. There is also a doubt about the participation of the Defendant at the precise time of the death. It can not be said that the Defendant Paulo caused the death of Kalistu.

The principle of reasonable doubt favors the accused every time there is a lack of evidence as to his culpability. The appropriate evidence for that is the forensic report, which has yet to be produced. We do not have one. Such a report would be the appropriate accurate evidence on which to base the count submitted by the Prosecution against Paulo da Costa as the main person responsible for the death of Kalistu Rodrigues. *Section 19.7 of UNTAET Regulation 30/2000.*

Another relevant issue to evaluate is whether Paulo da Costa had the relevant intent or premeditation to kill.

As above mentioned, he was forced. In this case, there is no guilt, since he did not desire the result, but acted under duress from the militia commander. He was forced to act with no intention other than to defend his own physical well-being or his own life. In addition to duress, we see the element of fear, since the accused knew that many people had been killed for the same reason at that stage in the struggle for independence.

Thus, where there is no desire to commit a crime, there can be no guilt. *Lectures of Criminal Law – Part I, Cavaleiro de Ferreira Manuel, Editorial VERBO.*

It is relevant to mention that the militia commanders imposed terror on the population, who faced terrible risks if they refused orders. People lived under constraints and everyone hoped that they would not be singled out by one of the militia commanders.

Therefore, it is a mistake to deem that a person, acting under a feeling of fear or being afraid of an external source as happened in the case of the death of Calisto Rodrigues, should be excused only either if he or she had a gun pointed at his or her head, or if the threat immediately comes into effect.

Paulo da Costa was not exempt from this overall fear. Therefore, for the reasons stated above and because he knew the background and what happened to those who refused similar orders, he carried out the orders given to him.

In summary, it has been proved, during the trial hearing, that the Defendant Alarico Fernandes did not commit the crime of murder with premeditation, and had no participation in those events.

Consequently, the Defense requests the Honorable Court to acquit this Defendant in the count of murder.

In this case, it has not been proved that Paulo da Costa participated in the crime of murder with intent or premeditation, because:

The Defendant fired the shot under duress; not by deliberate intent;

He had no intent to kill because the order given by the militia was to follow them and collect food;

It has not been determined which wounds caused the victim's death.

Based on all the above grounds, I request to this Honorable Panel to acquit the Defendant Paulo da Costa on the count of murder. In the event that the Court finds him guilty, I request that consideration be given to the mitigating circumstances that caused him to fire the shot.

Lastly, it is obvious that this crime can not be classified as a crime against humanity since it is not provided for by Section 5 of UNTAET Regulation 2000/15: *For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population with knowledge of the attack: (a) Murder...(b)..."*

Upon assessing the facts in comparison with the section above, we conclude that Paulo da Costa has no previous convictions and did not commit any systematic attack against the civilian population.

Instead, he just followed a militia group under their orders, not by his own desire or by agreeing with their actions.

He was not aware of any of the militia plans.

His job was as a driver and he belonged to the civilian population; not to an organized militia group.

Therefore, the prerequisites provided for in Section 5 above are not satisfied and the charge brought by the Prosecution is incorrect. This is not a matter to be tried as a serious crime, but rather as an ordinary crime.

Accordingly, the Defense requests this Honorable Court to acquit this Defendant on the count of murder.

COUNT OF MURDERS OF CLERGY, AND AGUS MULIAWAN, AND IZINHO FREITAS AMARAL AND OTHER PERSONS ON 25 SEPTEMBER 1999 – CHARGES AGAINST PAULO DA COSTA

The Prosecution submits a charge against the Defendant Paulo da Costa, in which he is allegedly involved in the killings of 9 people, a conduct provided as an offense by Section 8 of Regulation 2000/15 and by Article 340 of Indonesian Penal Code.

From the testimonies produced and the statements of the Defendants during the trial, it is easily concluded that this Defendant had no participation in the facts described under this count.

We explain why:

1. The Defendant was ordered to follow the militia members to pick up rice to feed the population at the 745 Base and themselves. The red minibus driven by Paulo da Costa made that journey.

The statements given by the Defendants Gonçalo dos Santos, Hilário da Silva, Amélio da Costa and Paulo da Costa, and by the witnesses Carlito Viegas and Eurico da Costa, assert unanimously that the accused Gilberto da Costa and João Soares went along with some militia members to pick up rice in Lautem.

Likewise, those persons, who belonged to the civilian population, state that they had no idea about what was going to happen halfway between Lautem and Ira-Ara and they only realized it during the occurrence of the events. They only obeyed the order to stop the vehicle on the road and afterwards they noticed that the nuns and other persons were in it.

Those persons also stated, as well as Paulo, that they just pushed into the water the car which carried the nuns and other persons after all of them had been killed by the militia members. This act was committed to fulfill an order from the militias. Therefore, they cannot be responsible for the death of those people because when they pushed the vehicle into the river, the victims appeared to have already died. We are dealing with an impossible crime, since you can not kill someone who is already dead.

The forensic reports conclude that the death of all those people resulted from gunshot wounds. But the Defendant Paulo da Costa had no gun.

Similarly, it has to be considered that the Defendant never had the intention to cause damage and admitted the facts as they really occurred, and never hid the truth.

The fact that this person was present at the events reported by the Prosecution does not render him guilty of the crime of murder "*with deliberate intent and premeditation*", as stressed in the count. This charge can be brought against those persons who actually committed the murders, but not against this Defendant, who had no idea about what was going to occur.

Based on these grounds and taking into account all the facts which were proved during the trial hearing, there is evidence that the Defendant Paulo da Costa did not commit or have any participation in the murders of those people. He just acted, as in previous events, by following

the orders given by the militia commanders. If he did it, he would be burdened with the above said consequences.

Thus, the actions of the Defendant can not be deemed as criminal, since they do not fall within the provisions of Section 18.3 of Regulation 2000/15 establishing the prerequisite of intention to commit such a crime. Without this element, no offense is committed.

Thus, the Defense requests the Honorable Court to acquit this Defendant on the count of murder.”

The Defense of Amélio da Costa

628. The assessment on the evidence on behalf of Amélio da Costa came as follows:

“III. ANALYSIS OF THE FACTS.

In accordance with the facts that emerged in the hearing it is necessary for me to provide a critical appraisal of these facts. This analysis or critical appraisal can be conducted on the testimony of several Defendants, namely Paulo da Costa, Manuel da Costa and Amélio da Costa himself, with the testimony of the witness João Soares, therefore I request that the honorable Panel disregard Charge No. 7 or find that Charge No. 7 has not been proven in accordance with the law, namely that the Defendant Amélio da Costa was involved with deliberate intent and premeditation to take the life of the victims: Brother Jacinto Xavier, Brother Fernando dos Santos, Brother Valerio da Conceicao, Sister Erminia Cazzaniga, Sister Celeste de Carvalho, Agus Muliawan, Cristovao Rudy Barreto, Titi Sandoa Lopes and Izino Freitas Amaral. Recalling the testimony of the witnesses examined, there was not one witness who could describe the actions of my client Amélio da Costa against the victims whose names I have mentioned above, the murders were in fact committed by Joni Marques, Horácio and João da Costa alias João Lemorai. The actions of those three Defendants is supported by the statement of one of them, namely João da Costa alias João Lemorai who said before the court on the 19th July 2001 *“I admit I am guilty because I shot at a boy who was trying to escape by jumping into the river, I followed him and fired 2 or 3 shots then I went back to the main road and Joni Marques ordered me to push the car into the river.”* From the examination of the Defendant and witnesses it can be deduced that Joni Marques was the ringleader behind the murders of the clergy. In other words he was behind the entire plan to block the road, to call on the young men, including the Defendants, who didn't know anything of the plan to kill the group of nuns, who were deliberately tricked as they intended to go to the Dolog Lautem Rice Warehouse to collect rice. This indication can be seen in the testimony of the Defendants and two witnesses (Gilberto da Costa and João Soares) who were presented to give testimony about the murder of the nuns. This is supported also by the role played by the deceased Horácio during the murder of the clergy and the civilians who were traveling with them, even though there are indications that Joni Marques was the brains behind the event, the actions of the deceased Horácio against the victims were more sadistic and caused more harm compared to Joni Marques.

The intention of my client Amélio da Costa in going to Lautem was not to follow Joni Marques but to accompany his older brother Paulo da Costa to collect rice, so that the charge of the Public Prosecutor against my client stating that he did with deliberate intent and premeditation take the life of the nuns, brothers and civilians who were accompanying them, is not correct and has no basis, the plan itself was not even known by my client Amélio da Costa. When linked with the testimony of the witnesses and the Defendants before the court, basically there was no mention of any object or dangerous weapon being carried by my client or of any act committed against the victims or the group of nuns. However the actions of my client as *stated by the other Defendants who one by one mentioned that Joni Marques forcefully ordered the young men to block the road and after the murders of the group of nuns, the Defendant Joni Marques ordered the young men and several of the Defendants to push the vehicle into the river. The ‘young men’ mentioned here includes my client Amélio da Costa.* Thus the position of my client Amélio da Costa is not so different than that of the witness João Soares who appeared before the court on 28th September 2001 and his testimony was heard by the Judges, the Prosecutor, the Public Defenders, the Defendants and those present in the hearing, namely that the witness left from Com heading towards the Lautem Dolog Rice Warehouse with the intention of collecting rice, then the witness said they went past the the Lautem Dolog Rice Warehouse at the order of Joni Marques. *When they*

arrived at the scene of the murder of the group of nuns, the witness João Sares with the other young men, including my client Amélio da Costa, received an order from the Defendant Joni Marques to look for rocks to block the road and also after the murder of the nuns Joni Marques ordered the witness and the young men, including my client Amélio da Costa, to push the car into the river.

Conclusion:

Considering that from the two sentences in *italics* in the previous paragraph it can be deduced that the position of my client Amélio da Costa with the witness presented by the Public Prosecutor on the 28th September 2001 was no different at the time when the murder of the group of nuns took place on the 25th September 1999. The difference between my client Amélio da Costa and the witness João Soares is that in the hearing my client Amélio da Costa was a Defendant and João Soares was a witness, in relation to the murder of the group of nuns. My client Amélio da Costa, should however, have appeared as a witness in the case of the murder of the nuns on 25 September 1999 and not as one of the Defendants involved in the said case. The indication why my client Amélio da Costa should have been a witness in this case is the position of the witness João Soares shared by my client, "traveling on a vehicle carrying the name Cruzeiro, the same purpose of going to the Lautem Dolog Rice Warehouse to collect rice and at the command of Joni Marques they continued their journey to the scene of the murders of the nuns, and carried out their task of collected rocks to block the road and after the murder of the nuns they were abused and commanded to push the vehicle in the river". The question is why was João Soares presented as a witness while my client Amélio da Costa was a defendant in the murder of the group of nuns, which was in fact without his knowledge or planning. What is the difference between the actions of the aforementioned witness and those of Amélio da Costa? Both of them were traveling on the same vehicle and the actions they committed were at the command of the Defendant Joni Marques, and both of them were present when the events of the 25th September 1999 occurred.

MITIGATING CIRCUMSTANCES:

My client has a wife and child who he needs to provide for

My client has been polite during the hearing

My client has stated honestly during the hearing about the facts that occurred

My client has pleaded not guilty because he did not commit a criminal act as charged by the Public Prosecutor, but he still regrets those actions that did occur.

DEFENCE

Pursuant to the analysis and facts that emerged during the hearing and the mitigating circumstances, as I have outlined above I consider that there are no aggravating circumstances for my client Amélio Da Costa, therefore I request to the Honorable Special Panel for Serious Crimes to consider and decide the following:

To state that my client Amélio da Costa was not involved and did not participate in the planning to commit the murder of the group of nuns on the 25th September 1999

Find that the testimony of my client Amélio da Costa in the hearing has the same status as the testimony of the witness João Soares

Find that if the position of the witness João Soares is to remain as that as a witness to the aforementioned murder, then my client Amélio Da Costa must be acquitted from all charges, and immediately release him from detention

State that the good name of my client Amélio da Costa must be restored as he has been accused of planning and deliberately committing the murder of a group of nuns on the 25th September 1999

The cost of the case shall be borne by the state"

629. The Public Defender Lisete Quintão addressed the following closing remarks on behalf of Hilário da Silva:

“IV. ANALYSIS OF THE FACTS

After seeing, hearing and examining the issues that emerged in the hearing, I the Public Defender for Hilário Da Silva wish to submit several points noted during the hearing. My client Hilário Da Silva is an ordinary civilian who has an insufficient standard of education to understand what was actually going on when the clergy were murdered on the 25th September 1999. His main objective for being at the Rice Warehouse was because he wanted to get rice for his family who were starving, needing food to survive. However he was forced and thus his good intentions were not realized because members of Team Alfa headed by Joni Marques came and forced the civilians, who knew nothing, to go to the scene of the crime. UNTAET Regulation No.15/2000 Section 19.1 (d) states that a person forced to commit a criminal act shall not be convicted for that act. My client Hilário da Silva was forced to follow the members of Team Alfa whose sadism against the common people was well known, because members of the civilian community saw it on a daily basis. They saw how those people cooperating with TNI treated the powerless common civilians, so to save his life Hilário da Silva was forced to follow the desires of the members of Team Alfa. In the charge however, the Public Prosecutor has charged my client Hilário da Silva with a crime against humanity. However a person charged with such a serious offence must have committed the crime, which consists of the following elements: (1) the actions of the person committing that crime must cause a great loss to the community, for instance great suffering, (2) causing great harm against the people and great mental and psychological anguish, (3) the attack must be planned and systematic, (4) it must be directed at the civilian population, (5) the attack must be directed at groups, such as political groups, racial groups, ethnic groups, religious groups. However in the hearing not one witness or piece of evidence could connect my client with the elements mentioned above and this can be clearly seen in the statement made by my client Hilário Da Silva on the 26th July 2001, he stated *“I went out in the morning until the afternoon with Manuel da Costa collecting rice in the Lautem Rice Warehouse using 4 vehicles going back and forth from Lautem to Com. Manuel da Costa was there to escort the group collecting rice, that is, us ordinary civilians who were starving at the Com harbor; in the afternoon I went with Manuel da Costa while waiting on a truck bearing the name Pulau Jaya we met another vehicle on the road, a minibus bearing the name Cruzero, Joni Marques asked Manuel da Costa to get down and a moment later Manuel da Costa suggested for 3 team alfa members and 2 civilians to get down and go with the minibus to collect some more rice, as we civilians were yet to get our share of rice we intended to go back and get our share of rice, recalling that the Rice Warehouse was visible so that we went with that minibus to get additional rice.”*

It is clear that my client Hilário da Silva had no intent, had no plan or desire to be involved in the murder of the clergy as Specified in UNTAET Regulation No. 15/2000 Article 18.1, my client Hilário da Silva was at the rice warehouse only to carry out his responsibility as the head of the family and the father of three children to provide for their basic needs, although he knew that the situation at the time was extremely dangerous, that his life may be threatened, however my client Hilário da Silva did not pay heed to that danger so that his family could be saved from an even bigger disaster, namely starvation and death, but what actually happened was that this intention cost him one year of his life, languishing in the Becora prison because of his good intention that he carried out to save his family. Even with conditional release Hilário has to report to Civpol everyday in relation to the accusations against him, but he has done this patiently, humbly and continually hopes that justice will come to him one day. While Hilário was in prison there was not a single examination or fair hearing for him, up until courts were established with their staff, although we all know that in the International Convention on Political and Civil Rights it clearly states that a person suspected of being guilty of committing a crime as provided for in Article 14.3 must be tried as quickly as possible and receive a fair trial. In this case my client Hilário Da Silva was not given this right, the detention of Hilário that exceeded the time limit was justified due to the unstable circumstances in East Timor at that time, and also due to technical issues that we are all aware off. My question though is this, is there any justice left for the common civilians who have had to endure such treatment as I have mentioned above, who are in fact victims of circumstances created by the Indonesian government and TNI? Is it fair for my client as a common civilian to bear the huge burden created by TNI and a handful of East Timorese intellectuals within the Indonesian government structure? After we have conducted this long

and exhausting hearing, as the Public Defender for Hilário Da Silva I can see that the witnesses and evidence presented by the Public Prosecutor is very minute, it could even be said very weak for him to convict my client of such a huge crime, namely a Crime against Humanity. Even after I explained the meaning of the term Crime Against Humanity, my client with his limited education was not even able to understand what it is and what a huge risk he faces by having the accusation of committing such a crime directed at him. The witnesses presented by the Public Prosecutor were in the same position as my client Hilário da Silva, for instance **JOAO SOARES**, whose testimony we heard in court, also carried out the same activities as Hilário da Silva, he blocked the road, was at the scene of the crime and even hid together with Hilário at the time. The testimony of João Soares even stated that they ran together in fear and in search of a hiding place to protect themselves from crossfire. I request to the panel, is it fair for an ordinary civilian like Hilário to languish in jail only because he saw the incident involving the nuns, the same incident that João Soares saw, who was summoned by the Public Prosecutor before the court as a witness, I would like to ask again to the Panel, is this justice for Hilário da Silva? *His friend who hid with him was summoned to give testimony in this case, whereas Hilário is considered a Defendant. Hilário has asked me throughout the trial why did his friend who hid with him become a witness in the trial while Hilário was considered a Defendant? Is that fair on me?* I was confused and had no proper answer to this question, all I could do was state that the decision rests with the panel, that is the only answer I gave to him in response to each question. In this hearing the Public Prosecutor presented a witness named **GILBERTO DOS SANTOS** who was clearly a part of the incident, he was in possession of a SKS rifle, something Hilário did not have, but as was stated by the witness **JOSE PERIERA**, it was Gilberto dos Santos who was summoned by the Prosecution as a witness to the event. We are all aware that those in possession of rifles are in violation of the law but in this case it is the opposite, an unarmed person like Hilário da Silva is considered a Defendant. Once again I ask, is this fair for Hilário? Only the honorable panel can answer this question, because maybe this question crossed Hilário's mind, therefore I hope the honorable panel can respond to this question and the hope and justice sought by Hilário da Silva. Hilário's biggest wish is that he gets justice so that he can carry out his function as head of the family, a father responsible for his children because while Hilário was in jail, his family's situation was of great concern as their situation deteriorated.

In the interests of justice sought by Hilário da Silva, he admitted his responsibility during the incident, he did not hide anything that occurred and made statements honestly before the court in relation to his involvement in this event. His statement was also corroborated by the other Defendants **AMELIO DA COSTA** and **GONSALO DOS SANTOS** and other witnesses presented by the Public Prosecutor. It was clear during the hearing that the Prosecutor could not prove the elements of premeditation, intent, participation or taking action in the aforementioned attack, thus it is very clear that my client can not be charged by the Prosecutor with Crimes Against Humanity because there is no evidence to support the Prosecutor's charge in this case.

I therefore request the following:

For the honorable panel to reject the charge submitted by the Public Prosecutor

Release my client from jail

State that the good name of my client Hilário da Silva must be restored

The cost of the case shall be borne by the state"

The Defense of Gonsalo dos Santos

630. The Defense on behalf of Gonsalo dos Santos came substantially in the following remarks by the counselor Lisete Quintão:

"(...) IV. ANALYSIS OF THE FACTS

After participating in this exhausting hearing process I would now like to submit a few points on behalf of my client, as the Public Defender for the Defendant in relation to the charges submitted by the Public Prosecutor, especially in charge No. 2 where it is stated that my client Gonsalo dos Santos is considered to be involved in committing the forced deportation of the community of Leuro Village. Here I would like to remind this honorable court that because of the events that occurred in September 1999, the entire East Timorese

community were forced to flee by the Indonesian Military who were dissatisfied with the outcome of the referendum, because the section of the community choosing independence from the Republic of Indonesia had claimed victory. These events did not just occur in Leuro village but in every region of East Timor and brought great suffering for the community who didn't understand or know anything but just endeavored to save their lives from an even bigger disaster, namely mass murder that was to be committed by those who were dissatisfied with the aforementioned results. The desire to save themselves was the basis for the population to leave their villages and go to the 745 base to be taken to Kupang. My client Gonsalo dos Santos and his family also had the same desire. They went with other civilians to the 745 base to save themselves from the threats of the military and members of Team Alfa who wanted to burn all the houses of the civilians if they did not get out of their villages as quickly as possible. We have heard about these events many times from the Defendants and the witnesses presented by the Public Prosecutor in this hearing. My client Gonsalo dos Santos was a member of the community forced to flee, but he did not force civilians to flee and the witness presented by the Public Prosecutor also did not prove the involvement of my client in forcing the community to leave their villages. The witnesses presented by the Public Prosecutor stated that my client was at the scene, this fact can be confirmed because my client was also a member of the community from the aforementioned village, therefore it is clear why my client Gonsalo dos Santos was there because he was a member of the community from Leuro village.

In the charge of the Public Prosecutor my client Gilberto Dos Santos was stated to be involved in forcing the community to exit their villages but from the hearing we can all see that from the witnesses presented by the Public Prosecutor that there is not a single witness who mentioned that my client Gilberto Dos Santos forced them or the community to go to Kupang. Also the Public Prosecutor does not have evidence that links my client to what is stated in Article 5.1 c. forcing the population. They stated that members of Team Alfa and the Indonesian military forced the population, however my client was not a member of Team Alfa or the Indonesian Military but only an ordinary civilian who did not know anything just like the other civilians. If we are talking about forced deportation we must also think that in this case have all the elements of a forced deportation been fulfilled? For instance: (1) Evacuation or transfer of an individual from his city or place of residence (2) Evacuation committed illegally and with force that removes an individual from his city or place of residence without heed to the desire of the individual or (3) Evacuation committed between countries (we refer to the Yugoslavia case between the Prosecutor and KRSTIC), from the reference to this case we feel that it is not that different to what is contained in UNTAET Regulation No. 15 Article 5.1 c, which may be used in the final decision in this case or considered when the honorable Panel make their final decision. Basically all cases that occur are similar to other cases, thus from these comparisons we can find points that assist us in reaching a decision in this case. In relation to the involvement of my client in the burning of the civilian houses that occurred in Leuro, Lali and Foema, the Public Prosecutor has not proven this involvement because the witnesses presented in the hearing did not mention that my client was involved in the said burning. They only mentioned Carolino Portela, Horácio and Sergio with others, except for the witness **Vito da Costa Almeida** who stated that he saw my client Gilberto Dos Santos burning the homes of civilians in the *village of Nunocaró*, we feel that the witness did not give true testimony, because Carolino Portela, Sergio and Horácio carried out the burning and not my client Gilberto Dos Santos, this point was stated by Alarico Fernandes when Alarico gave testimony before this court some time ago. In relation to the point that my client Gilberto Dos Santos was carrying a machete at that time, in fact all villages there always carry machetes because they are farmers who work the soil and take their machetes wherever they go because that is standard for villagers all over East Timor, not to threaten or frighten people. In relation to the statement of the witness who stated that 58 houses were burnt by my client Gilberto Dos Santos including the house and the vehicle of the witness, this statement is not true. Based on information that we have, the vehicle of the witness is still in use to this very moment, therefore that statement is not true because how is it possible for a person to burn so many houses and the witness could only see his own house from the garden and was perhaps a considerable distance from the houses that he said were burnt by my client. Therefore as the Public Defender for the Defendant I leave the decision in the hands of the honorable Panel because I feel that the witnesses and evidence submitted by the Public Prosecutor is insufficient to prove the involvement of my client Gilberto Dos Santos in the second charge, because we have made a comparison with the case that occurred in Rwanda which is not that different to what happened in this case. From the said case we can gain an interpretation of Crimes Against Humanity: (1). An attack that brings great misfortune and

causes great suffering, (2) great harm, extraordinary mental anguish, (3) an attack that involves more than one person that is widespread and committed systematically, (4) an attack against members of the civilian community, (5) an attack due to political, ethnic or religious backgrounds. I feel that the charge of the Public Prosecutor in stating that my client's actions form a part of a Crime Against Humanity is completely inaccurate because all the aforementioned elements are not found and the evidence submitted is extremely weak in order to be able to establish the charge of the Public Prosecutor and the involvement of my client Gilberto Dos Santos.

Honorable Panel of Judges,

Honorable Public Prosecutor,

Now we must look at, examine and consider Charge No.3 from the Public Prosecutor, namely the murder of Alexio Oliveira which occurred on the 11th September 1999. My client Gilberto Dos Santos is charged with a Crime Against Humanity. However before we discuss this case further it is best that I remind this honorable panel of the definition of a Crime Against Humanity in accordance with the ICTR statute and we can also examine the case that occurred in Rwanda, in that a Crime Against Humanity must fulfill the following elements: The attack must involve many people, be widespread and systematic against the civilian population or against a political, ethnic, racial or religious group, namely to kill, to carry out mass killings, to enslave, deport the population, to torture, to rape, to wipe out a political, racial or religious group and other inhumane acts. The definition for murder is that the victim must die, the cause of the death must be because of an illegal activity, to have intent to kill or cause serious physical harm and that cause can also result in the immediate death of the victim. The aforementioned murder(s) must be part of a widespread and systematic attack against the civilian population, the victim must be a member of the civilian population, the victim must die because of a discriminatory act against a nation, political, ethnic or racial group, or because of their religious background. Based on the aforementioned points the Public Prosecutor in this hearing can not prove the involvement of my client Gilberto Dos Santos in the death of Alexio Oliveira and the witnesses presented by the Public Prosecutor can not prove that my client Gilberto Dos Santos committed the murder of Alexio Oliveira. Therefore I wish to submit to the court a few points in relation to the witnesses presented by the Public Prosecutor, namely:

The testimony of the witness Florindo da Costa.

The witness stated that he knew Alexio Oliveira. At some time around the month of September 1999 the witness together with Alexio Oliveira were traveling in a vehicle heading towards the 745 base, the witness also saw Alexio Oliveira with his mother standing on the main road waiting for a car and the witness also heard what was said between Joni and Alexio Oliveira, Alexio stated that he wanted to follow Joni to the 745 base. On arrival at the 745 base the witness met up with Alexio Oliveira again and at that time the witness saw that Alexio Oliveira was taken by members of PROVOS heading towards the PROVOS office, Gonsalo, Paulo and PROVOS headed towards their office with the witness and then Alarico followed them, the witness also stated that the PROVOS office was situated at the 745 base. After several moments Gonsalo returned and stated to me that he wished to clean his sword but the witness did not see the shape of the sword because it was very dark at the time when the witness saw and heard the aforementioned incidents.

The testimony of the witness Filipina da Costa.

This witness was the wife of the victim, she said that she didn't know anything about the murder of her husband at that time. She only saw Joni with Alexio and it was dark so she wasn't certain. **The witness also stated that she did not know Paulo and Gonsalo dos Santos**, but the witness stated that she heard that people took her husband to the 745 base and there were several stories that mentioned that her husband was to be killed so the witness concluded that her husband was going to be killed and until now she doesn't know about the whereabouts of her husband but the witness considers that her husband is dead because for 2 years she has not seen her husband.

The testimony of the witness Jacinta dos Santos.

This witness stated that at the time she was waiting for a vehicle with her son Alexio Oliveira and Joni came and spoke to her son Alexio Oliveira asking for him to give the key to his motorbike and Alexio gave it to Joni and at that time the witness asked Joni to protect her son and Joni promised to and the witness also traveled on the vehicle heading towards the 745

base with others. That was the last time the witness was with her son and she didn't see anything relating to the murder of Alexio Oliveira.

The testimony of the witness Julio da Costa.

This witness stated that Alexio Oliveira and his mother were waiting for a vehicle in front of their house and the witness saw Joni come and speak to Alexio Oliveira, several moments later Joni took the key and the motorcycle of Alexio Oliveira, this witness did not mention anything about Gonsalo dos Santos.

The testimony of the witness Manuel da Costa.

This witness' testimony was not heard because this witness is related to the Defendant Joni Marques therefore this witness did not testify anything.

The testimony of the witness Basilio Fernandes.

This witness stated that he knew all the Defendants in the hearing because they all came from the same area, but he knew Gonsalo dos Santos more closely because they came from the same sub village, namely Leuro. He also said that he knew Alexio Oliveira because he was a teacher. Alarico and Paulo took Alexio Oliveira to the 745 base but the witness said that he didn't see or know about what happened to Alexio Oliveira, he also said that he saw 4 members of TNI with Alexio Oliveira. The witness also stated that he saw Alarico and Gonsalo holding machetes. The witness also stated that after the event he said that Manuel came and told him what had happened and what Gonsalo did at the time.

After I have reminded the honorable panel of the testimony given by the witnesses in this hearing I now submit that the witnesses presented by the Public Prosecutor were not able to give concrete evidence about the involvement of my client in the murder of Alexio Oliveira. Here I would also like to state that the testimony given by the **witness Basilio Fernandes** is irrelevant because that witness did not see the event, actually the witness heard the story from Manuel da Costa, alias Sávio. This statement is completely irrelevant because we can not appear in a court and state that we have heard a story from a third party/another person. Here we are supposed to hear testimony from the witnesses who were actually there and witnessed it themselves and not just heard it from another person. Therefore I strongly object to the testimony of this witness, what should happen is that the court should call Manuel da Costa, alias Sávio to hear his testimony about the event and not to hear the testimony given by the witness **Basilio Fernandes**.

In this hearing we all know that Alexio Oliveira died and this fact is supported by the autopsy report given by the doctor who explained that the body in the autopsy is in fact the body of Alexio Oliveira and the personal possessions of Alexio have been identified by the family of the victim so that there is no doubt that Alexio has died and that my client has been charged with the murder by the Public Prosecutor. We have all undertaken this hearing through each of its stages, for instance the testimony of the defendants, the testimony of witnesses and evidence presented, however with the conclusion of this process there is not enough evidence submitted by the Public Prosecutor to charge my client Gilberto Dos Santos, especially with the serious charge of Crimes Against Humanity, therefore I feel that Gilberto Dos Santos was not involved in the murder but was there at the 745 base with Alexio Oliveira on that night, even together with PROVOS taking Alexio out the back, but it was not Gonsalo who committed the act. When they were behind the base Gonsalo and Paulo da Costa witnessed two members of PROVOS taking Alexio Oliveira to a motorcycle parked at a considerable distance from the place where Gonsalo and Paulo were standing. That was the last time Gonsalo and Paulo saw Alexio alive, at that time Gonsalo and Paulo didn't ask anything because they were threatened not to say anything or their families would be the next victims. The presence of Gonsalo and Paulo in that place was because of coercion due to the circumstances. It is not kept secret what crimes the TNI committed in Lospalos, so that civilians would not ask and would comply with whatever they were told to do so that they could survive, especially at a time when every civilian was trying to save themselves from death or even greater suffering. Therefore my client Gilberto Dos Santos did not refuse, however the evidence does not indicate that Gonsalo was the main perpetrator of the murder as charged by the Public Prosecutor and we are in the hands of the panel who will consider and decide this matter in this case.

After we have discussed the second of the aforementioned charges now I arrive at the final charge involving my client Gilberto Dos Santos. We have heard the testimony of the

witnesses and the evidence submitted by the Public Prosecutor in relation to the final charge, namely the fifth charge, for which the Public Prosecutor presented the following witnesses:

Testimony of the witness João Pereira

In his testimony the witness stated that he arrived at the scene at approximately 3.00 after collecting rice and he placed the rice approximately 12 meters from the scene, he collected that rice from a place close to Lautem, collecting the rice with his younger brother. At that time Gilberto da Costa was holding an SKS rifle and told the witness and threatened the witness not to run away or else he would shoot, but the witness paid him no heed and jumped into the water and the witness also testified about what happened to his younger brother.

Testimony of the witness Gilberto dos Santos

The witness stated that he followed Team Alfa to collect rice at the Bulog Rice Warehouse and his job was to guard the back of the building for which he was given an SKS rifle. After leaving the Bulog rice warehouse they headed towards the scene but at the time the witness did not see the arrival of the group of nuns but they found 2 young boys who were pushing a cart.

Testimony of the witness João Soares

The witness stated that the statement given to Civpol was not entirely in accordance with what he testified in this hearing and the witness stated that he was a member of the community transported from Lautem and forced to come by members of Team Alfa to block the road, and that order came directly from Joni Marques. After the road block was set up the witness together with his friends hid behind the bushes. After the shooting of the group of nuns, Joni Marques called the witness and his friends over and said in a threatening tone come here and push the vehicle, using the term "motherfuckers" get over here quick and push the vehicle.

From the testimony given by the witnesses we can conclude that the presence of my client Gonsalo Dos Santos was that same as my other client Hilário da Silva. Gonsalo was forced without knowing why to join and travel with Joni Marques to the scene without any knowledge of what would happen. As he was a civilian who had a very limited education and because he feared for his life Gonsalo dos Santos went to that place without asking for what reason and why did he have to go there. What crossed his mind was that he must follow the command of Joni Marques or Joni could do something very dangerous like killing him, recalling that at the time Joni was very powerful and was carrying a gun in his hand meaning everybody there had to obey the commands of Joni Marques. Just like Hilário and Amélio, Gonsalo could not oppose the wishes of Joni Marques and had to carry out these orders. However the witnesses presented by the Public Prosecutor such as João Soares were also at the place and even helped block the road (as he himself stated) and then hid with Gonsalo at that time. However in this case that witness was called to give testimony about Gonsalo who in fact was in the same position as the witness presented in the hearing. The Public Prosecutor presented Gilberto da Costa as a witness for the Prosecution, but in this case Gilberto da Costa was carrying a gun and threatened one of the witnesses presented in the hearing, namely José Pereira. I would like to ask the Panel is that fair for my clients. From my prospective as a Public Defender it is far from fair because the person carrying a gun, which in the eyes of the law is illegal, was actually summoned by the Public Prosecutor as a witness. On the other hand an ordinary citizen struggling to save his family from starvation and death is considered to be a Defendant and is charged with a very serious crime, namely a Crime Against Humanity, perhaps my client does not even understand the risk such an accusation carries. The evidence and the witnesses presented by the Public Prosecutor did not mention the names of my clients or what they did, so if we look at UNTAET Regulation No. 15 Article 5.1 the definition of a Crime Against Humanity is an act of Genocide, murder, deportation, torture, rape and others, but in the fifth charge the Public Prosecutor did not prove that these elements have been fulfilled convincingly and beyond doubt. So that in this hearing a question has emerged in my mind, can all the charges made by the Public Prosecutor be accepted as Crimes Against Humanity or only as an Ordinary Crime or perhaps not even acceptable as either of the two. One again I leave the decision in this case to the honorable Panel. My client Gonsalo Dos Santos has a family that badly need his presence because since the time he has been in jail his family, including his children, have been suffering greatly,. Moreover, in the hearing the Public Prosecutor did not prove that Gonsalo dos Santos had the intent to commit the actions he is charged with by the Public Prosecutor, as specified in UNTAET Regulation No. 15/2000 Article 18.1 that refers to the

intent or the knowledge of a person in committing a crime. In fact what we have obtained from this hearing is evidence that what Gonsalo and others committed were acts caused by duress from another person, namely Joni Marques, therefore my client can not be charged, because in UNTAET Regulation No. 15/2000 Article 10.d it states that a person committing a criminal act because of duress can not be convicted for that act.

Pursuant to the facts that were established in the hearing and the evidence submitted, we request for the honorable Special Panel for Serious Crimes to reach the following fair decision for my client Gonsalo dos Santos:

For the honorable panel to reject the charge submitted by the Public Prosecutor

For the honorable panel to acquit my client from all charges

State that the good name of my client Hilário da Silva must be restored

The cost of the case shall be borne by the state”

The Defense of Alarico Fernandes

631. The Defense on behalf of Alarico Fernandes came substantially in the following remarks by the counselor Ana Beatriz Sanchez:

being and under duress from Carolino, to follow the order that under normal circumstances would be refused.

In the very specific case of Alarico Fernandes, his conduct is not foreseen in UNTAET Regulation 2000/15, because it cannot be deemed that, by burning two houses in the above mentioned context, he committed a serious crime or a crime against humanity. Such conduct may be assessed under the Article 400 of Penal Code of Indonesia as a crime of destruction of property (“A person who unlawfully and deliberately entirely or partially destroys a property, or has the intent to destroy, shall be punished with a maximum of 2 years and 8 months imprisonment plus a fine at a maximum of 300,000 Rupiah”).

In this case, the Defendant did not have deliberate or unlawful intent because, as stated above, he was forced to take part in that conduct. Therefore, it is not appropriate to classify the Defendant’s conduct in relation to the mentioned section, since there is a deficiency in the main element (the intention to cause damage or to destroy). In the absence of this element, the crime does not exist. The accused had no intention; nor did he deliberately commit the crime. He was under order and pressured by another person. This latter person definitely had the deliberate intent to cause damage and to destroy. Thus, given this deficiency in the elements of the crime, the Defendant Alarico Fernandes did not commit the crime of destruction or damage of property.

In summary, it has not been proven during the trial that the Defendants committed the crimes of forcible transfer or deportation of population.

The Defense therefore requests the Court to acquit the Defendants on the count of deportation or forcible transfer of population.

(...)

COUNT OF MURDER OF ALFREDO ARAUJO AND KALISTU RODRIGUES – THE CHARGES AGAINST PAULO DA COSTA AND ALARICO FERNANDES

The Defense of Alarico Fernandes rejects the charge of murder of Alfredo Araújo and Kalistu Rodrigues.

The witnesses and the statements of all the other Defendants agree on the fact that Alarico Fernandes was present at the time of the killing of Alfredo Araújo and Kalistu Rodrigues.

But they are very conclusive, on the other hand, in showing that Alarico Fernandes did not commit the crime, did not assist in committing the crime, and had no participation in these events at all.

On that day, Alarico Fernandes was forced by the Team Alfa militia members to go to the scene of the incidents, in order to collect food for the refugees in Com. Therefore, he was only an eyewitness to the facts, and had no direct participation in them.

Thus, it can not be said that Alarico Fernandes, with deliberate intent and premeditation, took the life of those two persons. Likewise, it can not be said that he had any involvement in the crime, since he did not know the militia commanders' plans that he was ordered to follow. The reason for the accused going to the site of the incident was not directly linked to what actually took place there.

This assertion can be proved through the statements of the Defendants and other witnesses who were present during the facts, like Joni Marques, Paulo da Costa, Eurico da Costa and Carlito Viegas, whose testimonies match the assertion that Alarico Fernandes did nothing at the time of the killing of Alfredo de Araújo and Kalistu Rodrigues.

This was proven during the trial sessions and is grounded in Section 18 of Regulation 2000/15, which provides: *"A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panel only if the material elements are committed with intent and knowledge"*.

Alarico Fernandes was present during the facts related to this count only because he was forced and taken by the people who were leading the militia group by ordering the refugees to follow them; not because it was his intent or knowledge to do so. Therefore, his conduct can not be deemed as participation, collaboration or deliberate intent or premeditation.

About this same issue, we have to consider that the word "knowledge" means *awareness that a circumstance exists or a consequence will occur in the ordinary course of events*. Section 18.3 Ibidem.

Therefore, Alarico had no knowledge about what was going to happen when he was ordered by the commander of the militia group to look for food in the Coconut Grove. In accordance with what Paulo da Costa and he himself stated, Alarico was only a witness to the events on that day and had no direct participation in them.

In summary, it has not been proved, during the trial hearing, that the Defendant Alarico Fernandes committed the crime of premeditated murder, or had any participation in the events."

The Defense of Mautersa Monis

632. The Defense on behalf of Mautersa Monis did not convey on the evidence submitted during the trial, as already quoted above.

The Defense of Gilberto Fernandes

633. The Defense on behalf of Gilberto Fernandes weighed up the evidence as follows:

2. The specific crimes within the category of crimes against humanity

Within the category of crimes against humanity Gilberto Fernandes is charged with the specific acts of murder and torture.

In order to clarify the defence of Gilberto Fernandes, we will examine separately each one of the charges.

2.1. The murder of Evaristo Lopes

The General Prosecutor included Gilberto Fernandes in the first count of the Indictment, charging him of murder, a crime against humanity, considering that he participated in the killing of Evaristo Lopes. The Prosecution considered that the conduct of Gilberto Fernandes towards Evaristo Lopes was such that he intended to cause his death and he knew that he was going to be killed. However the Prosecution misapprehend the factual elements otherwise Gilberto Fernandes would never be charged with this crime.

For Gilberto Fernandes to be accused and convicted for murder, as a crime against humanity, of the victim Evaristo Lopes, the following requisites must be proved:

1st - Gilberto Fernandes caused the death to of Evaristo Lopes.

2nd - His conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3rd - Gilberto Fernandes knew that his conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.

The long roll of witnesses that stand before the Court to testify about the murder of Evaristo Lopes proved that what happened that day is still unclear. Reading those statements is the best illustration of the thought «each witness each story». Who will the Court trust? Can the Court trust in Moises Lopes, Rudi de Jesus and Domingo Ribeiro that betrayed Evaristo Lopes by handing him over to the Kopassus commanders? Or will trust in Gonçalo da Costa Sanchez, Armindo Soares, Mario Ribeiro and Salvador Amaral, since as former militia members were present in the crime scene and some of them helped in the beating of Evaristo Lopes? Moreover the statements of the witnesses in Court don't match each other.

Gilberto Fernandes recognized that he went to the roadblock and escorted Evaristo Lopes back to the Base, following the Kopassus commander Syaful Anwar orders. Gilberto Fernandes also admitted that at the Base he did hit Evaristo Lopes three times with his hand.

What the Prosecution didn't prove is that with his conduct Gilberto Fernandes aided, abetted or assisted in the murder of Evaristo Lopes. It was clear that who committed the murder was the Kopassus commander Syaful Anwar. But who knew at that time that Syaful Anwar' intention was to kill Evaristo Lopes?

For Gilberto Fernandes to be convicted for aiding, abetting or assisting in the murder of Evaristo Fernandes, is necessary to prove the *mens rea*, the mental element. According to Section 18 of the UNTAET Reg. No. 2000/15, the conduct of Gilberto Fernandes must have been carried out with intent and knowledge of the killing, despite the fact that the perpetrator was another person. In other words, Gilberto Fernandes must have acted with intention to cause the death and should have been aware that the killing was going to occur in the ordinary course of the events. Only in those circumstances can Gilberto Fernandes be convicted with the murder of Evaristo Lopes. However the prosecution failed to prove the mental element. No witness during the hearings showed that Evaristo Lopes was captured to be killed. There was no previous similar situation occurred in the Kopasus Base that could be a sign of the intention of the Kopasus commanders regarding Evaristo Lopes. Was usual to take and arrest at the Base Falentil supporters and kill them after torturing? Is there any other case prior to Evaristo Lopes with comparable consequence that can be invoked to establish a pattern of conduct? And, moreover, nothing was brought to Court proving that the Kopasus commanders said to the members of Teal Alfa that they intended to kill Evaristo Lopes.

2.2. The torture of Evaristo Lopes

The second count set forth against Gilberto Fernandes in the Indictment is the torture of Evaristo Lopes as a crime against humanity.

For Gilberto Fernandes to be accused and convicted for the torture, as a crime against humanity, of the victim Evaristo Lopes the following requisites have to be proved:

1st – Gilberto Fernandes inflicted severe physical or mental pain or suffering upon Evaristo Lopes.

2nd - Evaristo Lopes was in the custody or under control of the Gilberto Fernandes.

3rd - Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

4th - The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5th - Gilberto Fernandes knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

According to the definition foreseen in Section 5.2 (d) of UNTAET Reg 2000/15, torture «means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent or incidental to, lawful sanctions».

Gilberto Fernandes didn't use any weapon or instrument to beat Evaristo Lopes. Recalling his statement Gilberto Fernandes never denied he had beaten Evaristo Lopes, three times with his bare hands. The beating of Evaristo Lopes was ordered and supervised by the Kopasus commanders Syaful Anwar and Rachmad.

Furthermore, Evaristo Lopes was not in the custody or in the control of Gilberto Fernandes. He was in the custody and control of the Kopasus commanders. In accordance with the definition of torture, it is a requisite to convict someone for the crime of torture to have the control over that person, what was clearly not the situation of Gilberto Fernandes.

3. Conclusion

Gilberto Fernandes is linked only to the first incident described in the Indictment, the torture and murder of Evaristo Lopes. This incident took place in April 1999. Gilberto Fernandes didn't engage in any other criminal act carried out by the militia group Team Alfa. Gilberto Fernandes is not being charged in any of the other incidents described in the Indictment and attributed to the Team Alfa group.

In conclusion, and taking in consideration all the facts brought before Court by the accused statements and the witnesses testimony, Gilberto Fernandes cannot be convicted for any crime against humanity, since the mental element of those crimes is absent in this case. In relation to the murder of Evaristo Lopes, Gilberto Fernandes must be acquitted since he did not participate in the murder, nor he knew that his actions were part of a scheme prepared by Kopasus to kill Evaristo Lopes. Finally, the only conduct that can be attributed to Gilberto Fernandes is the beating of Evaristo Lopes. So Gilberto Fernandes can only be convicted in this for the crime of maltreatment foreseen in the Penal Code of Indonesia.

The Defence of Gilberto Fernandes requests the Special Panel for Serious Crimes of the Dili District Court, taking into account the evidence brought to Court:

To decide the acquittal of Gilberto Fernandes regarding the first count of murder of Evaristo Lopes;

To consider the beating of Evaristo Lopes by Gilberto Fernandes as a crime of maltreatment in the terms of the Penal Code of Indonesia, and consequently to acquit Gilberto Fernandes from the charge of torture."

V. APPLICABLE LAW

- 634.** The applicable law for the offences alleged to have been committed by the Defendants are provided for in Sect. 5.1. of UR-2000/15. The acts foreseen in that provision of law are deemed as crimes against humanity insofar as they are committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack. The parties agreed on the applicable law. As specified by the parties, Sect. 5 of UR-2000/15 embodies the words which are contained in Art. 7 of the Finalized Draft Text of the Elements of Crimes, issued by the Preparatory Commission for the International Criminal Court.
- 635.** In accordance with this view and pursuant to many precedents from the International Tribunals, the contents of the context element are:
- 636.** The requirement of a widespread attack: an attack as the multiple commission of acts with the requirement of inhumane acts⁵⁴ as provided in Sect. 5 of UR-2000/15; or
- 637.** The requirement of a systematic attack: an attack “carried out pursuant to a preconceived policy or plan”⁵⁵
- 638.** The concept of “any population” as the victims implies a multiplicity of civilians attacked in a widespread or a systematic approach. Those hostilities may entail as victims both the members of a resistance movement and/or former combatants, regardless of whether they were in uniform or not, as well as those who were no longer involved in the fighting at the time the crimes were perpetrated⁵⁶.
- 639.** In conjunction with the aforementioned context element, a crime against humanity is bound to a policy context, which requires that a widespread or systematic attack results from a state or *de facto* power by means of the policy of that entity. It is required that a State or organization which exercises the highest *de facto* authority in a given territory at the relevant time control all the other holders of power and all individuals⁵⁷.
- 640.** About the individual act and the context element (widespread or systematic attack), it has already been stated that “it is sufficient to know how the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity”⁵⁸. The perpetrator needs to have knowledge of the attack.
- 641.** The mental element required (*mens rea*) is that the perpetrator, or aider, or abettor or contributor knowingly took the risk of participating in the implementation of that context⁵⁹. The perpetrator *knowingly* performed his acts in the context of a widespread or systematic attack⁶⁰. The perpetrator needs only to be aware of the risk of the existence of an attack and the risk of the existence of some circumstances of the attack, regardless of his or her knowledge about the details.
- 642.** His or her knowledge about the policy behind the attack must exist in the perpetrator’s mind, at least taking the risk that he may be performing his conduct in the context of a policy upheld by a State or organization⁶¹.

The individual inhumane acts as defined in Section 5.1 of UR-2000/15

Section 5.1.a: murder as crime against humanity

- 643.** The Panel, having assessed the shortcomings in the definition of murder as a crime against the humanity in Sect. 5.1(a) of UR-2000/15, is persuaded of the benefit of the guidance provided by the Preparatory Committee for the Rome Statute of the International Court⁶² and the precedents from the International Tribunals⁶³, with the remarks foreseen in Sect. 18 of UR-2000/15.

⁵⁴ ICTY: Prosecutor v. Blaskic, Judgement, ICTY Case n. IT-95-14-T, TCh. I (, 3 Mar. 2000, paragraph 202).

⁵⁵ ICTR: The Prosecutor v. Bagilishema, Judgement, Case n. ICTR-95-1A-T, T. Ch.I, 7 June 2001, paragraph 77.

⁵⁶ ICTY: Blaskic Trial Judgment, supra, paragraph 214.

⁵⁷ ICTY: Tadic Trial Judgment, Case IT-94-I, 27 Feb. 2001, para. 655. ICTR: Kayishema Trial Judgment, Case 95-1-T, Ch. I, para. 126; Kupreskic Trial Judgment, Case IT-95-16, TCh. II, 14 Jan. 2000, para. 551-552, Blaskic Trial Judgment, supra, para. 205; Bagilishema Trial Judgment, supra, para. 78.

⁵⁸ ICTY: Kunarac Trial Judgment, Case IT-96-23 and IT-96-23/1, T.Ch II, 22 Feb. 2001, para. 419.

⁵⁹ ICTY: Blaskic Trial Judgment, supra, para. 251.

⁶⁰ ICTY: Kordic Trial Judgment, IT-95-14/2, TCh. III, 26 Feb. 2001, para. 185-187.

⁶¹ ICTY: Kupreskic Trial Judgment, supra, para. 556.

⁶² Under (Sect. 7.1.a) of ICC Statute under the explanation by the Preparatory Commission, these are the elements of murder as a crime against humanity: (a) the perpetrator killed one or more persons; (b) the conduct was committed as part of a widespread or

- 644.** The Panel accepts the opinion of the parties in relation to the general *mens rea* provided by Sect. 18 of UR-2000/15. For this reason, an accused charged with murder as a crime against humanity shall have his or her *mens rea* deemed by this Panel insofar as he or she has shown intent to cause the death of the victim or be aware that it will occur in the ordinary course of events. Accordingly, the Panel lists the four requisite elements of murder as a crime against humanity:
- 645.** The victim is dead.
- 646.** The death of the victim is the result of the perpetrator's act.
- 647.** The act must be a substantial cause of the death of the victim.
- 648.** At the time of the killing, the accused must have meant to cause the death of the victim or was aware that it would occur in the ordinary course of events.
- 649.** In summary, in a murder, as a crime against humanity, there is no requirement of premeditation as the mental element for murder as a crime pursuant to Sect. 340 of Penal Code of Indonesia (KUHP). The *mens rea* is restricted to the deliberate intent to cause the death of the victim or that such result would occur in the ordinary course of events.

Section 5.1.d: deportation or forcible transfer of population

- 650.** The Panel reiterates the shortcomings in UR-2000/15 about the definition of the requisite elements for the crime of deportation or forcible transfer. Accordingly, the Panel accepts the rules of the draft of the ICC Statute, which are substantially grounded on the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts), as follows:
- 651.** The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
- 652.** Such person or persons were lawfully present in the area from which they were so deported or transferred.
- 653.** The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
- 654.** The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- 655.** The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Section 5.1.f: torture

- 656.** The Panel is satisfied with the definition of torture as a crime against humanity provided by Sect. 5.2 (d) of UR-2000/15, which is the same as Art. 7.2.e of the ICC Statute. These are the elements:
- 657.** The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
- 658.** Such person or persons were in the custody or under the control of the perpetrator.
- 659.** Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
- 660.** The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- 661.** The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Section 5.1.h: persecution

- 662.** Lastly, the Panel is also satisfied with the definition of persecution as a crime against humanity provided by Sect. 5.1. (h) and 5.2(f) of UR-2000/15, which is the same as Art. 7.1(e) and (2) (g) of the ICC Statute. These are the elements:

systematic attack directed against a civilian population; (c) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.”

⁶³ ICTR, in the Rutaganda Trial Judgement (*Case ICTR-96-3-T, T.Ch. I, 6 Dec. 1999, para. 80*), *inter alia*, established the following elements: (a) the victim is dead; (b) the death resulted from an unlawful act or omission of the accused or a subordinate; (c) at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.

- 663.** The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
- 664.** The perpetrator targeted such person or persons by reason of identity of a group or collectivity or targeted the group or collectivity as such.
- 665.** Such targeting was based on political, racial, national, ethnic, cultural, religious, gender (as defined in article 7, paragraph 3, of the Statute), or other grounds that are universally recognized as impermissible under international law.
- 666.** The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
- 667.** The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- 668.** The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
- 669.** Furthermore, the mental element of a discriminatory intent, which is assessed as that the reason for singling out the victim, has to be grounded on a particular characteristic of the identity of the group or collectivity.

VI. FINDINGS OF THE COURT

1. General considerations regarding the evaluation of the evidence

- 670.** The Special Panel has assessed the evidence in this case in accordance with the Presentation and Rules of Evidence provided by Sections 33 through 38 of UR-2000/30 and, where no guidance is given by those sources, in such a way as will best favor a fair determination of the case and which is consistent with the spirit of the practices of international tribunals and the general principles of law⁶⁴.
- 671.** The Panel has applied to the accused the presumption of innocence stated in Sect. 6.1 of UR-2000/30, which is accepted as a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the accused, and the Prosecution must do so beyond reasonable doubt.
- 672.** Since Sect. 6.2 (a) of UR-2000/30 provides that an accused has the right to remain silent and not admit guilt, and that silence will not be interpreted as an admission, which means that no suspect may be compelled to testify against himself, no unfavorable inference has been drawn from the fact that some of the accused refused to make a statement about some of the counts. On the other hand, if an accused decided to address the Court on his view of the facts, that does not mean that he accepted any onus to prove his innocence. The approach taken by the Panel has been to determine whether the evidence of the Prosecution witnesses should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the statement given by an accused. Even when an accused did not plead guilt, the Panel regarded the admission of the facts only in comparison with other evidence. Such admission of the facts was not allowed, however, to incriminate a co-accused.
- 673.** The Panel has made a thorough assessment of the evidence of identification during the trial, exercising particular caution in relation to it. The judges are aware that identification evidence involves inherent uncertainties due to the various intricacies in the identification process, which results from the vagaries of human perception and recollection. In searching for the truth, it is insufficient that the evidence of identification given by the witnesses has been honestly given; its reliability must also be evaluated. Many of them are illiterate and old peasants who have limited knowledge in their own dialects, resulting in testimonies coming out in a transparent manner. Because of this plainness in expressing their testimonies, such witnesses sometimes could easily fall into inconsistencies about irrelevant niceties. Other witnesses were found in the turbulent and often traumatizing circumstances in the villages of East Timor before and after the consultation process in 1999. It is apparent that close relatives of the victims were still psychologically affected by those events. One of them, for instance, admitted that “she lost her memory since she lost her son”.
- 674.** The Panel considered that in some testimonies the references to the time may have an irrelevant weight because they admitted having no watch at the time of the fact on which they testified.
- 675.** The Panel is acutely aware of the possibility of error in making an identification later of a person previously unknown to the witness due to the bewilderment in the last days of Indonesian rule in East Timor. Some of the accused certainly changed their appearance since the facts allegedly related to them and at the time of the events used to wear military fatigues during their operations.
- 676.** Each of the witnesses was asked whether he or she could identify any of the persons in the courtroom. Since many witnesses were villagers who came from and lived in small communities where the accused had their families, this afforded reliability to those testimonies.
- 677.** In some cases, a witness gave evidence of an incident with which one or other of the accused has been charged, but the testimony is grounded on hearsay. The Panel has assessed that the testimony given about a fact at which the witness was not present did not have sufficient value to override doubt about the facts raised against an accused. If a witness could only state that an accused was involved in a crime because this witness had heard about it, that does not result in certainty about the conduct of an accused.
- 678.** Another issue assessed by the Panel was the fact that, on some occasions, a witness came to testify about a fact in which he or she could be charged. The Court deemed that such circumstances did not harm the reliability of those testimonies if they were in accordance with some facts already admitted by the accused and mentioned by other witnesses.
- 679.** Lastly, the reports on the situation in East Timor at the time of the charges alleged by the Prosecution received no challenges from the Defense and can therefore be assessed as important evidence on the political and social background required in relation to the context element for evaluating the offences as crimes against humanity.

2. The existence of an armed conflict

⁶⁴ *Prosecutor Vs. Kumarac et. alii* - ICTY, Case IT-96-23-T-T & OT-06-23/1-T.

680. During 24 years of Indonesian rule in East Timor, there was an armed conflict between paramilitary groups openly supported by Jakarta and others dedicated to the independence of this half-island territory since the Portuguese colonial period. That conflict heightened in the second half of late 1990's with the persecution against civilian population when the international community addressed its concerns about the autonomy or independence of this territory⁶⁵.

681. The Panel notes that the parties agreed that, at least some months before and after the popular consultation on 30 August 1999, there was an armed conflict in East Timor. The Court is satisfied that the armed conflict has been established beyond reasonable doubt with respect to the territory where the incidents took place.

682. The Panel is also satisfied that the underlying crimes with which the indictments are concerned were closely related to the armed conflict. Thousands of Timorese passed away or still are at large as refugees as a direct result of the armed conflict. It is worth referring to the conclusions and recommendations of the Security Council Mission dispatched to Jakarta and Dili from 8 to 12 September 1999, exactly at the time when most of the facts outlined in the indictment took place:

"Despite having read and seen much press and visual media coverage of the wanton, destruction and arson of much of the country's housing and buildings, the Special Rapporteurs were still shocked by the sight, from the air and on the ground, of the catastrophe that had been inflicted on the people of East Timor, just as they were touched by the sense of joy and hope that the people evinced, despite this adversity, in the wake of their liberation.

It is still too early, on the basis of a short visit and the absence of many witnesses more than 400,000 of whom are – at the conclusion of the visit – still held in precarious conditions in West Timor or elsewhere in Indonesia, to assess the full extent of the human rights violations and crimes that were perpetrated before and after the 30 August consultation. What is clear is that they took place in the context of an attack against the East Timorese population that overwhelmingly supported independence from Indonesia. They include murder, torture, sexual violence, forcible transfer of population and other persecution and inhumane acts, including property destruction. These have all been committed on a scale that is widespread or systematic or both.

Even applying the strict standards of the International Court of Justice to establish State responsibility for the acts of armed groups in a context of external intervention (dependency of the group on the state) and the exercise of effective control of the group by the State – a standard which cannot reasonably be applied to a State's own acts and omissions of governance of its own people – there is already evidence that TNI was sufficiently involved in the operational activities of the militia, which for the most part were the direct perpetrators of the crimes, to incur the responsibility of the Government of Indonesia. What still remains to be determined is how much of TNI and to what level in the hierarchy was there either active involvement or, at least, culpable toleration of the activities"⁶⁶

683. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the Timorese territory. In this case, the alleged killings, forcible transfer and torture were closely tied to the armed conflict.

684. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed as an outcome of the fighting. This requirement is squarely met by the offences, insofar as the Panel finds the evidence to be sufficient to establish those offences.

685. The Court is also of the opinion that the ten remaining accused performed an active role as militia members or supporters in carrying out military tasks during the conflict, fighting on behalf of the parties to the armed conflict, namely as a spearhead of the Indonesian military forces. The evidence also shows that none of their victims took any part in the hostilities.

3. The attack against the civilian population and related requirements

686. The Panel is satisfied beyond reasonable doubt that there was an extensive attack by the pro-autonomy armed groups supported by Indonesian authorities targeting the civilian population in the area, namely those linked with

⁶⁵ For a detailed chronology of the battles and massacres, cf. JARDINE, Matthew (*East Timor: Genocide in Paradise*, Odonian Press, 2nd edition, July 1999, 95p.) and TAYLOR, John G. (*East Timor: The Price of Freedom*, Zed Books, 1999, 230p.)

⁶⁶ Case File C, p. 27, paragraphs 70-72.

political movements for the self-determination of East Timor. Most of the victims were unarmed and were villagers who were so scared that they decided to sleep in the forest rather than risk being burned alive in their houses or otherwise being caught in the attack on their communities. The evidence from the testimonies supports the conclusions of the International Commission of Inquiry into the patterns of human rights violations and breaches of humanitarian law in East Timor:

“[T]here were patterns of gross violation of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people. Patterns were also found relating to the destruction of evidence and the involvement of the Indonesian Army (TNI) and the militias in the violations. More specifically, the International Commission would like to emphasize the following:

Intimidation and terror

The evidence gathered shows that intimidation and terror were systematically used to prevent the people from freely exercising their political choice. Before the popular consultation ballot, intimidation and terror were primarily aimed at pro-independence groups and individuals. In the post-ballot period and after the announcement of the results, the attacks were widespread and took the form of vengeance.

Killings and massacres

There is evidence of threats of violence against persons and actual violence resulting in injuries and deaths in large numbers. The killings were often brutal and gruesome. In some instances, massacres took place in sites where people had sought refuge.

Gender violence

Because the men fled to the mountains, the women were targeted for sexual assault in a cruel and systematic way.

There is evidence of actual sexual abuse and rape of women. While in general, the militia refrained from killing women, they were subjected to humiliation and different forms of harassment that included, striping and sexual slavery. Women and children were also victims of forced displacement into exile.

International staff and journalists

Local and international staff of UNAMET, other humanitarian agencies, NGOs and journalists were also targeted by the militia and TNI. After the announcement of the result of the consultation, this resulted in the evacuation of local and international staff of UNAMET and other agencies, as well as journalists and others. This seemed to be in order to prevent them from witnessing acts of violence and destruction of property that took place subsequently.

Destruction of property

The acts of violence by militia and TNI included burning down of houses and office buildings of pro-independence groups. The evidence gathered shows that before the popular consultation ballot, destruction of property was selective and not widespread, involving properties of specific individuals known for their support for pro-independence.

After the announcement of the results, the destruction was widespread and systematic in towns and cities. The Commission saw for itself the extent of damage in Dili and all the other sites it visited. The damage to private and public property ranges from 60 to 80 per cent in the whole country. Even more serious is the fact that most hospitals and health centers have been destroyed, as well as school buildings. The destruction includes damage to public utilities, such as water and power. The widespread and systematic nature of the destruction indicates that it was planned and co-ordinated.

Displacement of people

Evidence gathered shows that before the popular consultation ballot, intimidation and terror resulted in internal displacement of people. People sought refuge in churches, and other safe areas, including fleeing to the mountains. Intimidation of the internally displaced included killings in places of refuge, denial of access to humanitarian agencies and, in some instances, denial of necessities such as water. The intimidation was aimed at dispersing people from their places of refuge.

After the announcement of the results of the popular consultation, thousands of people were forcibly assembled and moved to West Timor. The evidence shows that people were moved by sea and by road. The movement and evacuation of people would not have been possible without prior planning and a systematic execution of the plan.

Evidence gathered from people who have returned from West Timor shows that the people in the camps in West Timor have been subjected to intimidation and terror. The Commission also received reports of the abduction of children from camps. There is evidence of intimidation by militia to prevent those who want to return to East Timor from doing so. Due to all this, it was thus extremely frustrating for the Commission not to have been able to visit West Timor as it had requested from the beginning.

Destruction of Evidence

The information gathered by the Commission shows that there was a systematic attempt to destroy evidence, including removal of bodies from the site of killings. The removal of dead bodies to West Timor from the massacre site in Suai church is a clear indication of the extent of efforts to conceal evidence. The Commission was in Dili when bodies of victims of the Suai massacre were brought back from West Timor after having been exhumed there by the Indonesian National Commission of Inquiry. There are possibilities that more bodies will be found on a day to day basis.

Indonesian army and militia involvement

Evidence gathered shows that militia groups were responsible for the intimidation and terror experienced by the people of East Timor before and after the popular consultation.

The evidence further shows that the number of militia groups and their activities increased from January 1999. There is also evidence that the Indonesian Army and the civilian authorities in East Timor and some in Jakarta pursued a policy of engaging the militia to influence the outcome of the popular consultation. The approach pursued was to provide the impression that the East Timorese were fighting among themselves.

There is evidence that the policy of engaging militias was implemented by KOPASSUS (Special Forces Command of TNI) and other intelligence agencies of the Indonesian army. The policy manifested itself in the form of active recruitment, funding, arming and guidance and of the provision of logistics to support the militias in intimidation and terror attacks.

There is evidence to show that, in certain cases, Indonesian army personnel, in addition to directing the militias, were directly involved in intimidation and terror attacks. The intimidation, terror, destruction of property, displacement and evacuation of people would not have been possible without the active involvement of the Indonesian army, and the knowledge and approval of the top military command.

The Indonesian police, who were responsible for security under the 5 May agreement, appear to have been involved in acts of intimidation and terror and in other cases to have been inactive in preventing such acts.

The Commission is of the view that ultimately the Indonesian army was responsible for the intimidation, terror, killings and other acts of violence experienced by the people of East Timor before and after the popular consultation. Further, the evidence collected to date indicates that particular individuals were directly involved in violations of human rights.

The Commission received allegations that armed groups supporting independence were also involved in violent attacks during the period from January 1999. The incidents were relatively fewer in number and confirmation of their existence has not been obtained. (...)⁶⁷

687. As the aforementioned report noted, gross violations were also committed by parties oriented to the independence cause. This Panel has already released judgment about serious offences perpetrated by former members of FALINTIL forces. During this trial, more than one accused addressed to the Panel a request for the punishment of those who attacked part of the group on 27 September 1999 during an ambush which resulted in several deaths and serious and permanent injuries in some of them. The Court immediately requested the Prosecution Service to undertake enquiries about criminal prosecution for that incident. The accused Paulo da Costa added in his closing statement that a Serious Crimes Unit investigator had recently already interviewed him.

⁶⁷ Excerpts from the Report of the International Commission of Inquiry on East Timor to the Secretary-General . *United Nations – Office of the High Commissioner for Human Rights*, January 2000. Cf. Case File, p. 56-58.

- 688.** Furthermore, the testimonies from villagers persuaded the Court about the attacks on the civilian population; namely, against persons who were either under suspicion or widely-known as independence supporters. It is telling that despite some of the witnesses having close family ties with some of the Defendants, they nevertheless provided broad evidence about those attacks. The Court still bears in mind the torture of a young man by the group which his blood uncle belonged to, but who refused to admit the relationship in front of his fellow men. The boy fortunately survived to testify about the affliction of one the victims.
- 689.** The Court recognizes that most of the evidence came to be highlighted by the exhibits. Photographs, video recordings, seizures of objects related to the investigations emphasized the trustworthiness in the testimonies and expert reports.
- 690.** In sum, the Panel is satisfied that all of the accused had awareness about the accomplishment of a widespread and systematic attack against the civilian population in East Timor at the time. Although some of them used their lower level of education as an excuse for joining the militia activities or for fulfilling the orders of their superiors, all of them allowed – and called upon as a mitigating circumstance in the sentencing – the existence of an armed conflict in which all of them were involved.
- 691.** Each one of the elements for the alleged crimes shall accordingly be written down in this judgment as follows.

4. Charges against the accused

(a) Counts 1 and 2 – Torture and Murder of Evaristo Lopes

- 692.** The evidence clearly indicates that a roadblock was set up, regardless of whether it was made of stones or wood, targeted to single out the victim. Team Alfa members were at that roadblock. From the statements of the Defendants in agreement with some of the testimonies, the Court accepts that João da Costa, Mautersa Monis and Gilberto Fernandes were at the roadblock during the arrest of the victim.
- 693.** The victim's beating started at the roadblock. The evidence is unequivocal on that point. The witnesses Rudi de Jesus, Moises Lopes and Domingos Ribeiro provided the details. It was admitted by the accused Mautersa Monis. João da Costa, Mautersa Monis and Gilberto Fernandes admitted that they were at the roadblock when the victim was beaten.
- 694.** From the roadblock, the victim was taken to be beaten up in a room in a base shared by KOPASSUS and Team Alfa. All the accused admitted having been in the KOPASSUS base, a fact which is confirmed by the testimonies.
- 695.** All the accused, except Mautersa Monis, admitted having been in the room where the victim was beaten at least for a while.
- 696.** All the accused, except Joni Marques, admitted having beaten the victim at least once.
- 697.** The accused Joni Marques admitted having cut the victim's hair, a fact also referred to in the testimonies.
- 698.** The victim had no clothes while being beaten in the KOPASSUS base. His feet and hands were tied separately. This circumstance is mentioned several times in the testimonies and admitted (or passed over) by the Defendants.
- 699.** The victim, after being taken to KOPASSUS Base, was hit, beaten and stabbed to death. The Defendants admitted this fact and it was confirmed by the testimonies. It is undisputed that, after the beating, the victim was stabbed. The body of Evaristo Lopes was dumped as soon as the victim died. The Defendants and testimonies referred to an order to dump the dead body on that night at a site far from the base, immediately after his death. KOPASSUS and Team Alfa members did this.
- 700.** The relevant activities of each accused with respect to the charges can be summarized as follows:

About Joni Marques

- 701.** The accused Joni Marques denied that he was at the roadblock. Only one of the witnesses testified having seen him at the time. He admitted only having cut the victim's hair with a knife. With reference to the dumping of the body, Joni also admitted that he helped to take the body inside a rice sack.
- 702.** The Court acknowledges it has not been sufficiently proven that this accused was at the roadblock. The sole testimony of Gonsalo da Costa Sanches on this regard, even if reliable, is in a minority compared to what was stated in the other testimonies. At this stage, the Court accepts the opinion of the Prosecution in concluding that there is a doubt as to whether Joni indeed was at the roadblock with his fellow men when the victim was arrested.
- 703.** However, it has been proved beyond a reasonable doubt that Joni Marques was in the KOPASSUS base in the room where the victim was being tortured. About the hitting and the beating of the victim, the Court accepts the

testimony of the witnesses Gonsalo da Costa Sanches, Armindo Soares, Mario Ribeiro and Salvador Amaral regarding the conduct of Joni Marques during the torture of Evaristo Lopes. The Court relies on such evidence because they converge on the same fact, despite some of the witnesses having admitted also kicking and hitting the victim. The alleged reasons for them to lie are not enough to convince the Panel about the credibility of their testimonies. The fact that they were Team Alfa members and also participated in the torture does not mean necessarily that they told lies to the Court. For those witnesses, the only reason to be afraid should have been to incriminate themselves by denying conduct which could implicate them in the beating. However, they were not afraid to admit what they did, including kicking the victim.

- 704.** About the inconsistencies raised by the Defense about some testimonies, the Panel is of the view that the fact that Gonsalo did not say precisely who gave order to kill Evaristo Lopes – either Joni Marques or Syaful Anwar, or both of them – and also who stabbed the victim, does not imply that the statement in relation to Joni Marques’ conduct is not precise. Other witnesses have confirmed that Joni Marques kicked the victim in the room. The inconsistency is not related to the charge of torture.
- 705.** About the second inconsistency also raised by the Defense concerning who gave the order to kill the victim, the Panel sees no contradiction. The testimony is very clear that Joni Marques and Rahmad came out of the room and gave an order to kill Evaristo, even if the witness confesses that he is not sure which one of them gave that order. There is no discrepancy about the presence or absence of the accused Joni Marques at the scene of the crime until the death of the victim. The challenged testimony at any rate proves that Joni Marques and Rahmad came out of the meeting room and gave an order to kill Evaristo Lopes, even if it is uncertain which one – or both of them – issued the command.
- 706.** The Panel deems that there is sufficient evidence to prove that:
- 707.** Joni Marques beat, hit and kick the victim. The cutting of hair as an isolated act can not itself be considered as torture, but, under the victim’s circumstances and together with other maltreatments inflicted to obtain information from the victim, the cutting must be assessed as an act of torture, since it was a way to humiliate the victim and also to threaten him. Joni used a knife, an instrument generally applied not to cut hair, but to harm and to kill.
- 708.** There is enough evidence that, whilst the victim was being tortured, Joni Marques asked him some information about his support or membership of FALINTIL, and several times retorted that the victim “was lying”.
- 709.** Joni Marques was in the building the whole time - sometimes in the room where the victim was being beaten and sometimes in the other room with Rahmad.
- 710.** The order to finally kill Evaristo Lopes came either from Joni Marques or Rahmad - just after they came out of the room where they were holding a meeting. Anyhow, the Court is of the opinion that the order to kill was the outcome of what had been discussed by both of them, given the close ties between Team Alfa and Indonesian military officers.
- 711.** There is evidence that Joni Marques later ordered the body of the victim to be placed in a rice sack and helped to bury the body of the victim. The fact that some testimonies also accredited to Joni Marques an order to dump the corpse does not discount the likelihood that he stayed in charge after the victim died.
- 712.** Therefore, it is beyond reasonable doubt that Joni Marques was engaged in the conduct of torturing the victim. The Court bases its belief on the following:
- 713.** Joni Marques knew that, while beating the victim, his conduct and his purpose were unlawful, either by using psychological violence (cutting the victim’s hair) or by physical maltreatment. Being a veteran Team Alfa member and having confessed previously to being trained for guerrilla activities, he knew about methods of torture to obtain information from civilians and other political adversaries.
- 714.** Joni Marques was conscious of what would occur in the ordinary course of events. It has been sufficiently proved that Joni Marques knew that his conduct in beating the victim would result either in the psychological or physically suffering of the victim or even in his death.
- 715.** Regarding the *actus reus*, the Court is of the opinion that Joni Marques engaged deliberately in the torture and killing of the victim, pursuant to the evidence available before the Court.
- 716.** He was one of the persons in charge. A palpable assumption of that belief is that Joni Marques, as soon as the victim died, *ordered* the burial.
- 717.** His *mens rea* arises from the evidence that, by participating in the decision-making for ordering the killing of the victim, he really knew that it would occur by other expeditious means. For him, the death was an expected result.
- 718.** Joni Marques definitely knew that the torture and killing of Evaristo Lopes was only a single action amidst several other inhumane acts which constituted a part of a systematic attack against independence supporters in East Timor, regardless of whether the victims were FALINTIL members or civilians supporting the independence cause. As a confessed militia leader with close ties with the Indonesian officials, Joni knew that the torture and the killing of

Evaristo Lopes was not an isolated act against a single civilian person, but a part of a whole policy against pro-independence supporters in East Timor.

719. Joni Marques had more than enough knowledge that his conduct was a part of this attack, since he knew of the attacks sponsored by the ruling Government and about its policy. Marques was definitely engaged in a role for a wider policy against independence supporters since he was one of the leaders of a militia group bound to Indonesian military forces. Evaristo Lopes was tortured and killed for his political affiliation. Joni knew and desired this.

About João da Costa

720. It is undisputed that João da Costa arrested and beat the victim at the roadblock and escorted him from the roadblock to the KOPASSUS base. The Defendant João da Costa admitted that and the witnesses Gonsalo da Costa Sanches, Moises Lopes and Domingos Ribeiro recognized João da Costa as one of the Team Alfa members in the operation at the roadblock. He was the leader of the group during the arrest.

721. It is clear from the testimonies of the same witnesses, in addition to what was testified by Armindo Soares, Salvador Amaral and Valerio Valente, that João da Costa was one of those who participated in questioning, beating, hitting and stabbing the victim from the beginning at the roadblock until his death at the KOPASSUS base.

722. João da Costa assisted, by holding the victim's head and feet, in the final act which resulted in the death of the victim. This is the testimony of Salvador Amaral and Armindo Soares.

723. The Panel has evidence that João da Costa also had previously beaten the witness Valerio Valente. This fact boosts the belief that he did the same to the victim Evaristo Lopes on that same night.

724. João da Costa's mind during these events was absolutely focused on the results. He recognized that his mission was to arrest the victim, receiving the order from Syaful Anwar. Being an old Team Alfa member, he admitted that he knew about the previous militia activities, although he insisted that this was his first participation in hunting for FALINTIL members. He knew the victim and his status as a FALINTIL supporter, having regard to the fact that his initial words to him were "we've been looking for you for a long time!". Although João da Costa said that the victim "would be released the next day", he knew that the victim in fact was going to suffer pain to order to have information extracted from him. It is significant that, during the beating in the room, João da Costa came to the witness Valerio Valente and said: *'If you don't speak, you'll die just like your friend!'*. For sure he knew that his conduct would result in the pain and suffering of Evaristo Lopes. When he arrested the victim at the roadblock, his attitude revealed that he in fact was in charge of the armed group at the roadblock on that night.

725. The Court has no grounds to reject the testimonies which cited João da Costa as one of those who stabbed the victim. The evidence that João Lemorai stabbed the victim in the mouth is reliable and matches with the evidence that he held the victim during the final stabbing by Syaful Anwar.

726. His *mens rea* is undisputed: he definitely knew that his conduct would not only result in pain or suffering of the victim, but also in death. He was aware that a natural consequence of a stabbing in a vital part of the body would be the death of Evaristo Lopes.

727. João Lemorai was also aware and knew about the context in East Timor, since he was an old Team Alfa member and he definitely shared the same objectives of the group: to fight against independence supporters by using violence. He knew the connections between Team Alfa and the Indonesian military authorities. His interrogation of the victim was only one of the other actions he performed. He knew that the torture and the killing were a part of a wider and systematic attack whose plan was followed up by local militia members and headed by Indonesian military forces.

About Mautersa Monis

728. Mautersa Monis was one of the persons on duty to arrest the victim. He was the first one to have been recognized beating Evaristo Lopes at the roadblock. On the other hand, he denied having been with the victim in the room at the KOPASSUS base. However, the witness Gonsalo da Costa Sanches Sanches included Mautersa Monis among those who kicked the victim in the base:

729. "He was kicked by João Lemorai, **Mautersa Monis**, Oscar Pinto, and Martino from BRTT. (...) I saw also **Mautersa** striking Evaristo from the front. Lemorai and **Mautersa** were carrying and using an iron bar. (...) In the room, Evaristo was with Lemorai, **Mautersa**, Joni Marques, Cesar Augusto, João Pinto, Oscar Pinto and Martino Bebete. João da Costa Lemorai and **Mautersa Monis** were punching Evaristo Lopes using an iron bar; others were using their hands. They were punching him many times and Evaristo screamed: *'I am not guilty; that was not my fault!'*.

730. The witness Armindo Soares also testified that Mautersa was hitting Evaristo Lopes at the base.
731. The testimony of Mario Ribeiro included Mautersa in the group beating the victim at the KOPASSUS base:
732. “João Lemorai, **Mautersa Monis** and Joni Marques: they were the ones who beat up Evaristo Lopes. (...) Beating him up inside that room there were João Lemorai, Joni Marques, Joaquim Januario, Júlio da Costa, Virgal da Costa, **Mautersa Monis**, Alexio Dias Quintas, Gonsalo da Costa Sanches, Oscar, Sergeant Syaful and Gilberto”.
733. From the available evidence, the Panel concludes that Mautersa Monis beat the victim both at the roadblock and at the KOPASSUS base.
734. The Panel, considering the state of mind of this accused (*mens rea*) and after assessing the testimonies, also concludes that it has been sufficiently proved beyond any reasonable doubt that Mautersa Monis, a Team Alfa member since 1999, knew that the group had a plan to search for FALINTIL members in the forest, with the support of KOPASSUS, which was providing the weapons.
735. Mautersa Monis knew that his conduct was unlawful; he admitted to the Court that “he felt terrible and decided to avoid the group after that night”.
736. Mautersa Monis was aware and knew about the context in East Timor, since he was an old Team Alfa member and definitely shared the same objectives of the group: to fight against independence supporters, by using violence. He knew the connections between Team Alfa and the Indonesian military authorities. He knew that the torture was a part of a wider and systematic attack whose plan was followed up by local militia members and headed by Indonesian military forces. His awareness about the multiplicity of victims was also shown by the fact that he refused to recognize his family ties with the witness Valerio Valente, an independence supporter. Therefore, Mautersa Monis knew that every independence supporter could be sought, arrested, tortured and even killed in East Timor, not only Evaristo Lopes.
737. Regarding the count of murder, the Court has no evidence about the role of Mautersa Monis in the final beating which resulted in the death of Evaristo Lopes. There is no evidence beyond reasonable doubt that Mautersa Monis was in the room when the victim was killed. The witnesses Gonsalo da Costa Sanches and Mario Ribeiro have generally testified that Mautersa beat the victim until he died. However, it is still unclear to the Court whether Mautersa was continuously beating the victim until he died or if he left the room at a certain time before the victim died. Other reliable testimonies reported that only João da Costa, Oscar Pinto and Syaful Anwar were present in the room at the time when the victim was killed.
738. In addition to that, the elements for assessing his *mens rea* are not met. The Panel construes that his desertion from the group the next day might have arisen from his displeasure at the death of the victim. He also did not participate in the dumping of the corpse. Such behavior may have resulted from remorse or may be assessed as a lack of awareness about the result of his conduct in the initial beatings of the victim.
739. The Court has no certainty whether Mautersa Monis was conscious that his initial conduct – in arresting and by participating in the first moves to torture the victim – could also result in the death of the victim.
740. On these grounds, the Panel is not satisfied that, in relation to the count of murder, the accused Mautersa Monis intended also to kill the victim.

About Gilberto Fernandes

741. The Court is convinced that the evidence shows Gilberto Fernandes as also having participated in the beating of the victim, either by arresting him or by punching him using the hands. He himself admitted that he beat Evaristo Lopes first before Joni Marques cut the victim’s hair.
742. The testimony of Gonsalo da Costa Sanches also included Gilberto Fernandes in the room punching the victim. The witness Armindo Soares stated that Gilberto Fernandes kicked the victim five times on the left side of the stomach. He added: “(...) At approximately midnight, **Gilberto Fernandes** came and told us that the person had died. He did not say that to me in particular. (...) In front of **Gilberto Fernandes**, Evaristo Lopes was killed by Syaful Anwar, who had cut Evaristo’s throat. João Lemorai and Pinto helped Syaful by holding Evaristo’s head from behind and holding Evaristo feet”.
743. The witness Mario Ribeiro described how Gilberto hit and kicked the victim in the stomach. “He beat EL with his hands, but I couldn’t count how many times”.
744. The witness Salvador Amaral had the same view: “At the time, I saw those who were beating Evaristo Lopes. They were: João Lemorai, Oscar, Joni Marques, Martinho, Augustinho, **Gilberto**, Syaful Anwar, Salvador and Cesar Augusto.”

- 745.** The witness Valerio Valente mentioned Gilberto as one of the group who had arrested and taken him to the KOPASSUS base.
- 746.** Nonetheless, there is no evidence that he also stabbed the victim. The testimonies converge to conclude that Gilberto Fernandes used only his fists and was included among those who retorted by saying that “the victim was lying”.
- 747.** In relation to his awareness of his own conduct (*mens rea*), Gilberto Fernandes’ statement and the witnesses’ testimonies convinced the Court that:
- 748.** The accused, even though he refused to admit that he knew about the objectives of Team Alfa, was a Team Alfa member and had participated before in arresting a civilian. Thus, he was aware that his repeated conduct, once again, was unlawful.
- 749.** Although Gilberto Fernandes was at a low rank level – officially a cook – he knew that the arrest and beating was intended to cause suffering to the victim in order to extract some information about the activities of FALINTIL.
- 750.** Gilberto Fernandes, under all those circumstances, knew his conduct would result in the suffering of the victim.
- 751.** The Court has no doubts about his awareness of the widespread attack against the civilian population. He admitted being a Team Alfa member and had sufficient knowledge of the militia group’s objectives. On the same night, he had arrested another independence supporter; he was more than a mere cook, but also an activist taking part in those attacks.
- 752.** Regarding the count of murder, the Panel has no evidence that Gilberto also stabbed the victim. The testimonies converge to the conclusion that Gilberto Fernandes used only his fists and was included among those who retorted by saying that “the victim was lying”. This evidence is sufficient for the count of torture, but not enough for the count of murder.
- 753.** In assessing the *mens rea* of Gilberto Fernandes, the Court is of the opinion that there is no conclusive evidence that Gilberto intended or shared with the others the intent to kill the victim too. The sole testimony which mentions his presence in the room when the victim was stabbed by Syaful Anwar and held by João da Costa and Octavio Pinto is insufficient to persuade the Court that Gilberto was either also engaged in the fatal action against Evaristo Lopes or could predict the consequence of his initial conduct.

The conclusions on the counts

- 754.** The Panel is therefore satisfied that the allegations contained in the indictment regarding count 1 have been proved beyond reasonable doubt in relation to the accused Joni Marques, João da Costa, Mautersa Monis and Gilberto Fernandes.
- 755.** In relation to count 2 (murder), the Panel is satisfied that the allegations have been proved beyond reasonable doubt in relation to the accused Joni Marques and João da Costa. However, the Panel, in relation to the accused Mautersa Monis and Gilberto Fernandes, finds that the allegations for count 2 (murder) have not been proven beyond reasonable doubt.
- 756.** On the evidence produced, the Panel therefore finds the accused Joni Marques, João da Costa, Mautersa Monis and Gilberto Fernandes GUILTY of torture as a crime against humanity (Sect. 5.1(f) of UR-2000/15), and the accused Joni Marques and João da Costa GUILTY of murder as a crime against humanity (Sect. 5.1(a) of UR-2000/15).

(b) Counts 3 and 4 – Deportation or forcible transfer of civilian population and persecution

- 757.** The relevant information derived from the submissions of the parties and the evidence before the Court persuades the Panel to conclude that it is undisputed that houses were burned during September 1999 after the popular consultation in East Timor. People moved from their villages to other places: some of them went to Com; others as far as Kupang.
- 758.** It is also undisputed that Indonesian military personnel were present during the transfer of these populations. The Indonesian public administration was providing facilities in those operations – garbage trucks, troops and logistics (e.g. military base).
- 759.** During the withdrawal of the population Team Alfa members were always present. The population was not driven straight to Com Harbor, but always made a stopover at 745 Base in Los Palos. The final destination was Kupang. Some villagers who did not want to go to Kupang ran to the forests.

- 760.** Not one of the accused referred to the destruction of livestock; only the burning of houses. Some testimonies, on the other hand, reported: (a) stealing of money, as testified by Antonio Soriano; (b) burning of personal belongings and stealing of chickens, pigs and goats, as testified by Lucia Pereira and José da Costa Nunes; and (c) burning of personal belongings by the militia members, as stated by José da Costa Nunes and Aurito Rodrigues. After considering these testimonies, the Court firmly believes that there is reliable evidence on which it may be concluded that personal belongings and livestock of the villagers were also destroyed during the attacks in September 1999. The accused do not mention that, but the evidence is uncontroversial in relation to this finding of the Panel.
- 761.** Some of the burned houses belonged to pro-independence supporters. The accused Alarico Fernandes admitted having burned the houses of José Murta and Anselmo Correia Pinto, but under duress from Carolino Portela. Some of the houses burned belonged to the head of village, who was supporting CNRT, acknowledges Alarico: “When we burned those houses, most of them were occupied by CNRT supporters; Carolino used to say: ‘Those houses belong to the government; Xanana will replace them’.”
- 762.** The testimony of one of the victims, Anselmo Correia Pinto, former head of village, confirmed the statement of Alarico Fernandes: “Carolino came to burn my house and forced Alarico and Gonsalo to burn houses because at the time I was CNRT. Carolino ordered: ‘They are CNRT, burn their houses!’”. About the burning of the house of José Nunes, the witness said that, in the same manner, Carolino ordered Gonsalo and Alarico by saying “He also lied! Go and burn that person’s house, because that person also works for UNAMET”.
- 763.** The witness Victor da Costa Nunes did not know the reason why seven houses were not burned, since the owners had already fled before Team Alfa had come. But later he testified that “they were afraid to be hit by the people who were coming. They were afraid of the pro-autonomy people because the owners were CNRT supporters; they were afraid to die”.
- 764.** The witness Antonio Soriano is sure that “Carolino came on that day because we were supporters of FALINTIL”.
- 765.** The witness Angelina Soriano briefly concluded: “Team Alfa had suspicions because I was a supporter of Xanana”. Her house was also burnt.
- 766.** The witness Aurito Rodrigues confirmed that Carolino was threatening Antonio Soriano because he, Soriano, was CNRT supporter.
- 767.** The witness José da Costa Nunes, by confirming the burning of his house by Alarico, explained that he was a member of CNRT, and for that reason they burned his house. His son and daughter were working for UNAMET.
- 768.** The witness Olivio Lopes, whose house was also burned, introduced himself as CNRT and explained to the Court: “I was afraid at the time and I thought that Team Alfa or TNI were going to kill people. I believed that Antonio Soriano had been killed”.
- 769.** From those testimonies, the discriminatory intent of the attacks revealed itself in the burning of the houses of CNRT or any political group or individual who were pro-independence. The allusion of one victim to his relatives who worked for UNAMET highlights the discriminatory views of the pro-autonomy group in relation to civilians who had organized the popular ballot. United Nations’ officers were also seen as an adversary of pro-autonomy groups.
- 770.** It is credible that houses other than those belonging to independence supporters were also burned.
- 771.** The testimonies suggested that some of the houses burned indeed belonged to independence supporters. Nevertheless, they do not deny the possibility that some of the others belonged to pro-autonomy oriented villagers. However, this does not mean that the purpose was to burn only the houses owned by independence supporters, but also to force the people to leave their villages. We have evidence that one of the orders shouted out during the operation was: “burn all the houses, then Xanana will rebuild them”. That means the attack was in fact against all those who wished to stay in East Timor, who were suspected of being independence supporters. The alleged circumstance that the fire in one house could extend to other houses in a row is irrelevant: the multiplicity of the victims is related to the results, not the number of acts. The fact that persons other than independence supporters also had their houses burned does not exclude the fact that houses of the independence supporters were especially targeted, as can be seen from the testimony of the witnesses referring to orders from Carolino Portela.
- 772.** It is disputed that the transfer of those villagers was forcible. But the evidence before the Court clearly shows that there was a forcible transfer of the population. The transfer of those villagers was forcible. The accused Gonsalo dos Santos, in his defense, included himself as one victim. He claimed also to having been forced to go with the refugees, an assertion which promptly suggests the compelled nature of the transfer of civilians. The accused Alarico Fernandes strengthens what his colleague had alleged: “They forced the villagers to follow the refugees to Kupang”.
- 773.** The witness Anselmo Correia Pinto, head of the village and CNRT supporter, remarked that “it was not Team Alfa who was forcing us to move, but the Bupati of our region. They ordered us to go to Los Palos, then to Com in order to go to Kupang to become refugees”.

- 774.** The testimony of Antonio Soriano reveals that he did not want to go and this is the reason why they beat him.
- 775.** The witness Lucia Pereira testified: “Carolino threatened me if I didn’t go to Kupang. A white minibus took me to the 745 military base.” Her village was Soro Moco. The threat from Carolino was by saying those words and because he was carrying a bayonet. He was about 20 meters away from the witness at the time. “I was afraid of him because he was carrying a bayonet and threatening people. Carolino said, very angrily: ‘You shouldn’t stay here; you have to go away to Kupang!’. So we went and stayed in Com until INTERFET arrived. (...). Paulo took all of us”.
- 776.** The witness José dos Santos’ testimony is unequivocal. “I was in Suro Kecil when Felisberto told us to go to Kupang. They summoned us to go to the village office to hear the order. It was said there that if we stayed in the village, an armed force would come. Nobody was with Felisberto when he told us to leave the village. (...) We left the village in an ordinary minibus driven by Paulo, whose surname I don’t know, but [pointing him out in the courtroom] we are from the same village of Soro Kecil. Paulo just took members of the community to Com. About the other men sitting in this courtroom, I didn’t see any of them in my village on that day. (...) We went to the 745 barracks with a lot of people. (...) We stayed at Com for one month. We were waiting for a ship that was coming to pick us up and take us to Kupang.”.
- 777.** The testimony of Olivio Lopes increases the degree of certainty in respect of this matter. “They ordered us to go to Kupang. I didn’t go. I stayed in Com, then I went home. There no more ships”.
- 778.** The witness Aurito Rodrigues went further on dates and numbers. “It happened in September 1999. I received information from Team Alfa that, on 9 September, militia and BRTT were coming from Leuro to Foema. In order to avoid this threat, we ran away to the forest; the ones who remained were old people. After that, they ran away to the forest. We continued to assist the organization to go back to the village to check on the situation and on the conditions in the village in order to prepare ourselves. In case of any militia coming, we could report to the villagers about the militia movements so that they could avoid them. After that, after the 30 August (ballot), we saw that there were several members of Team Alfa and BRTT coming to the villages. They were burning houses and frightening everyone. There were 46 houses burned in Foema and about 68 in other villages. The ones who did the burning we know as Joni Marques, Gonsalo, Gilberto, Alarico, Paulo, Amélio and Manuel. And after that, they forced several families – about 30 or 31 families – to leave their homes and to go to the 745 Base in Los Palos. (...) At the time the houses were burned, the only few families that stayed in Nanakuro were removed to the 745 base, and then they moved to Kupang. (...) Team Alfa forced them to go. They used to threaten the villagers by shooting and by saying: ‘Anyone who doesn’t want to go to Kupang, we’ll kill!’”
- 779.** The witness Florindo da Costa, brother of the militia member Carolino Portela, was in a minority by saying that he was not forced, but, even so, stated: “I didn’t want to go to Com”. The organizer of the removal was the former head of village.
- 780.** The above witnesses testified that they were forced to leave their villages, either after having their houses burnt or upon being threatened to be killed or forced to get into the car. From their villages, they were driven to the 745 base, but the final destination was Kupang. Only one witness, Olivio Lopes, declared that he was not forced, but even so, he mentions that the head of the village ordered the people to go. If that was really true, it has still been proven that many of the independence supporters had no options: either they had to follow Team Alfa and the Indonesian Army or flee to the forest. In either case, their houses would be set on fire. There was no choice.
- 781.** The relevant activities of each accused with respect to the charges can be summarized as follows:

About Joni Marques

- 782.** Joni Marques was one of those Team Alfa members always carrying a weapon and in close collaboration with Indonesian military officers. He admitted that he was asked to help the people to go to Kupang.
- 783.** The Court was initially confronted with the following issues:
- 784.** Was Joni Marques present during the operation? Paulo da Costa mentioned that he saw Joni Marques during the removal in the company of the Team Alfa members Oliveira and Sérgio. All of them were carrying guns.
- 785.** Alarico Fernandes reported that Joni Marques and his Team Alfa members, carrying 11 rifles SKS, threatened them: ‘Anyone who supports CNRT will have their houses burnt and will also be killed!’.
- 786.** Gonsalo dos Santos also mentioned in his statement that Joni Marques and Felisberto Sávio used to threaten the villagers.
- 787.** The testimony of Aurito Rodrigues listed Joni Marques as one of those who did the burning. (“I saw Joni Marques with 5 members of TNI carrying 5 automatic rifles”). Although stating that he did not see him directly burning houses, the witness testified that Joni Marques “was walking around there with Carolino”. Among other

things, the witness recalled the order from Marques to one of the militia members to avoid burning chickens because they were useful.

- 788.** The witness Basilio Fernandes also saw Joni Marques carrying a gun during the operation.
- 789.** The testimony of Florindo da Costa mentioned Joni Marques coming by car with Paulo to pick up the villagers to the 745 Base.
- 790.** After assessing such evidence, the Panel has no doubt that Joni Marques was present during those attacks in September 1999.
- 791.** What was Joni Marques' role during the transfer? Joni Marques alleged that his duty was to provide for the withdrawal of the villagers who wanted to go to Kupang. Even disregarding some of the statements of the accused who claimed to have been forced by Joni Marques either to burn the houses or to pick up the people to leave their villages, the Court accepts the testimony of the witnesses on this point.
- 792.** The witness Anselmo Correia Pinto was not explicit in stating the name Joni Marques, but testified that "Team Alfa commanders were there carrying weapons". It is unchallenged that Joni Marques was one of those commanders for a long time.
- 793.** The witness Antonio Soriano mentioned that he recognized Joni Marques in the courtroom, but remarked that he did not do anything on that day.
- 794.** The witness Aurito Rodrigues, in an overall statement, pointed out Joni Marques as one of the perpetrators of the attack. "The ones who did the burning we know as Joni Marques, Gonsalo, Gilberto, Alarico, Paulo, Amélio and Manuel. And after that, they forced several families – about 30 or 31 families – to leave their homes and to go to the 745 Base in Los Palos." Aurito Rodrigues confirmed having seen Joni Marques walking away from the villages, from where the houses had been burning to the main road, and going to Jenituto on the other side that had not been burned. "Joni shouted to me: 'Follow me to Jenituto!'. In the end, he clarified his initial sentence: "I didn't see Joni Marques directly burning houses, but at the time he was walking around there".
- 795.** The witness Basilio Fernandes recognized Joni Marques in his village: "Joni came to pick up the villagers". At the time, the community was already gathered, so Joni, Carolino, Justino and another Carolino came to pick up the villagers.
- 796.** This evidence leads to the conclusion that Joni Marques was present during the withdrawal and burnings. His function, as a militia leader, was to command the removal of the villagers. He certainly did not decide about the plan to remove the villagers. The plan came from the Indonesian authorities; Team Alfa was on duty to implement the removal, with the support of Indonesian military authorities. Even if he did not directly burn the houses, he was commanding the operation. He was encouraging, or rather ordering them.
- 797.** Did Joni Marques know about the plan to remove the people? By responding affirmatively to this question, the Panel relies on the testimonies above and other evidence in this case for the other counts. Since he was a Team Alfa member and was working closely with KOPASSUS, the Panel has no doubt on this issue. It is true, according to the reports and some testimonies, that the order to remove the villagers came from Indonesian authorities through the heads of the districts. Those authorities were under the rule of the Indonesian government, which also provided support through military personnel and equipment. Those close ties among local leaders and Indonesian military authorities also explain the awareness about a widespread or systematic attack, which was known as Operation Kenzen.
- 798.** Regarding the *actus reus*, the Court is of the opinion in relation to the count of forcible transfer of the civilian population that Joni Marques deliberately participated in the attacks in the village of Leuro and its outskirts, pursuant to the testimonies relied upon by the Panel.
- 799.** He was one of the persons in charge. A palpable assumption of that belief is that Joni Marques, was always seen by the witnesses carrying weapons and coordinating in synchronization with Indonesian military authorities the actions after the consultation day on 30 August 1999.
- 800.** His *mens rea* may be drawn from the evidence that, by participating in the following-up of the displacement of the civilian population, he really knew what would occur in the sequence of the events. The forcible transfer had definitely been achieved from the moment that the villagers were forced to get into the trucks and mikrolet driven by Paulo da Costa. Some of the villagers did not reach Kupang, as planned; others, arrived at Com Harbor and continued on to West Timor.
- 801.** Joni Marques certainly knew that the attack against the villagers of Leuro was only a single action amidst several other inhumane acts which constituted a part of a systematic attack against independence supporters in East Timor, regardless of whether the victims were FALINTIL members or civilians supporting the pro-independence cause. A confessed militia leader with close ties with the Indonesian officials, Joni knew that the burnings and displacements comprised part of an overall policy against pro-independence supporters in East Timor.

802. Joni Marques had more than enough knowledge to be aware that his conduct was part of this attack, since he had knowledge of the attacks sponsored by the ruling Government and about its policy. Marques played his part in a wider policy against independence supporters since he was one of the leaders of a militia group bound to the Indonesian military forces.

About Paulo da Costa

803. He was present during the removal. He was driving a red minibus used to carry villagers to the 745 Base and Com no fewer than three or four times in September 1999.

804. He himself admitted to being pro-autonomy and a Team Alfa member since 1999.

805. Paulo da Costa remarked that it was not his wish to go to Kupang, but a wish of Team Alfa, since pro-autonomy had been defeated on the ballot. He went there because he was pro-autonomy. Asked once again whether he was a Team Alfa member, Paulo da Costa replied: "Call the people from my village and ask them about that!".

806. Did Paulo da Costa know about the plan and was he aware that he was playing a role in the plan? The Panel takes into consideration the fact that he had joined Team Alfa in 1999, after allegedly being harassed into doing so for a long time. His continuous further activities in the group also revealed that he at least knew that the purpose of the group was to fight against independence supporters, including civilians. Moreover, having driven the population on many occasions to military facilities, he was certainly aware of a plan and that he was performing an important role in that plan.

807. Did Paulo burn any houses? He denied doing so in his statement. However, the Court has enough evidence to conclude that Paulo da Costa did burn houses. The witness Victor da Costa Almeida saw Paulo da Costa and Alarico Fernandes burning all the houses from the start to the end. "Gonsalo, Alarico, A mélio, Paulo, Sérgio and Horácio burned Matheus da Costa's and my father's house. I didn't see who first set the house on fire.(...) Alarico and Paulo were holding gas lighters. They burned one house. They took coconut leaves to set fire to the other houses".

808. The witness Angelina Soriano saw Paulo da Costa carrying a sickle only, not burning.

809. The witness Antonio Soriano gave similar testimony, except for the description of the instrument held by Paul – a sword, not a sickle.

810. The Panel is sufficiently persuaded that Paulo da Costa burned houses on that day, in addition to driving the villagers to the 745 Base. One witness testified having seen him burning all the houses in the company of Team Alfa members. Even if a doubt is raised by this single testimony, it is certain that he was at least carrying a gas lighter in the company of Alarico, which leads to the conclusion that Paulo da Costa was there supporting and aware of the intention and what was going on. If his individual criminal responsibility is challenged as perpetrator of the burnings, his conduct fits as an assistant to the main perpetrators.

811. Did Paulo da Costa destroy any possessions other than houses? The Panel has found no evidence relating to this question.

812. Did Paulo da Costa force any people to leave their villages? The aforementioned testimonies enable the Panel to respond positively, since he also admitted to being under orders from Joni Marques.

813. Did he know about the lawfulness of the presence of the villagers in their respective dwelling locations? Since it is clear that the villagers were lawfully established in their places, the accused, as a member of the community, did know that reality.

814. Was Paulo da Costa forced to join the plan? As already decided by the Court in the case of *Prosecutor v. Joseph Leki*⁶⁸, the alleged duress can not be invoked for those who voluntarily and previously joined in the purposes of the group. Paulo da Costa was ordered, not forced to participate in the plan.

815. The Court has no grounds to refuse the testimonies which cited Paulo da Costa as one of those who assisted in the burnings and participated in the driving of the villagers to the 745 Base and to Com Harbor.

816. His *mens rea* is clear: he certainly knew that his conduct would result in the unlawful displacement of the villagers and deprivation of their fundamental rights. As already established by the Panel, he had always been aware of his engagement to the attack the civilian population.

817. Paulo da Costa was aware and knew about the context in East Timor. He knew and shared the same objectives of the group: to fight against independence supporters by using violence. He knew the connections between Team Alfa and the Indonesian military authorities.

⁶⁸ Case n. 5/2000 – The Prosecutor v. Joseph Leki.

About Alarico Fernandes

818. He admitted knowing the purposes of Team Alfa, and burning at least two houses, some of them occupied by CNRT supporters. The witnesses Anselmo Correia Pinto, José da Costa Nunes, Victor da Costa Almeida and Aurito Rodrigues confirm this admission. Apart from carrying a machete and lighter during those operations, Alarico was in several journeys with Paulo da Costa in the red minibus to Com and the 745 Base.

819. Did Alarico Fernandes also know the plan or was he aware that he was playing a role in a plan targeted against civilians? The Panel is of the opinion that Alarico Fernandes always knew about the purposes of Team Alfa and he was aware about the burning of the houses: "It was a very known group around Los Palos. I knew their purpose was to threaten the villagers; otherwise they would kill everyone who supported CNRT". The head of village not only had to support them; he had to follow them. About the other actions of Team Alfa, Alarico Fernandes confirmed that they burned houses. His frequent journeys with the group, his unceasing burning of houses in several villages and his status as a BRTT member are circumstances that raise no doubt about his state of mind in relation to the planned attack. The testimony of the witness Anselmo Correia Pinto that Carolino could kill Gonsalo and Alarico if they refused the orders has to be assessed only as an opinion, which has no probative value. Regarding the alleged duress, the Panel is reminded that so far there is no evidence of the killing of militia members who had refused to obey the orders of a superior.

820. Was Alarico Fernandes forced to join the plan? The Panel has no evidence about the alleged duress. Alarico Fernandes was ordered, as already assessed in the above paragraph.

821. Did Alarico Fernandes destroy any possession other than houses? The Panel responds positively to this question, relying on the evidence given by the witness José da Costa Nunes: "I was the only victim since they destroyed my possessions: my table and my goat. (...) At the time I could only see Alarico, Gonsalo and Carolino. (...) I didn't say anything to him. I was angry with him. (...) Everything was burned inside my house. Alarico or Carolino didn't give me an opportunity to take my possessions out".

822. Did Alarico Fernandes force anyone to leave? Alarico admitted that he was following the orders of Team Alfa, a fact unanimously accepted in the testimonies.

823. Did he know about the lawfulness of the presence of the villagers in their respective places of residence? Bearing in mind that he himself claimed to be "an ordinary citizen", the Panel is of the opinion that he knew that there were no lawful reasons for the civilians to be removed to Kupang.

824. The Panel has sufficient grounds to consider the conduct of Alarico Fernandes (*actus reus*) in the contextual element of a broader action achieved by local militia and pro-autonomy groups against independence supporters. His confessed participation in the burnings and in the unlawful displacement of civilians are consistent with the evidence accepted in this judgment.

825. His *mens rea* is clear: he certainly knew that his conduct would result in the unlawful displacement of the villagers and deprivation of their fundamental rights. As established above by the Panel, he had always been aware of his engagement to attack the civilian population.

826. Alarico Fernandes was also aware and knew about the context in East Timor. He knew and shared the same objectives of the group: to fight against independence supporters by using violence. He knew the connection between Team Alfa and the Indonesian military authorities.

About Gonsalo dos Santos

827. He went to the 745 Base and admitted that he traveled with Paulo on 11 September 1999. He denied being a Team Alfa member, but acknowledged that he followed Joni Marques' orders, addressing him as "commander". Similarly, he denied being a member of any pro-independence group.

828. Did Gonsalo dos Santos know about the plan or was he aware that he was playing a role in a plan? The witness Aurito Rodrigues, without hesitation, pointed out Gonsalo dos Santos as a BRTT member and testified having seen him carrying weapons on 8 September. Such evidence allows the Panel to ascertain the awareness of this accused about his role in a systematic attack against the civilian population in East Timor at the time. He knew his position in groups that worked as the spearhead for Indonesian military objectives.

829. Did Gonsalo dos Santos burn any houses? He refused to admit it, by claiming that he was forced to leave his village. However, the Panel relies on the witnesses Anselmo Correia Pinto, José da Costa Nunes, Victor da Costa Almeida, and Aurito Rodrigues.

830. The witness Anselmo Correia Pinto said that Gonsalo dos Santos was among the persons who burned some houses: "(...) They [Gonsalo and Alarico] used a match, but it didn't light, so they went to José Nunes' house. After José's house was on fire, they

came to burn my house. (...) At the time of the burning of the houses, there were just **Gonsalo**, Alarico and Carolino. (...)"

- 831.** The witness José da Costa Nunes also testified similarly: "(...) Alarico and **Gonsalo** were the ones who I saw starting the fire at Anselmo's house. After burning my house, I went with my family to where my sister lived and I stayed there. (...) First of all, my house was burnt; then Gonsalo and Alarico burned Anselmo's house. (...)"
- 832.** The witness Victor da Costa Almeida told the Court that he knew Gonsalo dos Santos was among the people who came and burned his village. "I saw that with my eyes. All of them are here in this courtroom (...) Firstly, they – **Gonsalo**, Alarico, Amélio, Paulo, Sérgio and Horácio – burned Mateus da Costa's and my father's house. (...) **Gonsalo** came to my village and burned as many as 58 houses with them. (...) I saw with my own eyes **Gonsalo** burning as many as 58 houses. (...) He burnt the house from the side. (...) After Gonsalo lighted his lighter, I could see him. (...) They were together burning the houses".
- 833.** The witness Aurito Rodrigues also included Gonsalo as one of those who were burning houses on that day: "(...) From PAM Swakarsa and BRTT, I knew **Gonsalo**, Alarico, Octavio, Júlio and Carolino. (...) About 7 o'clock on that night, there were people from BRTT, Team Alfa, TNI, coming from Leuro village and they went into the sub-village to burn houses. At the time, I saw **Gonsalo** and Júlio (...) with automatic weapons. There were about 15 of them. (...) Still on 8 September, about 7:00 PM we were on the edge of Nanakuro sub-village when we received information that there were already militia and TNI on the way. So we gathered up to prepare ourselves, close to the houses, but when they arrived they started to burn houses. [When they arrived at Nanakuro], I saw Júlio with my own eyes, and also **Gonsalo** and a lot of others, burning houses. There were some of them in front carrying petrol."
- 834.** The testimonies quoted above lead the Panel to conclude that Gonsalo dos Santos was burning houses in more than one village.
- 835.** Did Gonsalo dos Santos destroy any possessions other than houses? The Panel has no evidence that clearly proves that Gonsalo dos Santos destroyed possessions other than those he burned with his fellow men.
- 836.** Did Gonsalo dos Santos force any people to leave? As a general assessment, the Panel concludes from the testimonies quoted above that the burning was an action to cause the displacement of the villagers. Regardless of whether it came with some threat from the accused either to force the owners to go to Kupang or flee to the forest, it is undisputed that all those who were involved in burning the houses were also forcing the villagers.
- 837.** Did he know about the lawfulness of the presence of the villagers in their respective places of residence? The same reasons set out above in relation to the co-accused Alarico Fernandes and Paulo da Costa also apply to Gonsalo dos Santos.
- 838.** Was Gonsalo dos Santos forced to join the plan? Similarly, those who were seen more than one time carrying weapons during those turbulent days can not invoke duress. Gonsalo dos Santos, a BRTT member, definitely was not forced to join a plan; he had a role to play in that plan and performed it as ordered.
- 839.** The above evidence leads the Court to conclude that Gonsalo dos Santos participated in the burning of houses and deprivation of fundamental rights of the victims.
- 840.** His *mens rea* is clear for the Panel in the light of the circumstance that he was a BRTT member. Therefore, he was aware of his engagement in the conduct and its consequences.
- 841.** Gonsalo dos Santos was aware and knew about the context in East Timor. He knew and shared the same objectives of the group: to fight against independence supporters by using violence. He knew the connection between Team Alfa and the Indonesian military authorities.

The conclusions on the counts

- 842.** The Panel is therefore satisfied that the allegations contained in the indictment in relation to counts 3 and 4 have been proven beyond reasonable doubt in respect of the accused Joni Marques, Paulo da Costa, Alarico Fernandes and Gonsalo dos Santos.
- 843.** On the evidence adduced, the Panel finds the accused Joni Marques, Paulo da Costa, Alarico Fernandes and Gonsalo dos Santos GUILTY of the crimes of deportation or forcible transfer of civilian population as a crime against humanity (Sect. 5.1(d) of UR-2000/15) and persecution as a crime against humanity (Sect. 5.1(h) of UR-2000/15).

(c) Count 5 – Murder of Alexio Oliveira

- 844.** From the submissions of the Prosecutor and the response of the Defense, it is undisputed that Alexio Oliveira has been taken from the village of Foema, put into the mikrolet driven by Paulo da Costa and taken to the 745 Base, with a stopover in his house in Sawarica, to hand over his motorcycle and the keys to Joni Marques.
- 845.** Joni Marques himself admitted that, on 11 September 1999, he traveled on a motorcycle with another person called Justino and was accompanied by a red minibus with the writing *Cruzeiro* on its side, which was driven by Paulo da Costa. The car was used to transport civilians from the village of Leuro to the refugee camp at the 745 Base. Joni Marques explained that when he was halfway to the sub-village of Foema, Alexio de Oliveira's mother stopped the minibus and asked him to take Alexio Oliveira so he could meet up with his child and wife who were at the refugee camp. Alexio Oliveira got on the minibus. After picking up Alexio and when they arrived in a sub-village called Sawarica, the minibus stopped because Alexio allegedly asked to get his motorbike. Upon their arrival at the 745 Base, it was already dark. This is, in short, the submission of Joni Marques.
- 846.** The witness Florindo da Costa – who helped Alexio Oliveira by putting his suitcase on top of the car and traveled with Alexio Oliveira to the 745 Base – confirmed this statement. The witnesses Jacinta dos Santos and Filipina da Costa – respectively mother and wife of Alexio Oliveira – saw the latter being taken by Joni Marques. The witness Julio da Costa saw Alexio Oliveira getting into the minibus. The witness Eurico da Costa met Alexio at the 745 Base as a refugee, like himself. He arrived before Alexio at the 745 Base and saw Alexio arriving in the *Cruzeiro*.
- 847.** The first issue lays in what happened to Alexio Oliveira while he was inside the 745 Base. The Public Prosecutor alleged that he was killed there. The Defense of Joni Marques believes that the six witnesses called by the Public Prosecutor did not see the alleged murder of Alexio Oliveira: "As a matter of fact, most of these witnesses, with the exception of Filipina dos Santos and Wayne Fee, were not so sure about what had actually happened to Alexio Oliveira and merely speculated that maybe he was dead". Joni Marques stated that he does not know anything about the death of the victim.
- 848.** The Court has evidence that the victim was taken behind the PROVOST house at the rear of the 745 Base. It is clear, from the testimony of the witnesses Florindo da Costa and Basilio Fernandes that Alexio Oliveira was taken from his room to PROVOST with Paulo, Gonsalo, Horácio, and other TNI members, and that was the last time the victim has been seen. The witness Florindo da Costa told the Court: "We followed behind (...) Paulo, Gonsalo together with PROVOST soldiers who took Alexio Oliveira to the PROVOST house" "Alexio never returned after that. Paulo and Gonsalo came back to where we were". The witness Basilio Fernandes also testified that Gonsalo, Alarico, Eurico, Horácio and Manuel handed over Alexio to the soldiers.
- 849.** There is also evidence that Alexio Oliveira died. Following the evidence from the crime scene investigator, Wayne Fee and the forensic anthropologist Sofia Egana, the Court believes, as the Public Prosecutor advanced, that the body recovered from the well at the rear of the 745 Base was indeed that of Alexio Oliveira.
- 850.** But there is no evidence before the Court to prove when exactly Alexio Oliveira died and from what. Did he die while he was being taken to the rear of the PROVOST house? The witness Eurico da Costa told the Court that on the same evening that Alexio Oliveira was taken to the rear of the Provost house, Custodio came to the witness and threw at him the jacket of the victim. The witness stated: 'You may have done your job, but please don't throw it on my bed!'. The witness was the brother-in-law of the victim, but did not ask any questions about him. 'I didn't ask any questions about it because the situation was tense and I was scared'. He kept the belongings of Alexio under a coconut tree because the owner was no longer there.
- 851.** The Panel could not conclude from the Eurico da Costa's testimony that the victim indeed died right after his surrender to the Indonesian military. The fact that the jacket of the victim was handed over to him is not evidence that indeed the victim had already been killed. This testimony reveals a mere presumption that can not be relied upon by the Court since a doubt still remains about the moment and the manner of the killing.
- 852.** The forensic report does not determine precisely the cause of the death. This evidence was sufficiently reliable to identify the body, but not sufficient to determine the cause and the date of death. The report did not afford a definite conclusion on those two issues.
- 853.** The question therefore arises as to what really happened after Alexio Oliveira was taken behind the PROVOST house. Was he killed? If he was, then who killed him, when exactly, and how was he killed? Was he taken to the 745 Base to be killed? The Panel shall try to determine these issues after evaluating the conduct of each accused.

About Joni Marques

- 854.** In its oral response to the indictment, the Defense rejected the allegation that Joni Marques was the main perpetrator. Therefore, he did not plead guilty to the Prosecutor's charge in relation to the murder of Alexio Oliveira.
- 855.** Joni Marques stated that he was not the perpetrator of the alleged crime. "I'm not the perpetrator of the murder of Alexio Oliveira, and I did not participate in aiding or abetting the murder; and I had no intent or plan, and I am not guilty".

- 856.** To find Joni Marques guilty of the murder of Alexio Oliveira, the Court has to establish that: (a) Joni Marques killed or caused the death of Alexio Oliveira; (b) that the killing was part of a widespread or systematic attack against the civilian population; and (c) the accused knew that it was part of such an attack.
- 857.** It is clear that Joni Marques left Alexio Oliveira after handing over the key of his motorbike. Horácio then took it from the victim. The testimony of Florindo da Costa clarified that Joni Marques, as soon as he arrived at the Base, returned the key to Alexio, and left the place to go to deal with his brother's problem: "When we arrived of the military camp 745, the car was stopped, including Joni and the motorbike. Joni returned the key to the hands of Alexio Oliveira. Horácio actually took the key from Alexio. By the time we arrived, a member of the 745 military hit a brother of Joni. The name of this member was Raul. So Joni came over to resolve the matter and we followed Joni".
- 858.** The Court agrees with the Prosecution that there is no evidence that Joni Marques was one of the men who took Alexio Oliveira behind the PROVOST house at the 745 Base. Joni told the Court that, at approximately 18:30, he did not see where Alexio went. He stated that he did not accompany Alexio to find his family and did not meet up with anybody, including the TNI, or speak to anyone about Alexio: "I do not know where Alexio was taken or by who or where he went from that evening until the next morning because at the refugee camp there were three separate areas". This statement is in conformity with the testimony of the witness Florindo da Costa who saw Joni Marques leaving Alexio Oliveira upon his arrival in 745 Base. In the testimony of Basilio Fernandes, Joni Marques was not among the people who took Alexio Oliveira at the PROVOST place.
- 859.** Obviously Joni Marques was not with Alexio Oliveira at the alleged moment that he was killed, as submitted by the Public Prosecutor. Therefore, Joni can not be the main perpetrator.
- 860.** Did Joni Marques order the killing of the victim? The Court has to assess whether Joni Marques knowingly took Alexio Oliveira to the 745 Base to be killed and planned the death of the victim. The witness Florindo da Costa denied what he had allegedly said to CivPol. "I never said that Joni Marques said Alexio had to be killed, to be handed over to PROVOST or to be kicked or beaten".
- 861.** It is true that Joni Marques knew Alexio de Oliveira, who lived in the sub-village of Foema as a member of CNRT, and therefore, an independence supporter. Joni admitted that, before Alexio got into the minibus, he himself pointed his weapon at the head of Alexio and asked him about his involvement with CNRT.
- 862.** Joni Marques also knew that it was dangerous for a well-known member of CNRT to be brought to the 745 Base. He did not want Alexio to get on the minibus because Alexio was a CNRT member and in general pro-autonomy supporters did not like CNRT. The witness Filipina dos Santos told the Court that she herself and her husband had been seen by militia distributing posters of Xanana and flags of CNRT, and that the militia and all pro-autonomy members were very angry with them. The witness Jacinta dos Santos was afraid and worried because Joni Marques knew that her son was a CNRT member.
- 863.** The witness Eurico da Costa told the Court he was surprised to see Alexio Oliveira at the 745 Base. He knew that he had connections with CNRT. Eurico da Costa arrived before Alexio at the 745 Base and saw him arriving in the *Cruzeiro*. "When I met him, when we arrived there I asked him: 'Why are you here?'. Alexio didn't reply to my question. He offered me his belongings and said 'Please take my belongings and give them back later because I am going to bring my wife. We can only put our trust in the hands of Joni'".
- 864.** It can be concluded from the aforementioned statement that the victim was afraid of Team Alfa members and pro-autonomy supporters. He was concerned that something bad could happen, but he trusted Joni Marques.
- 865.** There is an issue as to whether Alexio Oliveira got into the car of his own free will or if he was forced to. The Court has evidence that Alexio Oliveira was not forced to get into the car. Joni Marques said: "I didn't pick him up, but Alexio's mother brought him to me and asked me to help Alexio register as a refugee and Alexio's mother didn't want to get on the minibus". He also told the Court that he wanted to help Alexio and he did not threaten him. The witnesses Florindo da Costa and Filipina da Costa substantially confirmed that the victim was not forced to get into the car.
- 866.** The witness Florindo da Costa said Joni Marques did not force Alexio Oliveira to go with him or to get into the car. He told the Court that Alexio Oliveira came towards Joni and asked to be taken for the registration. Alexio Oliveira insisted on going with Joni Marques. Nobody forced him to get into the car. He testified as to the approach of Joni Marques to Alexio and his mother on the road. At the time Joni came and stopped in front of Alexio, Alexio told Joni: 'Brother, please help me to go to the registration, so they can accept me'. At the time, Joni replied to him: 'I am sorry, but you behave like a snake, and I want you to move away from this road'. However, Alexio insisted on coming with Joni, so Joni took him and got into the car. The witness Filipina dos Santos, wife of the victim, emphasized that at that time Joni Marques said that they wanted to protect her husband.
- 867.** Jacinta dos Santos was the only witness who heard Joni Marques threatening to kill her son. Joni Marques, who stated that he was carrying a gun at that time and admitted having pointed it at Alexio's head, implicitly confirmed that. "I deliberately pointed my gun at his head to fool the others so they weren't suspicious of me and that

was only a tactic because I was a clandestine member also". But even so, the witness Jacinta dos Santos still believed that maybe Joni Marques would take her son to his family in Sawarica.

868. Joni Marques was holding and used a gun on the day Alexio was taken to the 745 Base. He refused to admit he fired a shot when the minibus stopped in a sub-village called Sawarica: "I did not fire a shot at anybody at that time". But the witness Florindo da Costa said that when the car stopped at Sawarica in front of Alexio's house, Alexio took 20 minutes to pick up his motorbike. Then Joni Marques fired a shot and the motorbike came soon. The witness Jacinta dos Santos also saw Joni Marques firing his gun.

869. The Court is of the opinion that Alexio Oliveira asked to be taken to the 745 base to be registered to go to West Timor. But there is also evidence that the victim was threatened. The fact that Joni Marques had a gun and was pointing it at Alexio Oliveira could be viewed as a threat by the victim who was well-known as a pro-independence supporter.

870. One could wonder whether Joni Marques brought Alexio Oliveira in order to help him. And if so, why did he not also take along at the same time his family, namely his wife and his mother? The victim was taken alone, leaving his wife and his mother behind. The witness Florindo da Costa, confirming what he said to Civpol, testified that Alexio Oliveira himself told Joni that his wife had already left: "My wife has left, so I want to register myself". Alexio's wife told the Court that she said to her husband: "I am going with you". He replied: "Stay, Team Alfa members will pick you up". Regarding Alexio's mother, the witness Florindo da Costa stated that there were no more seats in the vehicle for Alexio's mother. The Court is of the opinion that the fact that Alexio Oliveira's family were not brought with him was not a decision made by Joni Marques. That circumstance does not lead to the assumption that Joni Marques did not want to help him. The witnesses testified that it was not Joni Marques' decision not to also take the family of Alexio Oliveira to the registration. It cannot be assumed that Joni Marques refused to bring Alexio's family because he had a plan to kill the victim.

871. There is no evidence to draw the conclusion that Joni Marques issued an order to kill the victim. It is true that the co-accused Gonsalo told the Court that Joni Marques gave an order to kill the victim. However, the Panel can not rely on such a statement of a co-accused which is not supported by any evidence.

872. Furthermore, there is no evidence that Joni Marques' men killed Alexio Oliveira. Was he killed by Paulo da Costa, Gonsalo dos Santos or Horácio who were with the victim the very last time he was seen at the PROVOST place? Or was it the Indonesian military authorities at the PROVOST house who killed him? There is no evidence to allow the Court to determine who really killed the victim; neither is there evidence to show that the eventual perpetrator was under Joni Marques' authority or received an order from him.

873. In order to make Joni Marques criminally responsible of the murder of Alexio Oliveira either as a joint perpetrator or as an aider and abettor, as requested by the Public Prosecutor, the main perpetrator has first to be identified.

874. The Court can not establish beyond reasonable doubt that Joni Marques killed or caused the death of Alexio Oliveira. Therefore, since the first requisite element of murder is missing, Joni Marques can not be found guilty of the charge. The Panel has no evidence of Joni Marques' criminal responsibility under any of the instances provided for under Sect. 14.3 of UR-2000/15.

875. Therefore, the assessment of the other elements of the crime – widespread or systematic attack against the civilian population and knowledge of the attack – are not relevant since the first element – the question of who killed or caused the death of Alexio Oliveira – is not established.

About Paulo da Costa

876. The Court has enough evidence and it is not even disputed that Paulo da Costa was the driver who transported Alexio to the 745 Base. But, as was said by the Public Prosecutor, this would not make him responsible for murder, even as an aider or an abettor.

877. However, Paulo da Costa is one of the men who took Alexio Oliveira at the PROVOST house to the Indonesian military police. Indeed, he was seen with the group going to the back of the PROVOST house. The witness Florindo da Costa was with Alarico Fernandes and saw the victim going with Gonsalo, Paulo and Horácio to the PROVOST house. When they arrived, they were forbidden to go in. Only Gonsalo and Horácio were allowed to go into the military post. The witness was standing behind them, so he was sure that they were taking Alexio Oliveira away. From the front of the building they took him to the rear side of the house, but the witness did not know from there where they would be taken. That happened inside the perimeter of the 745 Base. They just took him to the area inside the military base beside the building. Paulo and Gonsalo were carrying machetes. It was about 30 minutes later when Paulo, Gonsalo and Horácio returned. Alexio Oliveira was no longer with them. He did not see any more PROVOST members.

878. The witness Basilio Fernandes saw the group taking Alexio Oliveira away and offering him to the Indonesian military. The group was Manuel, Gonsalo, Alarico, Eurico and Horácio. There were also some Indonesian soldiers in the group that led Alexio away. Gonsalo and Alarico were carrying machetes. They took Alexio to the place behind the main road.

879. The Public Prosecutor alleges that Alexio Oliveira was killed at the time he was taken to the PROVOST house and was dumped into a well, and that Paulo was present when that happened. Nevertheless, the Court does not have evidence to affirm that the victim was killed at that time, and in the presence of Paulo da Costa. If the victim was killed at that moment, who killed him and what role did Paulo play? Did Paulo only hand over the victim to the PROVOST knowing that the Indonesian military were going to kill him, or did he himself participate in the murder? It is likely that Alexio Oliveira could have been killed at that moment, but the Court is not sure about it. Other explanations might also be accepted or put forward.

880. The Court is of the view that it has not been proven beyond a reasonable doubt that Paulo da Costa participated in the murder of Alexio Oliveira.

About Gonsalo dos Santos

881. What has been said about Paulo da Costa applies to Gonsalo dos Santos. Many witnesses have said that Gonsalo dos Santos was on the minibus that brought Alexio Oliveira from Foema to the 745 Base. The witness Jacinta dos Santos knew and saw Gonsalo, but she did not see him speaking to her son.

882. Gonsalo dos Santos was also part of the group that took Alexio Oliveira to the PROVOST house, and afterwards to the rear side of the Base. It has also been shown that he returned half an hour later from the PROVOST house without Alexio.

883. The witness Florindo da Costa followed Horácio, Paulo da Costa and Gonsalo dos Santos with the military, and went to the post to see Alexio Oliveira. The witness was in the company of Alarico, smoking cigarettes provided by PROVOST. Only Gonsalo, Paulo and Horácio were allowed to go with the military. Alexio was taken to the back of the PROVOST building. At that time, the witness saw Gonsalo dos Santos and Paulo da Costa carrying machetes. Thirty minutes later, Gonsalo dos Santos, Paulo da Costa, Alarico and Horácio returned; Alexio was not with them. The witness did not see Gonsalo dos Santos forcing or doing anything to Alexio. In addition to that, the same witness testified that the accused Gonsalo was carrying Manuel's sword and was cleaning it before returning to the building at the 745 Base. The same witness specified that at the time they were going across the road, Gonsalo said: 'Brothers, wait for me, I have to clean my sword'. At that time, he also said to them: 'You, brothers, listen to me, if you mention this matter to anyone else, you will take the responsibility for this, because we will not take responsibility for this'. When he said he wanted to clean his sword, the witness did not hear anything else in relation to the blood. These facts were confirmed by the testimony of the witness Basilio Fernandes.

884. The witness Basilio Fernandes also testified that Manuel came to him the following day and said that Gonsalo had used Manuel's sword to cut Alexio. That is why the sword was bent. He did not see dirt on the sword when Manuel talked to him; the sword was already clean. The witness Florindo da Costa also made a similar testimony, correcting his deposition to the CivPol. He told the Court that "he didn't say about blood; only that he had to clean his sword; he didn't say about the dirt". Moreover, it was a sword, not a machete. But he did not see the sword, because it was almost dark. The accused Gonsalo dos Santos warned also: "do not mention about this incident".

885. The Court is of the opinion that there is no direct evidence to show that Gonsalo killed Alexio Oliveira dos Santos. It is true that Gonsalo dos Santos went to the PROVOST with the victim. The Court does not have evidence to affirm that the victim was killed at that time, and in the presence of the accused. Neither can the Court conclude that the sword Gonsalo dos Santos was holding was the one used to kill the victim, simply because he had been seen cleaning it. The Court can not accept the testimony of the witness Basilio Fernandes who said that Manuel had told him that his sword was the one used to cut Alexio Oliveira, when such hearsay is not confirmed by the first source.

886. The Court can not conclude with any certainty that Alexio Oliveira was killed at that moment he was brought to the rear side of the PROVOST house. It is also quite difficult to determine what role was played by Gonsalo dos Santos and whether the latter only handed over the victim over to the PROVOST knowing that the Indonesian military were going to kill him, or whether he stabbed the victim himself with his sword, or assisted, aided, abetted or in any other way contributed to the murder of Alexio Oliveira. In the present case, many alternative explanations might be put forward.

887. Therefore, considering the aforementioned reasons, the Court deems that it has not been proven beyond a reasonable doubt that Gonsalo dos Santos participated in the murder of Alexio Oliveira.

The conclusions on the counts

888. For the aforementioned reasons, the Panel is not satisfied that the Prosecution has proved the case against the accused Joni Marques, Paulo da Costa and Gonsalo dos Santos beyond a reasonable doubt, and therefore finds them NOT GUILTY of murder, as a crime against humanity, in violation of Sect. 5.1(a) of UR-2000/15.

(d) Count 6 – Murders of Alfredo Araujo and Kalistu Rodrigues

889. It is not disputed that Alfredo Araujo and Kalistu Rodrigues were killed on 21 September 1999. The accused admitted it and the witnesses Eurico da Costa and Carlito Viegas testified about the death of Kalistu Rodrigues and Alfredo Araujo. The witness Olavio de Jesus went to look for Kalistu Rodrigues some hours after the incident. He said: "My friends hadn't come yet about 5 o'clock, so I went to look for my friend Kalistu, and he had already died".

890. There is also no dispute over who fired the shots that killed the two men. The accused Joni Marques admitted that he shot Alfredo Araujo, and Paulo da Costa admitted that he shot Kalistu Rodrigues. The witnesses Eurico da Costa and Carlito Viegas told the Court a similar story. Carlito Viegas explained: "First of all, Felisberto shot José Lemorai in his feet. Then we walked over to a tree. We were standing under the tree. From there, we saw three young men coming toward us. Joni and Felisberto shot at them. The first to shoot didn't work. The second hit the young man, who suddenly collapsed to the ground. Two of the boys escaped (...) Paulo shot the young man and Joni Marques came back and shot José Lemorai".

891. The Court has to assess the conduct of each accused in order to determine his individual criminal responsibility.

About Joni Marques

892. Joni Marques admitted that he was part of the group that attacked Alfredo Araujo and Kalistu Rodrigues. His Defense Counsel stated that he would admit this charge and plead guilty. But the Court did not accept his guilty plea.

893. Joni Marques told the Court that on an undetermined date in September 1999, he left Com in the minibus driven by Paulo da Costa, with Felisberto, Eurico and Alarico Fernandes. They were going to Ira -Ara. Himself and Felisberto were carrying guns. Some of their colleagues were carrying machetes. They intended to get some fruit at the coconut plantation in Ira -Ara village.

894. Joni Marques admitted that he shot Alfredo Araujo, but at the request of the victim. Alfredo Araújo was injured in his left leg, shot by Felisberto in the front part under the knee. He was lying in a shadow still alive. According to the statement of Joni Marques, he did not say anything at first, but later he inquired: "Joni, why don't you kill me? I have no chance to live!" When the victim requested Joni to kill him, Joni told the Court that he did not do it immediately because they suddenly saw three people not far away from the main road coming to them from the forest. But he came back later to the place where Alfredo Araújo was and shot him three times in the head and those shots killed him. After that, he left the dead body there, at the coconut plantation.

895. Joni Marques also admitted having shot at the three men. Himself and Felisberto pointed their guns to them. He said that he tried to shoot, but his gun jammed and did not work. Felisberto was the one who shot successfully and one man was hit (Kalistu Rodrigues). After that, Joni Marques tried to shoot at least six times at the other two men who were escaping, but he did not know if the shots reached them. He told the Court he was not controlling the bullets: "When the bullets go out, you can not control them any longer".

896. There is no dispute that Joni Marques actually killed Alfredo Araujo. His statement is substantially supported by the testimonies of the witnesses Eurico da Costa and Carlito Viegas.

897. The only argument presented by the Defense is that the victim himself requested to be killed. But no evidence supports such assertions. Indeed, even if the victim did request to be killed, such request can not be deemed an excuse.

898. Concerning the murder of Kalistu Rodrigues, the Court has no evidence that the shots fired by Joni Marques hit the victim. But it is clear for the Court that Joni attempted to kill Kalistu and his friends since he recognized that he fired toward them. He admitted also that he was the one to give a gun to Paulo to shoot the victim, even if his statement was not supported by the testimony of the witnesses Eurico da Costa and Carlito Viegas. The latter witness testified that Paulo took Felisberto's gun.

899. In any case, Joni Marques fired toward the three men, and by his presence and support, he encouraged Paulo da Costa to fatally shoot Kalistu Rodrigues and therefore assisted in the commission of the offence. It is irrelevant whether or not he gave the gun to Paulo to kill the victim.

- 900.** Those men were killed because they were suspected to be independence supporters. Joni Marques knew that Alfredo Araujo was a FALINTIL supporter. He recognized that he knew him because he was his former co-prisoner. In addition to that, the victims were believed to be independence supporters (some of them had fled to the forest) since all the pro-autonomy people had left the villages and were gathered at Com in order to go to Kupang.
- 901.** Joni Marques told the Court that he did not know that the Coconut Grove was the meeting place of FALINTIL members and their supporters. However, that place was well known as such. The witness Olavio de Jesus knew that FALINTIL used to gather at that place. His friends used to go there to meet FALINTIL members. He testified: "At the site of the shooting, in the grove of coconut trees, there was an area where FALINTIL used to meet with civilians who supported them by bringing them food and equipment. I think the militia were probably hiding there to try and ambush FALINTIL members". The witness Carlito Viegas told the Court that the victim was shot because he was a member of CNRT; he heard Felisberto saying it.
- 902.** However, there is no evidence for the Court to conclude that the men from Team Alfa went there with the purpose of looking for FALINTIL or CNRT supporters. All the accused stated was that they went there to look for food. The witness Eurico da Costa declared that their purpose in going to Ira-Ara was not to kill or harm anybody, but to swim and look for leaves and betel nuts. For the witness Viegas, they went there to take a bath and to wash.
- 903.** The Court is of the opinion that it was a coincidence for Team Alfa members to meet those men they believed to be independence supporters. But when they saw them, the intent to attack arose.
- 904.** These murders took place as part of a continuous campaign against independence supporters. They occurred on 21 September 1999 not long before and after other events in which Joni Marques was either seen at or involved in. He could not have failed to realize that his actions on that day were part of a widespread and systematic attack.

About Paulo da Costa

- 905.** The accused Paulo da Costa stated that he was ordered by Felisberto and Joni Marques to drive the minibus to Ira-Ara "to take vegetables and not to kill people". He went there with Joni Marques, Alarico Fernandes and others. His intention was to get food and not to kill people. The witnesses Carlito Viegas and Eurico da Costa confirmed the statement. The latter said: "We went from Com in a red vehicle named *Cruzeiro* driven by Paulo, the same Paulo who is here today".
- 906.** Paulo da Costa admitted that he was involved in the murder of Kalistu Rodrigues and specified that he is the one who caused the death of the victim. He told the Court that he had no intent to kill the victim. He did it because Joni Marques ordered him. By doing that, it was a way to avoid suspicion of being a supporter of CNRT. For him, if he did not kill that person, maybe Joni Marques could shoot him. He added that when he shot the victim, the latter was already dead.
- 907.** However, Paulo da Costa was not able to prove how Joni Marques was going to shoot him while he was holding his gun, and how he could still be afraid of Joni Marques when he had his gun in his hands. Also the testimonies of the witnesses Eurico da Costa and Carlito Viegas did not support Paulo da Costa's assertions. The witness Eurico da Costa told the Court that Paulo just took off the gun from Felisberto, without saying anything, and shot the young man in his head. "Paulo was just standing beside the young man (...) Paulo just successfully killed that man. He didn't talk to the young man".
- 908.** The witness Carlito Viegas saw Paulo taking a weapon from Felisberto without saying anything to Felisberto or to Joni Marques. For the witness, Paulo only talked to the victim. He testified: "Paulo didn't carry a weapon. He took a weapon from Felisberto and then he shot. (...) Before he fired the shot, Paulo said to the victim: 'Do you know me?' The person who had been shot answered: 'no'. Paulo said: 'I know you'. After the victim died, Paulo said: 'I do know you!' (...) Paulo shot the victim twice."
- 909.** The Court does not consider that the defense of duress has been established because there is no evidence to support a conclusion that Paulo was forced to commit the murder. There is also no evidence that he was ordered. Likewise, the allegations that the victim was already dead when Paulo shot him were contradicted by the testimonies of the witnesses Carlito Viegas and Eurico da Costa, and not supported by any evidence.
- 910.** It has been proven previously that these murders took place as part of a continuous campaign against independence supporters. They occurred on the 21 September 1999. Considering the prevailing circumstances in September 1999, the Court is of the opinion that Paulo da Costa must have realized that his actions on that day were part of a widespread and systematic attack.

About Alarico Fernandes

- 911.** It is undisputed that the accused Alarico Fernandes was part of the group, which attacked Kalistu Rodrigues and Alfredo Araujo on the 21 September 1999. Neither is it disputed that Alarico had been with that group many times before and after that event.
- 912.** Nevertheless, there is no evidence that Alarico Fernandes was involved in the shooting and killing of the two men or contributed to their deaths. His alleged conduct was that he joined a group, which he knew had a criminal purpose. But, as was stated by the Prosecutor, that is not enough to make him criminally responsible for the actions of others in the group. There must be evidence that the accused committed, aided, assisted or contributed to the offence. In the current case, the Court does not have any evidence that Alarico Fernandes participated in the killing of Alfredo Araujo or Kalistu Rodrigues.
- 913.** Therefore, the Court finds Alarico Fernandes not guilty of the charge.

The conclusions on the counts

- 914.** For the aforementioned reasons, the Panel is satisfied that the Public Prosecutor has proven the case against the accused Joni Marques and Paulo da Costa beyond reasonable doubt and therefore finds them GUILTY of murder, a crime against humanity, in violation of Section 5. 1(a) UR-2000/15. On the other hand, the Panel finds Alarico Fernandes NOT GUILTY of murder, a crime against humanity, as a violation of Section 5. 1(a) UR-2000/15.

(e) Count 7 – Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others

- 915.** Based on the submissions of the parties and the statements of the accused, the Panel finds undisputed the fact that on 25 September 1999 a group of Team Alfa members and other persons went from Lautem to a place named Raumoco. The alleged purpose was to get rice at a warehouse on the way. However, the group did not stop, but continued to the place of the incidents. After chasing two young men at the site, the group set up a roadblock and went to hide in order to ambush a vehicle which was on its way to Baucau. The passengers in that vehicle were some clergy, a journalist and other lay persons. One of the boys who were chased escaped; the other was killed. All the passengers in the vehicle were also killed in a sequence.
- 916.** In the group which ambushed the victims were the Defendants Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva and Gonsalo dos Santos.
- 917.** The relevant activities of each accused with respect to the charges are assessed as follows.

About Joni Marques

- 918.** The Court admitted the plea of guilty of Joni Marques after the assessment of the evidence before the Court. It is clear that Joni Marques ordered the roadblock to be set up. After building the roadblock, the group went to hide. When the vehicle with the nuns came, the car started to be shot at. Joni Marques was one of the persons who were shooting towards the nuns' car. After the first shots were over, two passengers left the ambushed car. One of them was a nun who knelt beside a gutter and started praying. The other one was grabbed by a militiaman named Horácio, dragged into the river, and then shot by Joni Marques.
- 919.** After these first killings, Joni ordered the group to push the car into the river. Afterwards, a woman was still alive and was shot by Joni Marques. Subsequently, Joni Marques threw a grenade into the water.
- 920.** After having admitted the plea of guilty, two other issues needed to be clarified by the Panel about the person in charge of the operation.
- 921.** *Was Joni Marques the commander of Team Alfa?* The Panel is of the opinion that he at any rate he was one of the commanders, as can be assumed from his close ties and continuous contact with KOPASSUS and TNI authorities. The continuous reference to Cesar Augusto as the highest leader in the group is not challenged, but it does not disprove the fact that Joni Marques – as well as his colleague Manuel da Costa – was also commander of this group. The fact that Cesar Augusto left for West Timor is agreed in the testimony of João Soares as a reason for which Joni Marques was confirmed as one of the decision-makers in the group during September 1999.
- 922.** *Who was in charge on the day of the operation: Joni Marques or Manuel da Costa?* Joni Marques was reported in the testimony of the witness João Soares as the one who would take all the responsibility for the group after Cesar Augusto left for Kupang. At the crime scene, none of the accused reported that Manuel da Costa was the source of the orders to build the roadblock and to push the car. Those statements were not challenged in the evidence

given by the testimonies, which stressed Joni Marques as the person who made decisions for the group on that afternoon. In his closing remarks, Joni Marques, when addressing the Court in relation to his concerns about a fair punishment, was very clear in requesting “Justice for *my men*”. The use of a possessive noun reveals that on 25 September, Joni Marques was indeed the leader of the operation.

- 923.** Similarly, from the testimonies of the witnesses Gilberto da Costa (“Joni Marques ordered us to push the car (...) Joni Marques ordered me to go on guard”) and João Soares (“We were ordered by Joni Marques to put bricks on the road”), there is no doubt. Moreover, all the accused remarked in their statements that Joni Marques met Manuel da Costa and asked him to get off the truck with his men and get into the *Cruzeiro* minibus. Until this stage, it is correct to believe that two platoon commanders were drawing up a strategy for the attack, which does not presume that the action resulted only from Joni Marques’ mind. By requesting Manuel da Costa to join his men, the Court has no doubt that Joni was sharing the orders with Manuel. However, at the second stage, at the crime scene, Joni Marques was the one who said to Paulo da Costa not to stop in front of the warehouse and to keep going to the crime scene. Those who admitted having run after the young men also remarked that Joni Marques was the one who ordered them to chase the boys. They also emphasized that Joni Marques was leading the group in setting up the roadblock and pushing the car into the river.
- 924.** Even considering that Manuel da Costa had the same rank as Joni Marques, as stated by the witness Gilberto da Costa, the truth is that Manuel da Costa was a platoon commander, not the leader of the operation on that day. The same witness Gilberto da Costa reported “it was agreed that Joni Marques would be responsible for us since the leader of Team Alfa had gone to West Timor”.
- 925.** The Court has no doubts that Joni Marques was indeed in charge of the operation on 25 September 1999.
- 926.** His plea of guilty was unequivocal and consistent with the evidence found. His *actus reus* was clearly both in releasing the orders to kill and in committing some of the killings. It has been proven that Joni Marques: (a) led the operation; (b) fired the first shots at the victims; (c) shot and killed later one of the boys chased by his men at the beginning of the operation; (d) shot at one of the nuns who emerged from the car in the river; (e) finally fired a grenade into the river to be sure that there would be no survivors.
- 927.** Joni had a plan incorporated into the wider plan of the Indonesian authorities, as has been stated in this decision since the first count. His *mens rea* for this systematic attack against the civilian population is unquestionable; he himself admitted it when addressing the Court in his guilty plea.

About Manuel da Costa

- 928.** The Panel finds it clear from the statement of the accused Manoel da Costa, which matches the testimonies of the witnesses, that Manuel da Costa shot towards the car, even alleging that his weapon jammed at the beginning. The witness João Soares stated that he was sure that he saw Manuel da Costa among the three persons shooting at the car. (“I am sure they were shooting. I know those three people were shooting”).
- 929.** Manuel da Costa joined Team Alfa and became platoon commander. He acknowledges this and the witnesses confirm it. He himself declared he was a pro-autonomy supporter.
- 930.** It is undisputed that Manuel da Costa was armed and knew about the plan to kill the nuns at least just before the roadblock was set up, as he admitted having heard and talked with Joni Marques. His dialogue with Joni Marques at the time reveals that he was fully aware about the plan at least some minutes before it was launched. Even so, he did not refuse to go ahead: “(...) I asked Joni Marques: ‘*Now that we have come to this place, what are we supposed to do here?*’. He said: ‘*Now we wait for the sisters who are going to Baucau. We wait for them here. When they come, we kill them all!*’ .
- 931.** It is undisputed that the grenade thrown into the water by Joni Marques came from Manuel da Costa. He admitted that, regardless of whether he was ordered or not.
- 932.** The Panel also finds that it is undisputed that Manuel did not participate in the setting up of the roadblock (as he alleges), since no witness mentioned that.
- 933.** Manuel da Costa and his men joined the operation under request from Joni Marques. He admitted having shot, even remarking that at the beginning his weapon failed. Later he was by Joni Marques’ side providing him the grenade. His *actus reus* is unequivocal in committing the killings. Regardless of whether one of the shots he fired wounded (or killed) one of the victims, he was definitely participating, as a perpetrator, in the attack.
- 934.** There is an issue of knowing whether Manuel da Costa was forced by Joni Marques to participate in that operation. The Court is persuaded that Manuel da Costa knew about the plan. The dialogue between him and Joni Marques contains sufficient elements for that conclusion. Manuel da Costa, after being allegedly told by Joni about the purpose of the journey, reveals that he knew that the purpose was not (or never had been) to collect rice since they passed by the warehouse and later stopped to chase the two young men. On that opportunity, Joni was very clear

about the killings which would come to be carried out. His words to Joni were limited to warning him about the consequences (*'How are we supposed to kill those people? Do you understand what we have to do? We have to leave East Timor and go to West Timor!'*).

- 935.** It is unreasonable that Manuel da Costa, a militiaman who had joined the group more than ten years earlier and holding a high position, did not know the purpose and could feel threatened that he was going to be killed by one of his colleagues. The alleged duress is based on a hypothetical threat to have his legs crushed or even to be killed, but no one in the group had been killed for refusing to follow an order from the commander until that time.
- 936.** Manuel alleges having joined Team Alfa because he was threatened and tortured. As already decided by the Panel in the case of *The Prosecutor v. Josef Leki*, the alleged duress has to be current; not the alleged duress to join a group. There is a difference between being forced to join a group and to be engaged in a particular operation of a group. The words of Manuel to Joni Marques at the time when the grenade was thrown into the water sound like a comment only about the accomplishment of the operation, rather than a refusal to obey an order from Joni Marques (“Why throw the grenade if they are all dead?”).
- 937.** In sum, the Panel finds that there is no evidence demonstrating the existence of a threat from Joni Marques to Manuel da Costa to join the plan to kill the nuns. Neither is there any evidence about any threat when Joni Marques addressed Manuel da Costa. He ordered his men to get off the truck and join the group in the minibus.
- 938.** The Panel wonders if Manuel da Costa already knew about the plan when the two groups met on the road and after they passed by the warehouse. The alleged intention to pick up rice is implausible in these circumstances: a small car already overloaded with people inside and on the roof would be unlikely to fit more rice. Where was the rice to be put if there were more than 14 persons onboard? Even if Manuel da Costa refused to admit that he thought that the intention was to get rice in the beginning, he later knew that the purpose was not to pick up any more rice. He admitted that Joni Marques, after they arrived at the crime scene, told him about the operation. From that moment at least, Manuel was aware about what would be going on and about the purposes of that operation. Even if he refused to think about the purpose of the plan on that second stage, the Panel concludes that at the third stage he joined the plan, as soon as he took up his position and started to shoot at the target. Therefore, he knew what was supposed to happen.
- 939.** Even if his gun jammed during the shots, as he alleges, Manuel admitted that he was aiming at the car of the victims. Later, he was by Joni Marques’ side and provided him with the grenade; even if he was not the perpetrator, it is clear that he was assisting in the commission of the crime, or at least, he knew that he was contributing to the purpose. He had a gun; he used the gun. He had a grenade; he provided the grenade to throw at the victims, knowing that he could kill whoever was still alive.
- 940.** His *mens rea* raises no doubt. As an experienced Team Alfa member, he certainly knew about the plan. Otherwise, he would not have reacted by concluding that all of them had to leave to West Timor after attacking the group of clergy. Also as a commander, Manuel da Costa knew his role in the context element of a widespread and systematic attack against the civilian population in East Timor.

About João da Costa

- 941.** João da Costa admitted to having shot at one of the passengers who tried to run to the river after being burned by Horácio. The Court deems that the confession of João da Costa is in conformity with the testimony of the witness João Soares. João da Costa was carrying a gun at the time, as reported by the witnesses and highlighted by some of the accused. He was shooting at the car of the nuns, according to what he admitted and to what testified by João Soares.
- 942.** João da Costa was also one of those who pushed the car into the river, as he himself admitted, even remarking that it was under the order of Joni Marques. The testimonies also confirm this. The witnesses confirmed that some members of the group pushed the car into the river. João da Costa also admitted: “after the vehicle was pushed into the water, one of the passengers in the vehicle was still alive”. The witnesses confirm that at least one passenger was still alive after the car was pushed into the river.
- 943.** The Panel assesses the alleged threat from João da Costa to the witness João Pereira as a preparation for the operation.
- 944.** João da Costa also admitted that he chased one of the young men who ran to the river, but didn’t admit that he shot at him. The witness José Pereira, however, stated that João da Costa was pointing a gun at him. The Court takes into consideration the fact that João da Costa admitted having shot at one of the passengers in the nun’s vehicle, and the testimony of the witness João Soares is clear in relation to the accused having pointed a gun at him. João da Costa admitted having chased the witness, but does not detail whether he pointed his gun at the boy. The Court is of the opinion that the issue has no relevance in assessing the facts on this count, since the witness is not mentioned as a victim of attempted murder. However, the fact that one of the boys was captured and later killed reveals the

preparation for the attack against the victims on the way. There was no reason for this other than to avoid eyewitnesses to what was about to happen.

- 945.** João da Costa alleges that he had only thrown stones, but the victim testified that he had pointed his gun at him. The Court finds no evidence that João da Costa, apart from his other actions on that day, was also throwing stones at the boy. As emphasized above, the event must be seen as a preparation for what was going to be carried out by the group in the coming few minutes.
- 946.** João da Costa's statement that he was unaware of the plan is challenged by the testimonies. Firstly, João da Costa, who was carrying a weapon, threatened the witness José Pereira, one of the young men who escaped. Secondly, the witness João Soares, a Team Alfa member, testified that João da Costa was one of those who were shooting at the car of the nuns. Thirdly, João da Costa had come with Joni Marques from Com, carrying a gun allegedly with the purpose of collecting rice. Fourthly, the group, allegedly intending to collect rice, passed by the warehouse and did not stop. The accused kept silent about this unusual circumstance and did not say anything about it to his colleagues. João da Costa was carrying a gun. They passed by the warehouse, but no question was addressed to Joni Marques about the "change" of route. His next action was to chase the boys and threaten one of them him with a gun. He must certainly have been aware that something bad was going to happen. Later, by shooting, he was already accomplishing the plan coordinated by Joni Marques.
- 947.** João da Costa also admitted having killed one of the victims, qualifying it with the remark that he was acting under order from Joni Marques. Besides that killing, he also participated by both firing the shots during the ambush and later by pushing the car into the river, which resulted in more fatalities. There is therefore no doubt in relation to the *actus reus*.
- 948.** His *mens rea* is shared with Manuel da Costa, since both of them were veteran Team Alfa members. They were therefore engaged both in the conduct and in the consequences of the actions within the context element of a widespread and systematic attack against civilians in East Timor.

About Paulo da Costa

- 949.** The Panel finds it undisputed that Paulo da Costa, confessedly pro-autonomy and driver of the minibus during the operation, at least pushed the car into the river.
- 950.** Paulo da Costa refused to admit being a Team Alfa member when questioned about the facts related to the attacks in Leuro village⁶⁹. Nevertheless, on that charge, the witness Aurito Rodrigues identified Paulo and his brother Amélio as PAM Swakarsa members⁷⁰. In any case, his involvement with paramilitary groups leaned to autonomy is unchallenged.
- 951.** Paulo da Costa told the Court that he was forced to push the car into the river. He said that Joni Marques ordered all of them by saying '*Mother fuckers! Come down here and push the car!*' or '*If you don't push the vehicle, I will kill you all!*'. The Panel assesses whether such circumstance can be deemed as a threat sufficient to amount to duress.
- 952.** The Panel is once again reminded that Paulo da Costa was with the group right through the month of September. Less than one week earlier, on 21 September, he was with the group and shot a man in Coconut Grove. Joni Marques' words, if they were really spoken, can not be seen as a threat addressed to Paulo da Costa and his colleagues. No evidence came to the Court that someone had been killed for not following the orders of the commanders. One of the witnesses, Gilberto da Costa, refused to obey Joni Marques' order to push the car without any consequence for him. Why not Paulo da Costa?
- 953.** Paulo da Costa stated that he did not check before whether someone was still alive inside the car. But he acknowledged that a woman emerged. By not checking if someone could die in the river, Paulo da Costa took the risk that someone could be still alive and consequently drown in the river. At least from this moment, he took the risk of committing murder.
- 954.** Paulo da Costa alleged that he did not know about the plan and that he thought they were only going to get rice. The Panel wonders whether he could still believe that, even after the roadblock was set up. Paulo da Costa had been working with Team Alfa group at least since the beginning of September. He was driving on 11 September when Alexio Oliveira was taken to the PROVOST building. On 21 September, he was with the group and admitted

⁶⁹ Paulo da Costa stated: "They came again in 1999; then I joined. If didn't join, they would me take away, since in my village people supported Team Alfa. (...) There were many of them (...) I was threatened to be taken away".

⁷⁰ "The ones who formed Team Alfa were Joni Marques, Felisberto, Sergio, Alexio, Carolino and Horácio. There were others from BRTT and PAM Swakarsa: **the brothers Paulo and Amélio da Costa**, Gonsalo, Alarico, Octavio, Julio and Carolino. They went all around the place using sharp instruments and when the situation became tenser they used rifles to threaten the villagers. They were all together about 22".

having shot at Kalistu Rodrigues at Coconut Grove. On 25 September, Paulo da Costa was driving again with the same group in the journey which resulted in the killings of clergy and other victims. He alleged that the purpose was to get rice, but he did not mind when the group passed by the warehouse. He was not concerned that many persons, some of them carrying weapons, came into his car when they were supposed to pick up more rice. A man who admitted that he shot at a CNRT member four days before cannot claim that did not know what was going to happen after the road had been blocked. What is the purpose of blocking a road? It must have been to interrupt a trip. And why chase the boys? Paulo da Costa admits that the boy was already tied up when they started to build the roadblock. If the purpose was to get rice, why chase and tie up a boy to a tree?

955. The Court is of the opinion that Paulo da Costa was aware of the plan. He had known, since his participation in the event in the Coconut Grove, that Team Alfa activities usually resulted in the killing of independence supporters.

956. Paulo da Costa played different roles during Team Alfa operations. In this count, in addition to driving the car and taking the group members to the crime scene, he also built the roadblock and later pushed the car to finish off the lives of the remaining victims.

957. Sharing a common purpose in this operation and having previously engaged in unlawful conduct, Paulo da Costa once again, as part of a sequence of events, knowingly carried out a part of a widespread and systematic attack against civilians.

About Amélio da Costa

958. The Panel finds it undisputed that Amélio da Costa was involved in the operation on 25 September 1999. He acknowledged that he participated only by pushing the car into the river. He rejected having an intention to kill anyone, but admitted being a member of PAM Swarkasa, a pro-autonomy group.

959. However, the Court is of the opinion that Amélio da Costa knew about the plan to ambush the victims. What has been asserted above about his brother Paulo also applies to Amélio da Costa. If the purpose of the journey was to get rice, why did he not ask about what was going on, as the militia David did to Joni Marques? Amélio denied having an intention to kill anyone, but he did not refuse the order to push the car into the river, taking the risk that someone could still be alive and therefore be killed. Four days before, he had been with the same group at Coconut Grove and admitted that he was again with this group after two men had been killed. He was aware of the objectives of the group, both as a PAM Swakarsa member and after what he had seen at Coconut Grove. Violence was very usual from Team Alfa. By pushing the car, he committed or at least assisted or contributed to the killing of the persons who were still alive inside the car.

960. There is evidence that Amélio da Costa also participated in the building of the roadblock. Although Amélio da Costa denied having done so, the testimony of the witness João Soares referred to the entire group's involvement in the setting up of the roadblock⁷¹. Moreover, some of the other accused reported that Amélio was among those who helped to build the roadblock, as stated by Manuel da Costa. The Court relies on this testimony and considers it plausible and compatible with what was asserted by one of the accused. The Panel therefore concludes that Amélio da Costa also built the blockade, under order from Joni Marques.

961. Amélio da Costa claimed that he was forced to push the car into the river. However, there is no evidence to support this assertion.

962. His *actus reus* was the building of the roadblock and pushing the car.

963. His *mens rea* comes from his role as a PAM Swakarsa member and therefore one of those engaged and fully aware about the policy of Team Alfa to fight against pro-independence supporters as a spearhead of Kopassus. Such knowledge both in respect of his own conduct and the circumstances at the time in East Timor lead the Panel to ascertain his state of mind about his conduct at the time.

About Hilário da Silva

964. It is undisputed that the accused Hilário da Silva participated in the operation on 25 September 1999 by setting up the roadblock and pushing the car into the river. He admitted both facts, which is confirmed in the testimonies.

965. Hilário admitted that the purpose of Team Alfa was to kill FA LINTIL members. He knew that some of the persons in that group were Team Alfa members. He knew that Joni Marques was in charge, since he admitted that he received orders from Joni on that day, including calling for them to get off the truck and to join the group in the minibus. He knew all of that before his actions in relation to the incident: to set up the roadblock and to push the car

⁷¹ “ (...) We were asked to put stones on the carriageway; (...) We *all* were involved [to participate in collecting and picking up the rocks on the road]. I am not so sure whether we were forced, but we were told to pick up stones to block the road”.

into the river. He admitted that when he was helping to build the roadblock, he thought that the purpose was to kill FALINTIL members. Regardless of the fact that victims of the ambush that Hilário da Silva was helping to prepare were the clergy, he already knew that the aim was to kill. So, his purpose was to assist in the operation, regardless of whether the victims were FALINTIL supporters or not.

966. Earlier, he denied that he was on the journey with the same group on 27 September. Later, he admitted to being with Team Alfa members a couple of days later, right after the bloody incident he had helped to commit. It is quite difficult not to conclude that he was fully aware that he was sharing a common purpose with the group. By building the roadblock and some minutes later pushing the car, he always had in his mind that he was playing a role in the killing of the nuns. There is no indication of remorse given that two days later he followed the same group of men in getting rice.

967. Hilário alleged that he did not know “either what CNRT meant or whether or not CNRT and pro-autonomy group were different things”. For him, “whether or not people were autonomy or CNRT, they kept it for them in their hearts”. He added: “I didn’t know whether the Indonesian military supported the CNRT or autonomy group”. However, Hilário da Silva gave a different answer in the same deposition: “They called the civilians, including myself, to help to make the roadblock. I placed a piece of wood, but I did not know the purpose. *We knew that Team Alfa was to kill FALINTIL. Some people were killed in the jungle. It was not in my mind that Team Alfa, by setting up that roadblock, was intending to kill FALINTIL members.*” Even so, he immediately reported that he saw at 745 Base “CNRT members being arrested”. He must have drawn conclusions about the political situation at the time; otherwise it would not make sense that an Indonesian military base could be used as a prison for independence supporters (CNRT). Hilário da Silva confirmed his previous knowledge about the Team Alfa activities: “Team Alfa members were not capable of killing civilians before. What happened on 25 September was the first time I had seen it. I had never seen anything like that before”. The Panel has no doubt that Hilário da Silva knew the purposes of Team Alfa in relation to independence supporters.

968. There is no evidence that Hilário was forced or threatened to push the car and to set up the roadblock. The Panel deems that the order from Joni Marques, conveyed in indiscriminate swearwords, contained no threats, as already stated above in relation to assessment of duress. Indeed, Hilário knew the purposes of the group; by building the roadblock, he already knew the purpose was to kill FALINTIL. After the car emerged, he recognized some of the victims (one nun and the journalist Agus). Nevertheless, he did not say anything against the plan to push the car with the rest of the victims. He insisted on assisting in the killings. Hilário mentioned that, prior to the incident, he had met the nun at the warehouse: “At the time, Manuel told us that sisters had taken pictures of all of us”. One could wonder if the belief that the nuns had taken a picture of the Team Alfa group was the immediate reason of this attack. There is no evidence for the Panel to reach such a conclusion.

969. In relation to his *mens rea*, it was proven that he knew about the plan and could deduce that it was part of a systematic attack. On this matter, he was fully aware about the policy of Team Alfa to fight against pro-independence supporters.

About Gonsalo dos Santos

970. Gonsalo dos Santos participated by setting up the roadblock and pushing the car. He was also standing behind Joni Marques during the operation. Those confessions are supported by the testimonies of the witnesses.

971. He denied knowing about the plan, but he did not deny building the roadblock, following an order from Joni Marques. He said that his intention was to get rice. However, this purpose is difficult to accept from a man who noted that the car he was traveling in passed by the warehouse and did not stop. The purpose to get rice is also not credible for a man after he built a roadblock under order from another man to whom he himself usually addressed as “my commander”. Gonsalo dos Santos stated that he saw the two boys being chased and that Joni Marques ordered the killing of one of those boys. How could he not know that a plan was being performed for an unlawful act? How could he remain in the belief that the group was still going to pick up rice? How could he still declare that a man that he treated as his commander forced him? How could they get rice if there were no more places to get rice from beyond Lautem?

972. The Panel concludes that the sequence of these events and Gonsalo dos Santos’ role in them show that he had actual awareness about what was about to happen on 25 September.

973. The Panel is of the view that Gonsalo dos Santos was at any rate aware that a new attack against independence supporters was on its way.

974. In relation to the defense of duress, the Panel repeats what it said in respect of the Defendants Paulo da Costa and Hilário da Silva. The Panel agrees with the Defendant Gonsalo dos Santos when he said: “Joni Marques only ordered us to set up the roadblock. He didn’t say anything else (...) Joni Marques didn’t force me; he ordered me”.

975. Given the aforementioned findings, the Panel considers that Gonsalo dos Santos was aware of the plan aimed at killing the victims, and above and beyond that, was acquainted with its relevancy as part of a wider plan of the Indonesian rulers enforced through local armed groups to crush pro-independence supporters. Gonsalo dos Santos, as a BRTT activist, knew the purposes of Team Alfa in that course of action.

The conclusions on the counts

976. The Panel is therefore satisfied that the allegations contained in count 7 of the indictment have been proven beyond reasonable doubt in relation to the accused Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva and Gonsalo dos Santos.

977. On the evidence adduced, the Panel therefore finds the accused Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva and Gonsalo dos Santos **GUILTY** of murder, a crime against humanity (Sect. 5.1(a) of UR-2000/15).

VII. SENTENCING

The sentencing policy

- 978.** According to Sect. 10.1 (a) of UR-2000/15, for the crimes referred to in Sect. 5 of the aforementioned Regulation, in determining the terms of imprisonment for those crimes, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals. “In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person” (Sect. 10.2).
- 979.** The penalties imposed on accused persons found guilty by the Panel are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished (*punitur quia peccatur*). They are also intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights (*punitur ne peccetur*).
- 980.** Finally, the objective of prosecuting and punishing the perpetrators of the serious crimes committed in East Timor in 1999 is to avoid impunity and thereby to promote national reconciliation and the restoration of peace.

Determination of sentencing in respect of each convicted person

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

Counts 1 and 2 – Torture and Murder of Evaristo Lopes

- 982.** Pursuant to the findings of guilty, the Panel sentences Joni Marques, João da Costa, Mautersa Monis and Gilberto Fernandes as follows.

- 983.** In relation to the count of torture, the Panel shares the view that:

- 984.** **The accused Joni Marques committed the crime of torture as a crime against humanity under the following circumstances:**

Aggravating circumstances:

- 985.** Horrifying manner: the fact that the victim was beaten, kicked and punched for a long time in very bad conditions is in itself a small portrait of the cruelty common in militia activities in East Timor during 1999;
- 986.** The victim was a defenseless person whose inability to respond to the threats and harm was unconditional; and
- 987.** His function was proven to be that of the decision-maker of all the actions in fulfillment of a plan drafted by Indonesian officers and performed by paramilitary groups against the independence supporters in East Timor, which leads to the conclusion that he was one of those who were supervising those actions and therefore exercising a role of authority during the torture.

Mitigating circumstances:

- 988.** As mitigating circumstances, the Panel deems that the accused, for this charge, has the overall benefit of family obligations in his social background.
- 989.** Having assessed all these circumstances, the Panel sentences Joni Marques to a term of imprisonment of eight years on this count.

- 990.** **The accused João da Costa committed the crime of torture as a crime against humanity under the following circumstances:**

Aggravating circumstances:

- 991.** Horrific manner: João da Costa beat, kicked and punched the victim at the roadblock and continued the same actions at the KOPASSUS base; the victim was in very critical situation (naked and bleeding) until he was finally killed;
- 992.** The offence against a defenseless person whose inability to respond to the threats and harm was unconditional; and
- 993.** The performance of a role as a leader empowered with orders during the roadblock operation.

Mitigating circumstances:

- 994.** Exclusively the family obligations of the accused in case of conviction.
- 995.** Having assessed all these circumstances, the Panel sentences João da Costa to a term of imprisonment of seven years for count 1 (torture).

996. The accused Mautersa Monis committed the crime of torture as a crime against humanity under the following circumstances:

Aggravating circumstances:

- 997.** Horrible manner, as described above in relation to the accused Joni Marques and João da Costa; and
- 998.** Offence against a defenseless person, recalling the same aforesaid grounds.

Mitigating circumstances:

- 999.** Cooperation during the proceedings; providing useful details to ascertain the truth in this case;
- 1000.** The fact that he was under orders of Joni Marques;
- 1001.** The overall mitigating circumstance of his family obligations; and
- 1002.** His post-facto behavior in deserting the group.
- 1003.** Having assessed all these circumstances, the Panel sentences Mautersa Monis to a term of imprisonment of four years for count 1 (torture).

1004. The accused Gilberto Fernandes committed the crime of torture as a crime against humanity under the following circumstances:

Aggravating circumstances:

- 1005.** Horrible manner, as described above in relation to the accused Joni Marques and João da Costa; and
- 1006.** Offence against a defenseless person, recalling the same aforesaid grounds.

Mitigating circumstances:

- 1007.** Cooperation during the proceedings; providing useful details to ascertain the truth in this case;
- 1008.** The fact that he was under superior orders; and
- 1009.** The overall mitigating circumstance of his family obligations.
- 1010.** Having assessed all these circumstances, the Panel sentences Gilberto Fernandes to a term of imprisonment of five years for count 1 (torture).

1011. In relation to the count of murder, the Panel shares the view that:

1012. The accused Joni Marques committed the crime of murder as a crime against humanity under the following circumstances:

Aggravating circumstances:

- 1013.** Horrific manner: The victim was killed after having been severely and for a long time tortured;
- 1014.** The victim was a defenseless person whose inability to respond to the threats and harm was unconditional; and
- 1015.** His function was proven to be that of the decision-maker of all the actions in fulfillment of a plan drafted by Indonesian officers and performed by paramilitary groups against the independence supporters in East Timor, which leads to the conclusion that he was one of those who were supervising those actions and therefore exercising a role of authority during the torture and murder.

Mitigating circumstances:

1016. As mitigating circumstances, the Panel deems that the accused, for this charge, has the overall benefit of family obligations in his social background.

1017. Having assessed all these circumstances, the Panel sentences Joni Marques to a term of imprisonment of nineteen years on this count.

1018. The accused João da Costa committed the crime of murder as a crime against humanity under the following circumstances:

Aggravating circumstances:

1019. Horrifying manner: The victim was killed after having been severely and for a long time tortured;

1020. The victim was a defenseless person whose inability to respond to the threats and harm was unconditional; and

1021. The performance of a role as one of the leaders in arresting the victim in order to be tortured and killed.

Mitigating circumstances:

1022. The family obligations of the accused in case of conviction;

1023. Having assessed all these circumstances, the Panel sentences João da Costa to a term of imprisonment of seventeen years for this count.

Conjunction of punishable acts

1024. The crimes of torture and murder as crimes against humanity for which the accused Joni Marques and João da Costa were convicted are a conjunction of punishable acts. It was proved that the victim was first tortured, and as a result, he died following those maltreatments. Therefore, the Panel deems that each accused performed only one act (beating, kicking, stabbing) which resulted in more than one penal provision: torture and, as a consequence of that, murder.

1025. The Sect. 10.1 of UR-2000/15 recommends the Panel to apply Indonesian law in determining the terms of imprisonment for the crimes against humanity committed in East Timor⁷². Accordingly, the Art. 63(1) of Penal Code of Indonesia (KUHP) provides that only one of the most severe basic punishments shall be imposed, should an act fall within different provisions⁷³. In this case, the punishment for the crime of murder, having been considered more severe, shall apply. The accused Joni Marques and João da Costa shall therefore serve only the punishment for the crime of murder as a crime against humanity.

Counts 3 and 4 – Forcible transfer or deportation of civilian population and persecution

1026. Pursuant to the findings of guilty, the Panel sentences Joni Marques, Paulo da Costa, Alarico Fernandes and Gonsalo dos Santos as follows.

1027. In relation to both the counts (deportation or forcible transfer of civilians and persecution), the Panel shares the view that:

1028. The accused Joni Marques committed both crimes under the following circumstances:

Aggravating circumstances:

1029. His function was proved to be that of a decision-maker in respect of all the actions in fulfillment of a plan drafted by Indonesian officers and performed by paramilitary groups against the independence supporters in East Timor, which leads to the conclusion that he was one of those who was supervising those actions and therefore exercising a role of authority during the attack; and

⁷² Sect. 10.1 of UR-2000/15: “A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present Regulation: (a) imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals (...)”.

⁷³ Art. 63(1) of KUHP: “If an act falls within more than one penal provision, only one of those provisions shall apply whereby, in case of difference, the most severe basic punishment shall be imposed”.

1030. The number of victims and the material damage resulting from the attack.

Mitigating circumstances:

1031. As mitigating circumstance, the Panel deems that the accused, for this charge, has only the overall benefit of family obligations in his social background.

1032. Having assessed all these circumstances, the Panel sentences Joni Marques to a term of imprisonment of seven years on the count of forcible transfer or deportation and the count of persecution.

1033. The accused Paulo da Costa committed both crimes under the following circumstances:

Aggravating circumstance:

1034. The number of victims and the material damage resulting from the attack.

Mitigating circumstances:

1035. Acting under a superior order: the Court deems that Paulo acted subordinately to Joni Marques and Indonesian military personnel; and

1036. The family obligations of the accused in case of conviction.

1037. Having assessed all these circumstances, the Panel sentences Paulo da Costa to a term of imprisonment of six years on the count of forcible transfer or deportation and the count of persecution.

1038. The accused Alarico Fernandes committed both crimes under the following circumstances:

Aggravating circumstances:

1039. The number of victims and the material damage resulting from the attack.

Mitigating circumstances:

1040. Cooperation during the proceedings; providing useful details to ascertain the truth in this case;

1041. The fact that he was under superior orders; and

1042. The overall mitigating circumstance of his family obligations.

1043. Having assessed all these circumstances, the Panel sentences Alarico Fernandes to a term of imprisonment of four years on the count of forcible transfer or deportation and the count of persecution.

1044. The accused Gonsalo dos Santos committed both crimes under the following circumstances:

Aggravating circumstances:

1045. The number of victims and the material damage resulting from the attack.

Mitigating circumstances:

1046. The fact that he was under superior orders; and

1047. The overall mitigating circumstance of his family obligations.

1048. Having assessed all these circumstances, the Panel sentences Gonsalo dos Santos to a term of imprisonment of five years on the count of forcible transfer or deportation and the count of persecution.

Conjunction of punishable acts

1049. The crimes of deportation or forcible transfer of the civilian population and persecution as crimes against humanity for which the accused Joni Marques, Paulo da Costa, Alarico Fernandes and Gonsalo dos Santos were convicted are conjunctions of punishable acts. It was proved that the villagers had their houses burned, sometimes also with all of their possessions inside, which also resulted in the deprivation of their fundamental rights of property and shelter. Therefore, the Panel deems that each accused performed several acts (burning houses, destruction of property and picking up people from their villages) which forms in itself more than one crime with such a relationship that they must be considered as one continued act.

1050. The Sect. 10.1 of UR-2000/15 recommends the Panel to apply Indonesian law in determining the terms of imprisonment for the crimes against humanity committed in East Timor⁷⁴. Accordingly, Art. 64(1) of Penal Code of Indonesia (KUHP) provides that only one of the most severe penal provisions shall be imposed⁷⁵. In this case, since the punishment for the crimes of forcible transfer and persecution are the same, only one of them shall be served. The four accused in this count shall therefore serve only the punishment for the most severe of the convictions.

Count 6 – Murders of Alfredo Araujo and Kalistu Rodrigues

1051. Pursuant to the findings of guilty, the Panel sentences Joni Marques and Paulo da Costa as follows.

1052. The accused Joni Marques committed both crimes under the following circumstances:

Aggravating circumstances:

1053. The Special Panel deems that the victims Alfredo Araujo and Kalistu Rodrigues were killed in a horrible manner. Both of them were first shot and wounded in some parts of the body and kept waiting for a certain time before they were shot dead; and

1054. The victims were not armed and therefore defenseless persons, especially when they were shot for the second time, since they were already wounded and lying down.

Mitigating circumstances:

1055. It is important to recall that the accused Joni Marques made a statement before the Court in which he clarified the facts of the crimes committed. He had the same attitude from the beginning of the investigation before the police. In addition to that, and even if the Court did not admit his plea of guilty, his statement that he felt guilty about the facts may be interpreted as remorse and considered in mitigation.

1056. Also as an overall mitigating circumstance, the Panel bears in mind his family obligations.

1057. Having assessed all these circumstances, the Panel sentences Joni Marques to a term of imprisonment of 17 years on the count of murder of Alfredo Araujo and Kalistu Rodrigues.

1058. The accused Paulo da Costa committed the crime under the following circumstances:

Aggravating circumstances:

1059. The victim Kalistu Rodrigues was not armed, already shot and wounded and therefore a defenseless person. Paulo da Costa should have taken pity on him. Instead of feeling sorry for him, and maybe try to help him, he took a gun and shot him.

Mitigating circumstances:

1060. The overall family obligations of the accused, exclusively.

1061. Having assessed all these circumstances, the Panel sentences Paulo da Costa to a term of imprisonment of 18 years on the count of murder of Kalistu Rodrigues.

Count 7 – Murders of Clergy, and Agus Muliawan, and Izinho Freitas Amaral, and others

1062. Pursuant to the findings of guilty, the Panel sentences Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva and Gonsalo dos Santos as follows.

1063. The accused Joni Marques committed the offence on this count under the following circumstances:

1064. Aggravating circumstances:

⁷⁴ Sect. 10.1 of UR-2000/15: “A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present Regulation: (a) imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals (...)”.

⁷⁵ Art. 64(1) of KUHP: “If among several acts, even though each in itself forms a crime or misdemeanor, there is such a relationship that they must be considered as one continued act, only one penal provision shall apply whereby, in case of difference, the most severe penal provision shall be imposed.”

- 1065.** Horrifying manner: the victims were killed by the use of shots, stabbings, burning and blasts. The brutal killings are a cruel portrait of the actions carried out by militia groups in East Timor during 1999;
- 1066.** The victims were defenseless persons whose inability to respond to the threats and harm was unconditional;
- 1067.** The large number of victims, which expresses the gravity of the conduct; and
- 1068.** His function was proved to be that of the decision-maker in all the actions in fulfilment of a plan drafted by Indonesian officers and performed by paramilitary groups against independence supporters in East Timor, which leads to the conclusion that he was one of those who were supervising those actions.

Mitigating circumstances:

- 1069.** The plea of guilty; and
- 1070.** The overall benefit of family obligations in his social background.
- 1071.** Having assessed all these circumstances, the Panel sentences Joni Marques to a term of imprisonment of nineteen years on the count for the murders of clergy, and Agus Muliawan, and Izinho Freitas do Amaral and others.

1072. The accused Manuel da Costa committed the offence on this count under the following circumstances:

Aggravating circumstances:

- 1073.** Horrifying manner: the victims were killed by the use of shots, stabbings, burning and blasts. Their brutal killings are a cruel portrait of the actions carried out by militia activities in East Timor during 1999;
- 1074.** The victims were defenseless persons whose inability to respond to the threats and harm was unconditional; and
- 1075.** The large number of victims, which expresses the gravity of his conduct.

Mitigating circumstances:

- 1076.** The overall benefit of family obligations in his social background.
- 1077.** Having assessed all these circumstances, the Panel sentences Manuel da Costa to a term of imprisonment of nineteen years on the count for the murders of clergy, and Agus Muliawan, and Izinho Freitas do Amaral and others.

1078. The accused João da Costa committed the offence on this count under the following circumstances:

Aggravating circumstances:

- 1079.** Horrifying manner: the pain and suffering of the victims is in itself a small portrait of the cruelty common in militia activities in East Timor during 1999;
- 1080.** The victims were defenseless persons whose inability to respond to the threats and harm was unconditional; and
- 1081.** The large number of victims, which expresses the gravity of his conduct.

Mitigating circumstances:

- 1082.** The overall benefit of family obligations in his social background; and
- 1083.** The commission of the crime under superior order.
- 1084.** Having assessed all these circumstances, the Panel sentences João da Costa to a term of imprisonment of nineteen years on the count for the murders of clergy, and Agus Muliawan, and Izinho Freitas do Amaral and others.

1085. The accused Paulo da Costa committed the offence on this count under the following circumstances:

Aggravating circumstances

- 1086.** Horrifying manner: the victims were killed by the use of shots, stabbings, burning and blasts. Their brutal killings are a cruel portrait of the actions carried out by militia groups in East Timor during 1999;
- 1087.** The victims were defenseless persons whose inability to respond to the threats and harm was unconditional; and
- 1088.** The large number of victims, which expresses the gravity of his conduct.

Mitigating circumstances:

- 1089.** The overall benefit of family obligations in his social background; and
- 1090.** The commission of the crime under superior order.
- 1091.** Having assessed all these circumstances, the Panel sentences Paulo da Costa to a term of imprisonment of eighteen years on the count for the murders of clergy, and Agus Muliawan, and Izinho Freitas do Amaral and others.

1092. The accused Amélio da Costa committed the offence on this count under the following circumstances:

Aggravating circumstances:

- 1093.** Horrifying manner: the victims were killed by the use of shots, stabbings, burning and blasts. Their brutal killings are a cruel portrait of the actions carried out by militia groups in East Timor during 1999;
- 1094.** The victims were defenseless persons whose inability to respond to the threats and harm was unconditional; and
- 1095.** The large number of victims, which expresses the gravity of his conduct.

Mitigating circumstances:

- 1096.** The overall benefit of family obligations in his social background; and
- 1097.** The commission of the crime under superior order.
- 1098.** Having assessed all these circumstances, the Panel sentences Amélio da Costa to a term of imprisonment of eighteen years on the count for the murders of clergy, and Agus Muliawan, and Izinho Freitas do Amaral and others.

1099. The accused Hilário da Silva committed the offence on this count under the following circumstances:

Aggravating circumstances:

- 1100.** Horrifying manner: the victims were killed by the use of shots, stabbings, burning and blasts. Their brutal killings are a cruel portrait of the actions carried out by militia groups in East Timor during 1999;
- 1101.** The victims were defenseless persons whose inability to respond to the threats and harm was unconditional; and
- 1102.** The large number of victims, which expresses the gravity of his conduct.

Mitigating circumstances:

- 1103.** The overall benefit of family obligations in his social background;
- 1104.** The commission of the crime under superior order; and
- 1105.** Cooperation with the investigations: the Panel deems that Hilário da Silva has cooperated in the search for the truth since the commencement of the investigation. Due to information he provided following his arrest by INTERFET, the police were able to go further in the enquiries and arrests of the suspects.
- 1106.** Having assessed all these circumstances, the Panel sentences Hilário da Silva to a term of imprisonment of seventeen years on the count for the murders of clergy, and Agus Muliawan, and Izinho Freitas do Amaral and others.

1107. The accused Gonsalo dos Santos committed the offence on this count under the following circumstances:

Aggravating circumstances:

- 1108.** Horrifying manner: the victims were killed by the use of shots, stabbings, burning and blasts. Their brutal killings are a cruel portrait of the actions carried out by militia groups in East Timor during 1999;
- 1109.** The victims were defenseless persons whose inability to respond to the threats and harm was unconditional; and
- 1110.** The large number of victims, which expresses the gravity of his conduct.

Mitigating circumstances:

- 1111.** The overall benefit of family obligations in his social background; and
- 1112.** The commission of the crime under superior order.
- 1113.** Having assessed all these circumstances, the Panel sentences Gonsalo dos Santos to a term of imprisonment of eighteen years on the count for the murders of clergy, and Agus Muliawan, and Izinho Freitas do Amaral and others.

VIII. DISPOSITION

Sentence

- 1114.** The Panel recalls that the mandate of United Nations in East Timor described in Resolution 1272 (1999) of 25 October 1999 includes the administration of justice and requires all persons undertaking public duties or holding public office in East Timor to observe internationally recognized human rights standards⁷⁶. This Court, having exclusive jurisdiction over serious criminal offences, namely in this case the crimes against humanity, may impose in its sentences the penalties of imprisonment for a specified number of years, a fine of up to a maximum of US\$500,000, and a forfeiture of proceeds, property and assets derived directly or indirectly from the crime⁷⁷.
- 1115.** In accordance with the previous section of this decision, the Panel imposed on each accused a specified number of years of imprisonment. This penalty is limited to 25 years of imprisonment for each count, pursuant to Sect. 10.1 of UR-2000/15. In this case, the Panel is of the view that some of the accused are guilty of more than one offence committed on different occasions and under different penal provisions.
- 1116.** Sect. 10.1(a) of UR-2000/15 requires the Panel to consider the general practice regarding prison sentences in the courts of East Timor and under international tribunals for the crimes against humanity⁷⁸. The Panel has the opinion that the sentencing practices in the courts of East Timor may be used for guidance, but that it is not binding⁷⁹. The Panel disregarded the maximum penalties in the Penal Code of Indonesia (KUHP) when imposing the sentences for each count, but took into account the aggravating and mitigating circumstances adopted by the Indonesian criminal law simultaneously with the precedents in international tribunals.
- 1117.** For the multiple counts, the Penal Code of Indonesia (KUHP) has established a specific rule for the imposing of penalties. Since the counts resulted from separate acts which formed several crimes with different punishments, one single punishment shall be imposed. This is in accordance with Sect. 65 of KUHP:
- 1118.** “In the case of conjunction of several acts which must be considered as separate acts and which form several crimes on which similar basic punishments are imposed, one punishment shall be imposed. The maximum of this punishment shall be the collective total of the maximum punishments imposed on the acts, but not exceeding one-third more than the most severe maximum punishment.”
- 1119.** In sum, the final punishment for each accused shall be determined based on the collective total of the punishments imposed in respect of the acts – 25 years’ imprisonment, according to Sect. 10.1(a), first part – but shall not exceed one-third more than the most severe punishment – eight years and four months. As a result, no accused shall be sentenced to more than 25 years plus eight years and four months’ imprisonment, which results in a maximum penalty of 33 years and four months.
- 1120.** Regarding the fine and forfeiture penalties, the Panel finds no reason to impose them in this case, bearing in mind the economic condition of the Defendants.
- 1121.** However, the Panel orders that the Defendants be jointly liable to pay the costs of this proceeding.
- 1122.** Accordingly, for the abovementioned reasons, the Panel, having considered all of the evidence and the arguments, imposes a single penalty for each accused.
- 1123.** The Defendant Joni Marques has been found guilty on the counts 1, 2, 3, 4, 6 and 7 for crimes against humanity (torture, murder, forcible transfer or deportation of civilian population and persecution). The collective total of his punishments is 62 years’ imprisonment. However, having regard to the limit provided in Sect. 65 of KUHP, the Panel sentences him to 33 (thirty-three) years and 4 (four) months’ imprisonment.
- 1124.** The Defendant Manuel da Costa has been found guilty on count 7 for crimes against humanity (murder). The Panel sentences him to 19 (nineteen) years’ imprisonment.
- 1125.** The Defendant João da Costa has been found guilty on counts 1, 2 and 7 for crimes against humanity (torture and murder). The collective total of his punishments is 37 years’ imprisonment. However, having regard to the limit provided in Sect. 65 of KUHP, the Panel sentences him to 33 (thirty-three) years and 4 (four) months’ imprisonment.

⁷⁶ Sect. 2 of UNTAET Regulation 1999/1.

⁷⁷ Sect. 10.1 of UNTAET Regulation 2000/15.

⁷⁸ Art. 24.1 of the Statute of ICTY, as amended by 1329 (30 Nov 2001) has similar words, *mutatis mutandis*: “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”.

⁷⁹ For instance, this approach is shared also in the international tribunals regarding to the sentencing practices in the former Yugoslavia (*ICTY, The Tadic Case*).

- 1126.** The Defendant Paulo da Costa has been found guilty on counts 3, 4, 6 and 7 for crimes against humanity (murder and forcible transfer or deportation of civilian population and persecution). The collective total of his punishments is 42 years' imprisonment. However, having regard to the limit provided in Sect. 65 of KUHP, the Panel sentences him to 33 (thirty-three) years and 4 (four) months' imprisonment.
- 1127.** The Defendant Amélio da Costa has been found guilty on count 7 for crime against humanity (murder). The Panel sentences him to 18 (eighteen) years' imprisonment.
- 1128.** The Defendant Hilário da Silva has been found guilty on count 7 for crimes against humanity (murder). The Panel sentences him to 17 (seventeen) years' imprisonment.
- 1129.** The Defendant Gonsalo dos Santos has been found guilty on counts 3, 4 and 7 for crimes against humanity (forcible transfer or deportation, persecution and murder). The Panel sentences him to 23 (twenty-three) years' imprisonment.
- 1130.** The Defendant Alarico Fernandes has been found guilty on counts 3 and 4 for crimes against humanity (forcible transfer or deportation of civilian population and persecution). The Panel sentences him to 4 (four) years' imprisonment.
- 1131.** The Defendant Mautersa Monis has been found guilty on count 1 for crimes against humanity (torture). The Panel sentences him to 4 (four) years' imprisonment.
- 1132.** The Defendant Gilberto Fernandes has been found guilty on count 1 for crimes against humanity (torture). The Panel sentences him to 5 (five) years' imprisonment.

Credit for time served

- 1133.** In accordance with Sect. 10.3 UR-2000/15, Sect. 42.5 of UR-2000/30, and Art. 33 of KUHP, the Panel makes a deduction for time already spent in detention by the Defendants, due to an order of an East Timorese Court.
- 1134.** The Defendants Joni Marques, Manuel da Costa and João da Costa have been detained since 31 October 1999, and so far, have been in prison for 2 (two) years, 1 (one) month and 10 (ten) days.
- 1135.** The Defendant Paulo da Costa has been detained since 21 October 1999, and so far, has been in prison for 2 (two) years, 1 (one) month and 20 (twenty) days.
- 1136.** The Defendants Amélio da Costa and Hilário da Silva were detained from 5 October 1999, and so far, have been in prison for 2 (two) years, 2 (two) months and 6 (six) days. In relation to Hilário da Silva, who is currently on home detention under substitute measures, the Panel remarks that Sect. 42.5 generally refers to time the convict spent under pre-trial detention, without any reservations. Therefore, the credit for time served in detention, regardless of whether it is in prison or at home, shall be deducted from the term of imprisonment.
- 1137.** The Defendant Gonsalo dos Santos was detained from 30 September 1999, and so far, has been in prison for 2 (two) years, 2 (two) months and 11 (eleven) days.
- 1138.** The Defendants Alarico Fernandes and Gilberto Fernandes were detained from 9 October 1999, and so far, have been in prison for 2 (two) years, 2 (two) months and 2 (two) days.
- 1139.** The Defendant Mautersa Monis was detained from 4 January 2001, and so far, has been in prison for 11 (eleven) months and 7 (seven) days.
- 1140.** Accordingly, previous detention for each accused shall be deducted from the sentence imposed today together with such additional time he may serve pending the determination any final appeal.

Rights and legal benefits of the Defendants after conviction

- 1141.** Pursuant to Sect. 43.1, a convict may be granted conditional release following trial after (a) two-thirds of the term of imprisonment has been completed; (b) a favorable report on conduct; and (c) where there is no danger to public security or safety. The Defendants will have served two-thirds of their respective terms on the following dates:
- 1142.** Joni Marques – 21 January 2022
- 1143.** Manuel da Costa – 1st July 2012
- 1144.** João da Costa – 21 January 2022
- 1145.** Paulo da Costa – 11 January 2022

- 1146.** Amélio da Costa – 5 October 2011
- 1147.** Hilário da Silva – 5 February 2011
- 1148.** Gonsalo dos Santos – 30 January 2015
- 1149.** Alarico Fernandes – 9 June 2002
- 1150.** Mautersa Monis – 4 September 2003
- 1151.** Gilberto Fernandes – 9 February 2003
- 1152.** None of the Defendants has served more than two-thirds of his term of imprisonment so far.
- 1153.** The penalty of imprisonment will expire, respectively:
- 1154.** For Joni Marques on 28 February 2033;
- 1155.** For Manuel da Costa on 30 October 2018;
- 1156.** For João da Costa on 28 February 2033;
- 1157.** For Paulo da Costa on 20 February 2033;
- 1158.** For Amélio da Costa on 4 October 2017;
- 1159.** For Hilário da Silva on 4 October 2016;
- 1160.** For Gonsalo dos Santos on 29 September 2022;
- 1161.** For Alarico Fernandes on 8 October 2003;
- 1162.** For Mautersa Monis on 3 January 2005; and
- 1163.** For Gilberto Fernandes on 8 October 2004.

Enforcement of sentence

- 1164.** Pursuant to Sections 42.1 and 42.5 of UR-2000/30, the convicted persons shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.
- 1165.** The sentence shall be executed immediately at the Becora prison, with this disposition as a warrant of arrest.
- 1166.** One copy each of this decision is provided to each of the Defendants and his legal representatives, to the Public Prosecutor and to the prison manager.
- 1167.** Made in English and Indonesian, the English text being authoritative.

Dili, East Timor,

11 December 2001.

Judge Marcelo DOLZANY DA COSTA
Presiding

Judge Sylver NTUKAMAZINA

Judge MARIA NATERCIA Gusmão Pereira.