



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

**RDTL**

**TRIBUNAL DISTRITAL de DILI**

**SECÇÃO CRIMES GRAVES**

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Case No. 18/2001

Date: 16/07/2003

Original: English

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Before:

Judge Maria Natércia Gusmão Pereira, Presiding

Judge Sylver Ntukamazina

Judge Siegfried Blunk

Registrar: Joao Naro

Judgement of: 16 July 2003

**THE PROSECUTOR**

**V.**

**Benjamin Sarmento**

**Romeiro Tilman**

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**JUDGEMENT**

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**The Office of the Public Prosecutor:**

Mrs Shyamala Alagendra

Mr. Essa Faal

**Counsel of the accused**

Mr. Siphosami Malunga, for the accused Benjamin Sarmento

Ms. Maria Rocheteau, for the accused Romeiro Tilman

## **INTRODUCTION**

- 1 The trial of BENJAMIN SARMENTO (43 aged, married, born on the 2nd February 1960 in Holarua, Sub District of Same, Manufafi District, East Timor), and ROMEIRO TILMAN (29 aged, married, date of birth unknown, born in Maubesi, Ainaro), before the Special Panel for Serious Crimes within the District Court of Dili (hereafter: the “Special Panel”), commenced with the Trial Hearing on the 30th June 2003, and was concluded on the 16th July 2003 with the rendering of the decision.
- 2 After considering the plea of guilty made by the accused persons BENJAMIN SARMENTO and ROMEIRO TILMAN, after considering all the evidence presented in the indictment, and the written and oral statements from the office of the Prosecutor General (hereafter: the “Public Prosecutor”), and considering the arguments of the parties including the submissions of the parties in their joints documents of agreement submitted to the Court on the 30<sup>th</sup> June 2003 and the evidence presented, the Special Panel

## **HEREBY RENDERS ITS JUDGEMENT**

### **A. THE SPECIAL PANELS**

- 3 The Special Panels were established, within the District Court of Dili, pursuant to Section (hereafter “Sect.”) 10 of UNTAET Regulation (hereafter “U.R.”) no. 2000/11 as amended by U.R 2001/25, in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, Crimes Against Humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of U. R. 2000/15. All U.R mentioned herein after have been upheld by Section 165 East Timorese Constitution after East Timor’s independence was internationally recognised on 20<sup>th</sup> May 2002.

### **B. PROCEDURAL BACKGROUND**

- 4 On 7 August 2001, the Public Prosecutor filed before the Dili District Court a written indictment (in English) against BENJAMIN SARMENTO, ROMEIRO TILMAN, João Sarmento and Domingos Mendonça.
- 5 The accused Benjamin Sarmento was originally charged with nine counts, namely: five counts of Murder as a Crime against Humanity (counts 1, 2, 3, 4 and 5), two counts of Imprisonment or other severe deprivation of physical

liberty in violation of fundamental rules of international law as a Crime against Humanity (counts 6, 7), one count of Deportation or Forcible Transfer as a Crime against Humanity (count 8) and one count of Persecution for political reasons as a Crime against Humanity (count 9).

- 6 The accused Romeiro Tilman was originally charged with five counts, namely: one count of Murder as a Crime against Humanity (count 10), two counts of Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law as a Crime against Humanity (counts 11, 12), one count of Deportation or Forcible Transfer as a Crime against Humanity (count 13) and one count of Persecution for political reasons as a Crime against Humanity (count 14).
- 7 Attached to the indictment were copies of the following documents:
  - The list of the victims, that forms an integral part of the indictment, was attached as annex A containing as victims of murder the names of Carlito de Araujo aka Tilman (Maulito), Luis Boco Siri, Agapito de Araujo, Afonso da Costa, Armindo da Costa (Armindo Tilman), Carlito da Costa (Alberto Ximenes) and Lorenço Tilman; and as victims of Detention, Deportation or Forcible Transfer of population and Persecution, the villagers from Grotu Lau, Urema, Leubrema, Datina, Suri-Rema, Orluli, and Trilolo.
  - The list of evidence was also attached to the indictment as annex B, containing the statements of the witnesses, the statement of the suspects Benjamin Sarmiento, Romeiro Tilman, João Sarmiento and Domingos Mendonça, and also the documentary evidence. All annexes were an integral part of the indictment.
- 8 The Court clerk provided notification of the receipt of the indictment to the accused persons Benjamin Sarmiento, Romeiro Tilman, João Sarmiento and Domingos Mendonça and to their legal representatives, on 17 of August 2001, pursuant to Sect. 26.1 and 26.2 U.R. 2000/30.
- 9 The Accused Benjamin Sarmiento was arrested on 11 September 2000 and was held in detention until the Court released him under substitute restrictive measures on 27 February 2001. On 12 March 2001 the Accused was re-arrested and kept under detention up to date.

- 10 The Accused Romeiro Tilman was arrested on 25 March 2000 and was held under detention until the Court released him under substitute restrictive measures on 27 February 2001. On 12 March 2001 the Accused was re-arrested and kept under detention up to date.
- 11 On 12 September 2001 the Prosecutor submitted to the Court the indictment in Indonesian translation.
- 12 The first preliminary hearing was scheduled for 8 November 2001. However, one of the accused still in liberty did not show up, and the preliminary hearing was re-scheduled for 22 January 2002. On 22 January one of the judges was not available and the hearing was postponed to 13 February 2002.
- 13 The preliminary hearing commenced on 13 February 2002 and finished on 14 February 2002. During the preliminary hearing, the Court checked whether the defendant Benjamin Sarmiento had read the indictment or if the indictment had been read to him, and asked him if he understood the nature of the charges, informed him of the right to be represented by a legal advisor, his right to remain silent, to plead guilty or not guilty to the charges, as provided for in Sect. 30.4 U.R. 30/2000. The Defendant Benjamin Sarmiento made a statement that he had read the indictment and understood the charges against him. The same procedure was followed for his co-accused Romeiro Tilman, João Sarmiento and Domingos Mendonça. The Court then accepted the list of evidence submitted by the Public Prosecutor.
- 14 On the same date, the prosecution responded orally, and submitted a written response to the preliminary motion by the defense, relating to the nullity of the decision on the application for release by a single judge. The Court took the case to decide in chamber on the motion raised by the defense and postponed the trial for 4 April 2002. On 4 April 2002, the Court was occupied with another trial (case Gaspar Leki) and therefore the hearing had to be postponed to 28-29 May 2002.
- 15 On 28 May 2002 the defence counsels of Benjamin Sarmiento, Romeiro Tilman, and Joao Sarmiento submitted an application for the release of the accused persons. On the same date the Prosecutor objected to that application. However the Court did not hold the hearing because the East Timorese Judge on the Panel had no authority to carry out the functions of a judge, before the new Government of East Timor resolved the issue of her appointment. The Court decided in chambers to overrule the request for release of the accused

Benjamin Sarmiento and Romeiro Tilman. The date of the trial was fixed for the 12<sup>th</sup> August 2002.

- 16 On 12<sup>th</sup> August 2002 the trial was again postponed to 7 October 2002 because one of the judges was not available. On 7 October 2002, the Special Panel held another trial and the hearing was, therefore postponed to 2 December 2002.
- 17 Considering that on 2<sup>nd</sup> December 2002, the Special Panel was busy with the trial of the Lolotoe case the hearing was postponed to 17 March 2003.
- 18 On 5 February 2003 the defence of Benjamin Sarmiento submitted an application for release of the accused.
- 19 On 17 March 2003 two of the Judges in this case were involved in another case and it was decided to postpone the trial to 19 May 2003.
- 20 On 19 May 2003 the return of one of the judges of the Panel to his home country provoked the postponement of the trial to 30 June 2003.
- 21 On 30 June 2003, during the trial hearing the accused persons Benjamin Sarmiento and Romeiro Tilman made admissions of guilt.
- 22 The Accused Benjamin Sarmiento pleaded guilty to the following 5 counts in the indictment: 1) Count 1: murder of Carlito de Araujo alias Maulito, 2) Count 2: murders of Luis Boco Siri and Agapito de Araujo, 3) Count 3: murder of Afonso da Costa, 4) Count 5: murder of Lorenço Tilman, 5) Count 8: Deportation or Forcible Transfer of population.
- 23 The accused Romeiro Tilman pleaded guilty to the following 2 counts in the indictment: 1) Count 10: murders of Armindo da Costa (Armindo Tilman) and Carlito da Costa (Alberto Ximenes) and 2) Count 13: Deportation or Forcible Transfer of population.
- 24 The hearing was postponed to the 1<sup>st</sup> July 2003 for the Court to verify the validity of the guilty plea. After verifying the validity of the guilty plea, particularly in light of Section 29A of U.R. 25/2001, the Special Panel entered into a plea of guilty against both accused, and convicted them.
- 25 The Public Prosecutor withdrew the remaining charges of imprisonment, deportation and persecution against both accused. The Court gave permission to the withdrawal of the remaining counts and decided to sever the case of

Benjamin Sarmiento and Romeiro Tilman from the case of their former co-accused João Sarmiento and Domingos Mendonça. On the same date the parties made their final statements.

- 26 On the 16<sup>th</sup> July 2003, the Court read out to the public the disposition of the decision and decided to issue later the final written decision, which is done presently with the release of the judgment.
- 27 Interpreters for English, Bahasa Indonesian, and Tetum languages assisted at every act before the Court.

### **C. THE GUILTY PLEA.**

- 28 As stated earlier, both the accused persons Benjamin Sarmiento and Romeiro Tilman pleaded guilty to certain charges set forth in the indictment against them. In accordance with section 29A.1 U.R. 2001/25 the Special Panel sought to verify the validity of guilty plea. To this end, the Panel asked the accused Benjamin Sarmiento:
- a) If he understood the nature and the consequences of the admission of guilt;
  - b) If his guilty plea was voluntarily made, if he did it freely and knowingly without pressure, or promises;
  - c) If his guilty plea was unequivocal, i.e. if he was aware that the said plea could not be refuted by any line of defense;
  - d) If he had consulted with his legal representative regarding his guilty plea.
- 29 The same procedures were following for his co-accused Romeiro Tilman.
- 30 Both accused Benjamin Sarmiento and Romeiro Tilman replied in the affirmative to all these questions. They further admitted in order to support their guilty plea all the facts of the case as contained in the indictment and in the materials that were submitted to the Court. The Special panel accepted the plea of guilty of both accused persons. Furthermore, it was found that all the essential facts required to prove those crimes to which the admission of guilty

relates had been established as required by Section 29A.2 of regulation 2000/30.

- 31 The accused Benjamin Sarmiento was convicted for the murders of Carlito de Araujo aka Maulito, Luis Boco Siri and Agapito de Araujo, the murder of Afonso da Costa, and the murder of Lorenzo Tilman as Crimes Against Humanity, according to Section 5.1(a) U.R. 2000/15; and for the Deportation or Forcible Transfer of the population from Same Sub District, in particular from Grotu Lau Village, Orema, Datina, Leubrema, Trilolo and other neighbouring villages as Crimes Against Humanity , according to Section 5.1(d) UNTAET Regulation 2000/15;
- 32 The Accused Romeiro Tilman was convicted for the murders of Armindo da Costa (Armindo Tilman) and Carlito da Costa (Alberto Ximenes) as Crimes Against Humanity, contrary to Section 5.1(a) U.R. 2000/15; and for the Deportation or Forcible Transfer of the population from Same Sub District, in particular from Grotu Lau Village, Orema, Datina, Leubrema, Trilolo and other neighbouring villages as Crimes Against Humanity , contrary to Section 5.1(d) UNTAET Regulation 2000/15;

#### **D. APPLICABLE LAW**

- 33 As specified in U.R. 1/1999, 11/2000 as amended by U.R. 2001/25, and U.R. 15/2000, the Special Panel for Serious Crimes shall apply:
  - UNTAET Regulations and directives;
  - Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
  - Pursuant to Sect. 3 U.R.1/1999, the law applied in East Timor prior to 25.10.1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as they do not conflict with the internationally recognized human rights standards, the fulfilment of the mandate given to UNTAET under the United Nations Security Council Resolution 1272 (1999) or UNTAET regulations or directives.
  - The Special Panel has held that “the laws applied in East Timor prior to 25 October 1999” are Indonesian laws (Prosecutor v. João Sarmiento and Domingos Mendonça, Decision, 24<sup>th</sup> July 2003)

## E. FACTS OF THE CASE

- 34 The Prosecutor, had described Benjamin Sarmiento as Commander, and Romeiro Tilman as Deputy Commander of the Tim Sasurut ABLAI militia in Holarua, Same, with authority and control over members of the ABLAI militia.
- 35 The Prosecutor, had stated that the accused Benjamin Sarmiento among others, was responsible for:
- Murder of Carlito de Araujo a.k.a Tilman, on or about 17 April 1999 in Orluli Village, Same Sub-District, Manufahi District.
  - Murder of Luis Boco Siri and Agapito de Araujo, on or about 17 April 1999 in Grotu Lau Village, Same Sub-District, Manufahi District.
  - Murder of Afonso da Costa, on or about 24 April 1999 in Orema Village, Same Sub-District, Manufahi District.
  - Murders of Armindo Da Costa (Armindo Tilman) and Carlito Da Costa (Alberto Ximenes) on or about 30 August 1999 in Datina village, Same sub-district, Manuhafi District.
  - Murder of Lorenço Tilman, on or about 9 September 1999 in Datina Village, Same Sub-District, Manufahi District.
- 36 The Prosecutor described also how Benjamin Sarmiento was responsible for: The imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, of villagers from Grotu Lau, Leubrema and Orema, from 30 August 1999 to about 4 September 1999 in Leubrema village,
- 37 The imprisonment or other severe deprivation of physical liberty, in violation of fundamental rules of international law, of villagers from Datina, Grotu Lau, Leubrema and Orema from about 5 September 1999 to about 9 September 1999 in Datina village,
- 38 The Deportation or Forcible Transfer of population from Same Sub-District, in particular from Grotu Lau Village, Orema, Datina, Leubrema, Trilolo and other neighbouring villages, to West Timor during September 1999,

- 38 The persecution of supporters of independence of East Timor in Same sub-district, Manufahi district, in particular the villagers of Orema, Datina, Grotu Lau, Orluli, Leubrema and Suri-Rema between April 1999 and September 1999.
- 39 The Prosecutor described also how the accused Romeiro Tilman was responsible among others for:
- 40 The Murder of Armindo da Costa (Armindo Tilman) and Carlito da Costa (Alberto Ximenes) on or about 30 August 1999 in Datina Village, Same Sub-District, Manufahi District,
- 41 The imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of International Law, of villagers from Grotu Lau, Leubrema and Orema from 30 August 1999 to about 4 September 1999 in Leubrema village,
- 42 The imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of International Law, of villagers from Datina, Grotu Lau, Leubrema and Orema from about 5 September 1999 to about 9 September 1999 in Datina village,
- 43 The Deportation or Forcible Transfer of population from Same Sub-District, in particular from Grotu Lau Village, Orema, Datina, Leubrema, Trilolo and other neighbouring villages, to West Timor during September 1999,
- 44 The persecution of supporters of independence of East Timor in Same sub-district, Manufahi district, in particular the villagers of Orema, Datina, Grotu Lau, Orluli, Leubrema and Suri-Rema between April 1999 and September 1999.
- 45 The Prosecutor underlined that those acts or omissions by both accused persons were undertaken as part of a widespread or systematic attack directed against the civilian population, especially targeting those who were considered to be pro-independence, linked to or sympathetic to the independence cause for East Timor, with knowledge of the attack.
- 46 According to the Prosecutor both accused persons were individually criminally responsible for the crimes alleged in this indictment in violation of Section 14 of UNTAET Regulation 2000/15. Under section 14.2 and 14.3(a) to (c) individual criminal responsibility results if the individual committed, planned, instigated, ordered, solicited, induced, aided, abetted or otherwise

assisted in the commission of the crimes, or attempted commission. Individual criminal responsibility also results if an individual in any other way contributes to the commission or attempted commission of the crime, if such contribution is intentional and is either (i) made with the aim of furthering the criminal activity or purpose of a group; or (ii) is made with the knowledge of the intention of the group to commit the crime.

- 47 According to the Prosecutor, Benjamin Sarmiento and Romeiro Tilman were criminally responsible as superiors for the acts of their subordinates in violation of Section 16 of UNTAET Regulation 2000/15. Superior criminal responsibility is the responsibility of a superior for the acts of their subordinates if the superior knew or had reason to know that the subordinate was about to commit such acts or had done so, and the superior failed to take necessary steps or reasonable measures to prevent such acts or to punish the perpetrators thereof.
- 48 In her final statement, the Public Prosecutor requested the Court to sentence Benjamin Sarmiento to 12 (twelve) years of imprisonment for Count 1, to 9 (nine) years imprisonment for count 2, to 9 (nine) years of imprisonment for count 3, to 12 (twelve) years imprisonment for count 5 and to 5 (five) years imprisonment for count 8. Regarding the accused Romeiro Tilman the Prosecutor asked for a sentence of 8 (eight) years of imprisonment for count 10 and of 5 (five) years for count 13.
- 49 Both Benjamin Sarmiento and Romeiro Tilman admitted the allegations in the indictment with respect to the charges to which they pleaded guilty. They admitted the allegations contained in the paragraphs 10 to 21, 22 to 48, 49 to 56, and 57 to 78 of the indictment. They further admitted that as Commander and deputy Commander of Tim Sasurut ABLAI militia in Holarua, they, among others, were responsible: for Murder and Deportation or Forcible Transfer of population from Same Sub-District, in particular from Grotu Lau Village, Orema, Datina, Leubrema, Trilolo and other neighboring villages, during September 1999.
- 50 Both accused persons admitted also that the crimes listed above (to which they were unequivocally and unconditionally admitting) were committed as part of a widespread and systematic attack against a civilian population with knowledge of the attack.
- 51 From the submissions of the Public Prosecutor and the admissions made by both the accused persons, it is clear that the offences alleged have been committed in 1999 before the promulgation of U.R. 2000/15, 2000/11 and

2000/30 on Transitional Rules of Criminal Procedure as amended by UNTAET Regulation 2001/25, which apply in the matter as underlined above<sup>1</sup>. According to the principle *nullum crimen sine lege*, the law applicable has to be the law, which was in force when the offences were committed. Therefore, the first issue to be analyzed by this Court will be the applicability of UNTAET regulations with respect to the crimes the both accused are charged.

## F. FINDINGS OF THE COURT

### I. The applicability of UNTAET Regulations with respects to the crimes the both accused Benjamin Sarmiento and Romeiro Tilman were charged.

52 The principle *nullum crimen sine lege* (no crime without law) has developed as a general principle of criminal law and as a rule prohibiting retroactive application of criminal laws. It is counted among the so-called “principles of legality,”<sup>2</sup> and it may be found in various international legal instruments, including international human rights and humanitarian law treaties.<sup>3</sup>

53 Section 31 of the Constitution provides as follows:

*“No one shall be tried and convicted for an act that does not qualify in law as a criminal offence at the moment it was committed, nor endure security measures the provisions of which are not clearly established in the previous law”.*

54 The principle *nullum crimen sine lege* is found in Section 12 of U.R. 2000/15, which reads as follows:

12.1 *A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.*

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<sup>1</sup> Op.cit. Page 12

<sup>2</sup>M. Cherif Bassiouni, The Sources and Content of International Criminal Law: A Theoretical Framework, in International Criminal Law, Second Editin, Volume I, Crimes, (M. Cherif Bassiouni ed. 1999) at 32.

<sup>3</sup>See, for example, Article 11(2) of the Universal Declaration of Human Rights; Article 15(1) of the ICCPR; Article 7(1) of the European Convention on Human Rights; Article 9 of the America Convention on Human Rights; Article 7(2) of the African Charter on Human and Peoples' Rights; Article 67 of the Fourth Geneva Convention; and Article 13 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind.

12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.

12.3 The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.

55 It has been shown in the case *The Prosecutor versus Jhoni Franca*<sup>4</sup> that, in order to satisfy the principle of *nullum crimen sine lege*, the act must have been a crime under international law giving rise to individual criminal responsibility at the time the conduct occurred.<sup>5</sup>

56 With respect to the application of *nullum crimen sine lege* to crimes within the subject matter jurisdiction of the Special Panels, the Court has to examine the application of the principle of *nullum crimen sine lege* to the subject matter jurisdiction of the Special Panels under UNTAET Regulation No. 2000/15. In particular, this part investigates whether the “serious criminal offences” enumerated in Section 1.3 of U.R. 2000/15 were already crimes under international law either as customary international law binding on all states;<sup>6</sup> or, in the absence of customary law and at least to the extent the defendants were Indonesian citizens,<sup>7</sup> as treaty law binding on Indonesia.

57 Section 1.3 of U.R. 2000/15 states that the Special Panels have jurisdiction over the following serious criminal offences: genocide, Crimes Against Humanity, war crimes, torture, murder and sexual offences. If it is clear that some acts like murder and sexual offences

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<sup>4</sup> *The Prosecutor Versus Jhoni Franca, Judgment of the 5<sup>th</sup> December 2002.*

<sup>5</sup> This requirement, of course, is limited to acts occurring before the Regulation 2000/15 entered into force.

<sup>6</sup> See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc, S/25704, 3 May 1993 [hereinafter Report of the Secretary-General regarding the ICTY Statute], accompanying the proposed statute for the International Criminal Tribunal for the Former Yugoslavia. Paragraph 34 of this report addresses the principle of *nullum crimen sine lege* and reads, in relevant part:

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

<sup>7</sup> There may be a question about to what extent East Timor fell within the scope of Indonesia's treaty obligations. This question arises from uncertainty as to whether East Timor was legally part of Indonesia.

were presumably criminalized under domestic law during the relevant period (Sections 8 and 9 of UNTAET Regulation 2000/15); it is not the same for other acts like genocide, war crimes and Crimes Against Humanity.

- 58 Section 5 enumerates the Crimes Against Humanity that fall within the Special Panels' jurisdiction and reads, in relevant part:

*5.1 For the purposes of the present regulation, "Crimes Against Humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:*

*a) Murder*

*b)(...)*

*d) Deportation or Forcible Transfer of population.*

- 59 Of these different Crimes Against Humanity, the following were included in the jurisdiction of the International Military Tribunal (Article 6(c) of the Charter of the International Military Tribunal (IMT)): murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated. In addition, the ICTY and ICTR Statutes enumerate the following Crimes Against Humanity within each tribunal's jurisdiction (Article 5 ICTY Statute and Article 3 ICTR Statute, respectively): murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts. According to the Report of the Secretary General that accompanied the draft Statute of the ICTY, these acts are considered crimes under customary international law.<sup>8</sup> In the present case, both accused Benjamin Sarmiento and Romeiro Tilman were charged with Murder as a Crime against Humanity in violation of Section 5.1(a) U.R. Regulation 2000/15, and Deportation or Forcible Transfer as Crimes Against Humanity, in violation to Section 5.1(d) U.R. 2000/15.

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<sup>8</sup> See Report of the Secretary-General regarding the ICTY Statute, *supra* note X, para. 34.

59 The Special Panel therefore has to decide whether the specific Crimes Against Humanity enumerated in the paragraph above (and with which the accused are charged) are considered to be customary international law. Both offences are included in the IMT Charter, in the Statutes of the ICTR and the ICTY and in the Statute of the ICC. It is therefore clear that Murder as a Crime against Humanity and Deportation or Forcible Transfer of population as a Crime against Humanity are part of customary international law.

## **II. The attack against the civilian population and related requirements**

60 In light of the guilty plea of the accused, of the written statements by the witnesses and the accused, of the reports on the situation of Human rights in East Timor, of the note by the Secretary General, and of the Report of the Indonesian Commission on human rights violations in East Timor, January 2000, the Court is convinced that the following facts occurred:

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

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

- 63 In 1999, more than twenty-five militia groups operated throughout East Timor. Their goal was to support autonomy within Indonesia. The Integration Fighting Forces (PPI), (*Pasukan Pejuang Integrasi*) under the command of Joao Tavares was the umbrella organization under which these militia groups were organized. It had the backing of the TNI and the Civil Administration. PPI Commanders issued, called upon and incited militia groups and their members to intimidate independence supporters and those perceived to support them. The militia groups participated in the widespread or systematic attack and acted and operated with impunity.
- 64 The Indonesian Military in East Timor consisted of both regular territorial forces (BTT), Special Combat Forces, i.e. the Strategic Reserve Command (KOSTRAD), (*Komando Strategis Angkatan Darat*) and Special Forces Command (KOPASUS), (Komando Pasukan Khusus), all of which had units, staff officers and soldiers stationed in East Timor.
- 65 These large-scale attacks were directed against civilians of all age groups, predominantly against individuals who supported or were perceived to support independence, and resulted in lethal injury including death by sharp force injury, gun shot injury, blunt force trauma or a combination of the three.
- 66 Widespread or systematic attacks were also carried out against property and livestock, including mass destruction of houses by fire, stealing of property, killing and stealing of livestock.
- 67 The widespread or systematic attack resulted in the internal displacement of thousands of persons. Additionally, the forcible transfer and deportation of the civilian population within East Timor and to West Timor (Indonesia) was an essential feature of that orchestrated campaign of violence.
- 68 Under terms of the 5 May 1999 Agreements between Indonesia, Portugal and the United Nations on the popular consultation, the Indonesian security authorities had the responsibility to ensure a safe environment devoid of violence or other forms of intimidation as well as the general maintenance of law and order before and during the popular consultation. The TNI and POLRI (which were the Indonesian Security Authorities) failed to meet these obligations and made no

attempt to disarm or neutralize the militia groups. They were allowed to act with impunity.

- 69 From February to October 1999, the Indonesian Police Force (POLRI), the state agency for upholding the law and public order were also present in East Timor. It also included a Mobile Police Brigade (BRIMOB), whose Units and members were stationed in East Timor, including Manufahi District.
- 70 Same is a Sub-District of Manufahi District, which is one of the thirteen districts of East Timor.
- 71 Between April and October 1999, the ABLAI militia Group (Aku berjuang Iestarikan Amanat Integrasi) (I Struggle for a perpetual integration mandate) operated throughout Manufahi District. It comprised about 2000 members under the command of Nazario Corte Real, Fransisco Capela and Guilhermino Marcal. The ABLAI Militia was divided into several teams (also called Tims), which operated in various villages and sub villages.
- 72 Tim Sasurut ABLAI Militia was one of the militia groups under the ABLAI militia. It was established some time between March 1999 and April 1999. The inauguration ceremony was presided over by Eurico Guterres and commanders of ABLAI including Nazario Corte Real, Fransisco Capela and Guilhermino Marcal.
- 73 The Leaders of Tim Sasurut Militia ABLAI in Same Sub-District were Bernardino da Costa (DanRim) who was the first Sub-District Commander, Benjamin Sarmiento (DanDim) who was the Deputy Commander and Romeiro Tilman (DanRu) who was Third-in-charge of the Sub-District Command. Tim Sasurut Militia ABLAI comprised many sections including the Soldado Section, Leubrema Section and Carbalao Section.
- 74 Tim Sasurut Militia ABLAI group operated in collaboration with others militia *tims* of the ABLAI militia group in particular Tim Hadomi ABLAI Militia.
- 75 Between April and October 1999 the Tim Sasurut ABLAI militia Group operated from Leubrema Village around Orema village in Same Sub-District, Manufahi District. During this period Tim Sasurut ABLAI Militia carried out acts of violence against those members of

the civilian population in Same sub-district who were considered to be pro-independence, linked to or sympathetic to the independence cause. The concerted attacks included intimidation, threats, unlawful arrests and detention, interrogations, arsons, murders, forcible transfer, deportations and other acts of persecution. Many acts were directed in particular against civilians who were presumed to be members or supporters of FALINTIL (Forças Armadas De Libertacao Nacional De Timor Leste: Armed Forces for the Liberation of East Timor) or supporters of independence.

- 76 Bernardino da Costa, Benjamin Sarmiento and Romeiro Tilman respectively as Commander, Deputy Commander and Third-in-Charge, of the Tim Sasurut ABLAI Militia, had control over its members.
- 77 The commander of the Tim Sasurut ABLAI Militia had regular meetings; they briefed the militia about some of their plans, and gave them instructions how to carry them out.
- 78 Members of the Tim Sasurut ABLAI Militia put up guard posts in many places in Same sub-district including Anilumu, Blaro, Datina, Grotu Lau, Hailesu, Leubrema, Orema, Suri-rema, Tionai, Titikua and Tirilolo. The militia members, who were guarding these posts, were instructed to arrest any supporter of independence or Falintil who attempted to pass through the militia posts. They also patrolled all the villages and villages in the sub district in search of independence supporters.

### **III. Factual findings on the charges against the accused Benjamin Sarmiento**

- 79 In light of the guilty plea of the accused, of the statements by the witnesses and the accused, of the reports on the situation of Human rights in East Timor, of the note by the Secretary General, and of the Report of the Indonesian Commission on human rights violations in East Timor, January 2000, the Court is convinced that the following facts occurred:

#### **Count 1 - Murder of Carlito de Araujo a.k.a Tilman (Maulito)**

- 83 On or about 17 April 1999 Bernadino Da Costa and Benjamin Sarmiento held a meeting with the members of the ABLAI Militia in

Leubrema. Bernadino Da Costa and Benjamin Sarmiento ordered the militia members to attack Grotu Lau Village. Bernadino Da Costa and Benjamin Sarmiento also ordered the militia to kill supporters of independence in Grotu Lau. Bernadino Da Costa gave a list of targeted supporters of independence to militia members. That list included the name of the victim Carlito De Araujo a.k.a Tilman (Maulito). Bernadino Da Costa and Benjamin Sarmiento also told the militia members that the attack on Grotu Lau Village was, because the people of Grotu Lau village were believed to be supporters of independence.

- 84 When Benjamin Sarmiento spoke at the meeting, he told the militia members that they were going to Grotu Lau Village, and they were asked to bring their machetes and spears along with them.
- 85 The villagers of Grotu Lau received information that there was going to be a militia attack on the village, and that the militia were going to kill the men. Upon hearing this, the men ran into hiding in the jungles, and the women remained in the village.
- 86 Soon after the meeting members of the *Tim Sasurat ABLAI* Militia led by Bernadino Da Costa, Benjamin Sarmiento and Romeiro Tilman and other militia groups (Fahiluhan and Carbalau) attacked Grotu Lau Village. Among the *Tim Sasurat ABLAI Militia* members present were, Moisses Rafféal, Domingos Mauclau, Antonio De Jesus, Reskoli Tiago (Mausera), Armino Da Costa, Francisco Mendonca and Abdullah Ernesto.
- 87 Bernadino Da Costa ordered the women they found in Grotu Lau village to call out to the men in hiding to return to the village, otherwise they would be killed. After the women had called out to the men, only a few of them came out, one of whom was Carlito De Araujo a.k.a Tilman (Maulito).
- 88 Bernardino Da Costa interrogated Carlito De Araujo. After the interrogation, Benjamin Sarmiento and a few other militia members led Carlito about 100 m. away. Benjamin Sarmiento stabbed Carlito De Araujo with a spear in the back and Domingos Mauclau cut his neck. Benjamin Sarmiento and another militia member then threw Carlito de Araujo's body into the bushes. Upon returning to the militia post Benjamin Sarmiento told the other militia members "I stabbed Maulito with my spear and Domingos Mauclau cut his neck.

## Count 2 - Murder of Luis Boco Siri and Agapito de Araujo

- 89 On or about 17 April 1999 members of *Tim Sasurat ABLAI Militia* led by Bernadino Da Costa, and Benjamin Sarmiento and two other militia groups attacked the village of Orluli. About 78 militia members took part. When the members of the ABLAI militia arrived in Orluli, they divided into three groups. Two of the groups (Fahiluhan and Carbalao) secured the outskirts of the village. Members of *Tim Sasurat ABLAI Militia*, (the third group) under the command of Bernadino Da Costa, and Benjamin Sarmiento attacked the village. Before the attack most of the villagers had run into the jungle to hide from the militia. The militia beat the villagers they found in the village Luis De Araujo, Maria Prego, Agapito De Araujo and Luis Boco-Siri were among those who remained in the village and did not run away.
- 90 Luis Boco-Siri was standing near his house. Some members of Tim Sasurut ABLAI Militia including Francisco Mendonca ("Resimau") attacked Luis Boco Siri. There were four other men hiding in the house of Luis Boco Siri. The men were supporters of independence. When the militia attacked Luis Boco Siri the four men ran away to the jungle. Some militia members chased them but could not catch them. The militia members including Francisco Mendonca ("Resimau") beat up Luis Boco Siri with sticks and also kicked him. They stabbed him and killed him.
- 91 Agapito De Araujo, his brother Luis De Araujo and their mother Maria Prego were in their house when members of the *Tim Sasurut ABLAI Militia* attacked the village. All of them came out of the house. Members of Tim Sasurut ABLAI Militia attacked Agapito De Araujo and severely beat him up with fists and sticks. Soon after Luis Boco Siri was killed, Francisco Mendonca ("Resimau") joined the other militia members who were beating up Agapito De Araujo.
- 92 Agapito De Araujo suffered severe injuries from the beating. He was bleeding profusely from his head, ears and eyes. His mother Maria Prego ran to him and embraced him trying to shield him from further beatings.
- 93 The members of Tim Sasurut ABLAI Militia pulled Maria Prego away from her son Agapito De Araujo and stabbed him to death with spears.

Some of the other members of Tim Sasurut ABLAI Militia who took part in the beating and killing of Agapito De Araujo were Benjamin Sarmiento, Abdullah Ernesto, Ahmad, Armindo, Tiago Mauseira, Alberto and Resikoli.

### **Count 3 - Murder of Afonso da Costa**

- 94 Students at the University in Dili were believed to be supporters of independence for East Timor.
- 95 Afonso Da Costa was an 18 years old student at the University. He was from Trilolo village. On or about 24<sup>th</sup> April Afonso Da Costa was returning to Holarua from Dili. When he arrived at Anilumo Village (which is about 1½ kilometres from Orema Sub-Village) he was arrested by members of the *Tim Sasurut ABLAI Militia*. He was taken to Orema Sub-Village and handed over to Bernadino Da Costa.
- 96 Bernadino Da Costa ordered the militia to take Afonso Da Costa to the top of the mountain above Orema and kill him there. The militia members including Benjamin Sarmiento, Antonio Goreta, Manuel Fatima, Ahmad and Mariano Mobili tied Afonso da Costa's hands behind his back and took him up the mountain. When they reached the top of the mountain Benjamin Sarmiento stabbed Afonso Da Costa in the back with his spear and a militia member, Manuel Fatima chopped Afonso Da Costa's neck. On the order of Benjamin Sarmiento and some other militia members including Afonso Da Costa (*militia member bearing the same name as the victim*) and Victor De Jesus lifted the body and threw it over the mountain.

### **Count 5 - Murder of Lorenzo Tilman**

- 97 After the announcement of the result of the popular consultation on 4 September 1999 the members of the *Tim Sasurut ABLAI Militia* under the command of Bernadino Da Costa, Benjamin Sarmiento and Romeiro Tilman forced villagers from Faliluhan area (Villages of Orema, Grotu Lau, and Leubrema) to go to Datina Village where they were all detained in "community houses". Lorenzo Tilman was one of the villagers who was taken by the ABLAI militia to Datina Village and detained at a "community house".
- 98 On 9 September 1999 Bernadino Da Costa, Benjamin Sarmiento and Romeiro Tilman ordered all the villagers detained in the "community

houses” to board trucks to be transported to West Timor. All villagers present boarded the trucks.

- 99 Lorenzo Tilman refused to board the truck claiming that he would rather die in East Timor than in West Timor. Militia members and Benjamin Sarmiento then forcibly took Lorenzo Tilman to a coffee plantation near the militia guard post. Other militia members held Lorenzo Tilman and Benjamin Sarmiento stabbed him in the back with his spear, thereby killing him.
- 100 Benjamin Sarmiento and other militia members returned to the truck. On the truck Benjamin Sarmiento told the other militia members present that he and other militia members had killed Lorenzo Tilman. They re-enacted how they killed Lorenzo Tilman, and all the militia members rejoiced over it.

#### **Count 8 - Deportation or Forcible Transfer of population**

- 101 After the announcement of the result of the popular consultation in which the East Timorese voted overwhelmingly in favour of independence of East Timor, the commanders of *Tim Sasurut ABLAI Militia* commenced operations to forcibly transfer the population of the villages around Leubrema to West Timor. In pursuance of this operation, the militia arranged for trucks in which the villagers were transported.
- 102 The villagers who were detained in Leubrema and Datina were then forcibly transported in trucks to Betano where they waited for about one week. Then they were transported to Metamauk in West Timor. Some villagers were transported to Atambua in Indonesia in trucks while others were transported to Kupang in Indonesia by a ship belonging to the Indonesian Navy.
- 103 Bernardino Da Costa, Benjamin Sarmiento, Romeiro Tilman, Joao Sarmiento and other members of *Tim Sasurut ABLAI Militia* threatened the villagers that if they did not go to West Timor they would be killed by the militia.
- 104 From the following villages people were forcibly taken to Indonesia by the ABLAI Militia together with Bernadino Da Costa, Benjamin Sarmiento, Romeiro Tilman:

- a) From Grotu Lau village 17 families
- b) From Orema 19 families
- c) From Datina 40 families
- d) From Leubrema 20 families
- e) From Trilolo village 170 people.

105 People from other neighbouring villages including Suri-rema were also deported.

106 In all more than 15,000 villagers from Same were forcibly assembled in Betano and thereafter forcibly taken to Indonesia.

#### **IV. Factual findings on the charges against the accused Romeiro Tilman**

##### **Count 10 - Murder of Armindo da Costa (Armindo Tilman) and Carlito da Costa (Alberto Ximenes)**

107 On 30 August 1999 a large group of villagers from Datina Village were on their way back to Datina after having voted in Holarua Village. Among this group were Armindo Da Costa (also known as Armindo Tilman) and Carlito Da Costa (also known as Alberto Ximenes). Both men were believed to be supporters of Falintil and of independence for East Timor. As the group reached the outskirts of Datina a big truck full of members of *Tim Sasurut ABLAI Militia* under the command of Bernadino Da Costa, and Romeiro Tilman stopped near them.

108 Bernadino Da Costa ordered the group to board the truck and the group was taken to the Militia checkpoint / guard post in Datina. There Armindo Da Costa and Carlito Da Costa were separated from the group, tied up and led by Romeiro Tilman and other militia members to a nearby coffee plantation.

109 At the coffee plantation Bernadino Da Costa, and Romeiro Tilman and other members of Tim Sasurut ABLAI Militia including Ahmad Ernesto, Clementino Bere Leki, Baltazar strangled Armindo Da Costa and Carlito Da Costa with a rope.

110 Bernadino Da Costa, and Romeiro Tilman then ordered the other militia members to kick and punch Armindo Da Costa and Carlito Da

Costa. On the order of Bernadino Da Costa, Benjamin Sarmiento and Romeiro Tilman, Luis Magno cut off the head of Armindo Da Costa and Domingos Mauclau cut off the head of Carlito Da Costa.

- 111 After Armindo Da Costa and Carlito Da Costa were killed, Bernadino Da Costa, and Romeiro Tilman ordered members of Tim Sasurut ABLAI Militia to take the heads of Armindo Da Costa (Armindo Tilman) and Carlito Da Costa (Alberto Xiemenes) to the house of Bernadino Da Costa and hang them on a tree outside his house.

**Count 13 - Deportation or Forcible Transfer of population**

- 112 The same facts as in count 8 (in the paragraph 102 until 107) apply here.

**V. Individual criminal responsibility**

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

As regards Murder the accused are individually responsible according to Sect. 14.3 (a) because they committed the crimes either themselves or through others.

As regards Deportation or Forcible Transfer they made use of their position as militia commanders to commit the crimes through their subordinates.

## VI. Legal findings of the case

116 Sect. 5 U.R. 2000/15 sets out various acts that constitute Crimes Against Humanity, when those acts are committed as part of a widespread and systematic attack and directed against any civilian population, with knowledge of the attack. Among those acts are Murder and Deportation or Forcible Transfer of population.

117 Both Benjamin Sarmiento and Romeiro Tilman are accused of Murder and Deportation or Forcible Transfer of population as Crimes Against Humanity.

### **Murder as a Crime Against Humanity**

118 The offence of Murder as a Crime Against Humanity is provided for in Section 5.1 (a) U.R. 2000/15. The offence is not defined in this regulation but the Special Panel had the opportunity to do so in the case *The Public Prosecutor against Joni Marques*<sup>9</sup>. In this case the Special Panel provided with the following definition of the offence:

*643. The Panel, having assessed the shortcomings in the definition of murder as crime against the humanity in Sec. 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 Court and the precedents from the International Tribunal, with the remarks foreseen in Sect. 18 of UR-2000/15.*

*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.*

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<sup>9</sup> 9-PID.C.G/2000 General Prosecutor vs. Joni Marques & 9 others, decision on 11 December 2001

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 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.*

119 This definition was followed by the Special Panel in its successive decisions, *inter alia* in the case *the Public Prosecutor against Jose Cardoso*<sup>10</sup> Therefore the Panel must analyse if the 4 elements of murder are satisfied: 1) *The death of the victim*; 2) *Death as a result of the perpetrator act*; 3) *Substantial causality*; 4) *Intention to cause the death or awareness of the possibility*.

120 *Death of the victim.* It has been proved that Carlito de Araujo was stabbed, that his neck was cut and his body thrown to the bushes. There is no dispute that during the attack on 17<sup>th</sup> April 1999 in Orululi village, they have been killed. Luis Boco Siri was beaten up with fists and a stick, and killed after, and Agapito de Araujo also suffered many injuries from the beating, and was stabbed to death with spears. Their dead bodies were buried around 5 meters from their houses. It is also undisputed that Afonso da Costa have been arrested and taken to the top of the mountain of Orema, where he was killed. He was tied up, stabbed on his back with spears, chopped in the neck and his body was lifted on the mountain. For Lorenço Tilman, he was taken to the coffee plantation and was stabbed with spears on his back until he died as result. It has been proved also that Armindo da Costa (Armindo Tilman) and Carlito da Costa (Alberto Ximenes) have been taken to the coffee plantation. They have been strangled with a rope, and after the

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<sup>10</sup> 4-PID.C.G/2001 *General Prosecutor vs. Jose Cardoso*, decision on 5 April 2003

killing, their heads were taken to Bernardino da Costa's house where the militia members hang them on the tree outside his house.

- 121 *Death as a result of the perpetrator act.* It has been proved that all the victims were alive before the attack and before being taken by the members of militia, and that their deaths were the result of Benjamin Sarmiento and Romeiro Tilman.
- 122 *Substantial causality.* It has also clearly been showed that, the victims were dead because they suffered many wounds, and attack with spears. The victims were direct result of the wounds received during the attack.
- 123 *Intention to cause the death or awareness of the possibility.* It was described previously that at the time of the killing the accused persons meant to cause the death of the victims on were aware that it would occur in the ordinary course of events. All the deaths were the result of the accused persons and their member's behaviour. The nature of the attack, i.e. the indiscriminate killing against civilians during the attack showed that the actions were meant to cause the death of the victims or at least the death constituted a reasonable possibility in ordinary course of events. Whoever participated in the attack to the villagers was conscious of the possibility that the people would die as a consequence of the attack.
- 124 It is therefore clear that elements of murder are satisfied in the present case.

### **Deportation or Forcible Transfer of population as a Crime Against Humanity**

- 125 UNTAET Regulation 2000/15 (as amended) includes Deportation or Forcible Transfer of population within the list of acts that, when committed as part of a widespread or systematic attack and directed against a civilian population with knowledge of the attack, constitute Crime against Humanity [Section 5.1, d)]. Therefore, Deportation or Forcible Transfer of population are not autonomous crimes as genocide, murder, sexual offences and torture, and in order to fall within the jurisdiction of the Special Panels always require the condition of the widespread or systematic attack.
- 126 Section 5.2 c) defines Deportation or Forcible Transfer of population as

*“The forced displacement of the persons concerned by expulsion or other coercitive acts from the area in which they are lawfully present, without grounds permitted under international law”.*

127 The Special Panels so far did not have the opportunity, to analyse the crime of Deportation or Forcible Transfer of population. The double formulation of the criminal action refers only to the international or national character of the displacement: deportation is the forced removal of people from one country to another, while population transfer applies to compulsory movement of people from one area to another within the same state<sup>11</sup>. Under international humanitarian law the main consequence of the distinction refers to the status that the moved persons obtained: victims of deportation qualify as refugees while victims of transfer of population are called “internally displaced persons” or IDPs.

128 Individual or mass deportations are war crimes and Crimes Against Humanity as defined at the Nuremberg Tribunals following World War II, and war crimes under the 1949 Geneva Conventions. The Nuremberg Tribunal condemned the practice of "Germanising" occupied territories transferring German population and deporting civilians from one occupied region to another. The Fourth Geneva Convention of 1949 in its Art. 49, explicitly forbids deportations in conditions of war:

*"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."*

129 The convention permits the "*total or partial evacuation*" of any area where either "*the security of the population or imperative military reasons*" require, but the evacuated civilians must be returned to their homes "*as soon as hostilities in the area have ceased.*"

130 As to the internal displacement the same Article 49 of the Fourth Geneva Convention declares that "*individual or mass forcible transfers . . . are prohibited, regardless of their motive.*" Additional Protocol II of 1977, which applies in internal conflicts, provides that forced

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<sup>11</sup> M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, Second revised edition (1999) at 312.

civilian displacement may be undertaken legally only when civilian's safety or "imperative military reasons" require it.

131 Therefore the standard is the same for international or internal conflicts: if civilians have to be moved for either of those two reasons—safety or military imperatives—their evacuations are to be under protected, hygienic, and humane conditions, and as short-lived as possible.

132 The International Tribunals had the opportunity to define Deportation or Forcible Transfer of population as a crime against humanity in the ICTY *Krtic* Judgement<sup>12</sup> when stating that:

*478.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.*

*479.However, this distinction has no bearing on the condemnation of such practices in international humanitarian law. Article 2(g) of the Statute, Articles 49 and 147 of the Geneva Convention concerning the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Article 85(4)(a) of Additional Protocol I, Article 18 of the ILC Draft Code and Article 7(1)(d) of the Statute of the International Criminal Court all condemn Deportation or Forcible Transfer of protected persons. Article 17 of Protocol II likewise condemns the "displacement" of civilians.*

*480.In this regard, the Trial Chamber notes that any forced displacement is by definition a traumatic experience which involves abandoning one's home, losing property and being displaced under duress to another location. As previously stated by the Trial Chamber in the Kupreskic case, forcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining Crimes Against Humanity [...]*

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<sup>12</sup> Krstic IT-98-33 "Srebrenica-Drina Corps", of 2 August 2001.

133 The same ICTY sentence, when examining the facts, establishes what are the elements of the crime common to both the deportation and the transfer of population. The two elements are

a) the unlawfulness of the transfer

b) the compulsory nature of the transfer.

134 The requisite of the “unlawfulness of the transfer” refers to the fact that not every transfer of population can be considered illegal. As already mentioned, Article 49 of the Fourth Geneva Convention and Article 17 of Protocol II allow total or partial evacuation of the population “*if the security of the population or imperative military reasons so demand*”. Therefore the Panel, when facing a deportation or a forcible transfer of population must assess if the motif of the transfer was to protect the population or there was an imperative military reason.

135 The element of the “compulsory nature of the transfer” implies the need for the Panel to determine whether the population was obliged to move or not. It is important to bear in mind that, as explained by the Preparatory Commission for the International Criminal Court, *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*<sup>13</sup>.

136 It is worth noticing that the definition of Deportation or Forcible Transfer of population used in the UNTAET Regulation 2000/15 is the same contained in the Statute of the International Criminal Court (the ICTY and ICTR Statutes did not contain such a definition).

137 It has been shown in the present case that the transfer of the population was unlawful and that the population was obliged to move. The population did not move voluntarily.

138 Since East Timor became independent on 28<sup>th</sup> November 1975 according to the Preamble and Sect. 1.2 Timorese Constitution, that

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<sup>13</sup> Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 11.

part of the population which was transferred to Indonesia was moved to a different country and therefore suffered Deportation.

139 Both accused persons in their guilty plea admitted the alleged facts regarding the charges of Deportation or Forcible Transfer. Since an accused person can only plead guilty to alleged facts but not to legal evaluations (which can be done only by the Court), it was for the Court to assess whether the admitted facts constituted the crime of Deportation or Forcible Transfer. Since part of the population was transferred from their native villages to Betano, and had to stay there for a whole week, during which it was unclear whether they would be deported to Indonesia (like another part of the population deported directly by lorries), the Court decided that this constituted Forcible Transfer of population as Crime Against Humanity.

### **G. VERDICT**

140 For the aforementioned reasons, in light of the evidence and the plea of guilty, pursuant to Sections 29A and 39 U.R. as amended by U.R. 2001/25, the Special Panel accepted on 16 July 2003 the plea of guilty of Benjamin Sarmiento and Romeiro Tilman made on the 30 June 2003, finds that all the essential facts required to prove the crimes to which the admission of guilty relates have been established as required by Section 29A.2 U.R. 2001/25.

141 The accused Benjamin Sarmiento was convicted of:

The murder of Carlito de Araujo aka Tilman (Maulito), on or about 17<sup>th</sup> April 1999 in Grotu Lau Village, Same Sub District, Manufahi District, Murder as a Crime Against Humanity, contrary to Section 5.1(a) U.R. 2000/15; the murder of Luis Boco Siri and Agapito de Araujo, on or about 17<sup>th</sup> April 1999 in Orluli Village, Same Sub District, Manufahi District, Murder as a Crime Against Humanity, contrary to Section 5.1(a) U.R. 2000/15. Murder of Afonso da Costa, on or about 24<sup>th</sup> April 1999 in Orema Village, Same Sub District, Manufahi District, as Crimes Against Humanity, contrary to Section 5.1(a) UNTAET Regulation 2000/15, the murder of Lorenzo Tilman, on or about 9 September 1999 in Datina Village, Same Sub District, Manufahi District, as Crimes Against Humanity, contrary to Section 5.1(a) U.R. 2000/15; deportation or forcible transfer of population from

Same Sub District, Manufahi District, in particular from Grotu Lau village, Orema village, Datina village, Leubrema Village, Trilolo village and other neighboring villages in East Timor to West Timor during September 1999, Deportation or Forcible Transfer as Crimes Against Humanity , contrary to Section 5.1(d) U.R. 2000/15.

142 The Court convicted the accused Romeiro Tilman of: the murder of Armindo da Costa (Armindo Tilman) and Carlito da Costa (Alberto Ximenes), on or about 30<sup>th</sup> August 1999 in Datina Village, Same Sub District, Manufahi District, Murder as a Crime Against Humanity, contrary to Section 5.1(a) UNTAET Regulation 2000/15; Deportation or Forcible Transfer of Population from Same Sub District, Manufahi District, in particular from Grotu Lau village, Orema village, Datina village, Leubrema Village, Trilolo village and other neighbouring villages in East Timor to West Timor during September 1999 Deportation or Forcible Transfer as Crimes Against Humanity, contrary to Section 5.1(d) U.R. 2000/15.

143 Pursuant to these findings of Guilty, the Court proceeded to sentence both accused persons Benjamin Sarmiento and Romeiro Tilman, in order to determine an appropriate penalty.

## **H. SENTENCING**

### **Facts related to the sentence.**

144 The Public Prosecutor and the defense suggested in their agreement that the accused Benjamin Sarmiento be given a penalty of 12 years, and for the accused Romeiro Tilman 8 years of imprisonment.

145 The Special Panel has taken into account the following:

### **Mitigating circumstances:**

146 It is important to recall that both accused pleaded guilty to the charges against them. As the Court established, their guilty plea was unequivocal. As already decided by this Court in the case of Augusto Dos Santos<sup>14</sup> a person, who is honest in admitting guilt, coming with an open heart and an open mind, has to be treated consequently. There are not many cases, in which accused persons admit guilt.

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<sup>14</sup> Case No.06/2001, The Public Prosecutor v. Augusto Do Santos, and judgment of 14 May 2002.

- 147 Both accused persons' cooperation with the Court was substantial. They freely admitted their participation in murders and deportation or forcible transfer of population. The accused have aided in the administration of justice by cooperating and providing full disclosure of the crimes that occurred.
- 148 Both persons prior to the commission of the crimes, were living in a very coercive environment.
- 149 The Special Panel bears also in mind the family background of both accused and the fact that they are married and have children. However this cannot be given significant weight in a case of this gravity.
- 150 The Special Panel has also taken into consideration the fact that the accused had no previous conviction.
- 151 Having reviewed all the circumstances of the case, the Special Panel is of the opinion that exceptional circumstances in mitigation surrounding the crime committed by both accused afford them some clemency.

**Aggravating circumstances:**

- 152 Both accused Benjamin Sarmiento and Romeiro Tilman, murdered victims that were defenceless, whose inability to respond to the threats and harm was unconditional;

**Sentencing policy**

- 153 According to Sect. 10.1 (a) of U.R. 2000/15, for the crimes referred to in Sect. 5 of the aforementioned Regulation, in determining the terms of imprisonment for those crimes, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals. "In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (Sect. 10.2).
- 154 The penalties imposed on both accused persons found guilty by the Panel are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished (*punitur quia peccatur*). They are also intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall

not tolerate such serious violations of law and human rights (*punitur ne peccetur*).

- 155 Finally, the objective of prosecuting and punishing the perpetrators of the serious crimes committed in East Timor in 1999 is to avoid impunity and thereby to promote national reconciliation and the restoration of peace.
- 156 The Panel considered all the aggravating and mitigating circumstances upheld both by the practices of East Timorese courts in applying the Penal Code of Indonesia (KUHP) and the standards derived from the ICTY and the International Tribunal for Rwanda, apart from those provided for under UR-2000/15 as well as under general principles of law.

#### **Conjunction of punishable acts**

- 155 It has been proved that the accused Benjamin Sarmiento committed several crimes of murder as Crimes Against Humanity and crimes of Deportation and Forcible Transfer as Crimes Against Humanity. The Panel deems that the accused performed several acts in the sense of Art. 65.1 Indonesian Penal Code (on the one hand murder, on the other hand deportation and forcible transfer), because murder on the one hand and deportation (and forcible transfer) on the other hand require a different intent and different means, and in this case were not committed at the same time.

As regards the relation between deportation and forcible transfer, this constituted one continued act in the sense of Art. 64.1 Indonesian Penal Code because the underlying intent was the same, and this intent was merely realised in several consecutive actions.

- 156 It has been proved also that the accused Romeiro Tilman committed two crimes of Murder as Crime Against Humanity, and the Crimes of Deportation and Forcible Transfer as Crimes Against Humanity. For the same reasons the Panel deems that the accused insofar performed several acts, whereas Deportation and Forcible Transfer constituted one act.
- 157 Taking into account the aggravating and mitigating circumstances, the Court deems it appropriate to sentence Benjamin Sarmiento to 9 years

of imprisonment for the murder of Carlito de Araujo aka Tilman (Maulito), 9 years of imprisonment for the murder of Luis Boco Siri and Agapito de Araujo, 9 years of imprisonment for the murder of of Afonso da Costa, 9 years of imprisonment for the murder of Lorenço Tilman, and 5 years of imprisonment for the Deportation and Forcible Transfer.

158 With respect to Romeiro Tilman, taking into account the aggravating and mitigating circumstances of the case, the Court deems it appropriate to sentence him to 6 years of imprisonment for the murder of Armindo da Costa (Armindo Tilman) and Carlito da Costa (Alberto Ximenes), and 5 years of imprisonment for the Deportation or Forcible Transfer.

159 Article 65.2 Indonesian Criminal Code states that:

The maximum of this punishment shall be the collective total of the maximum punishments imposed for the acts, but not exceeding one third beyond the most severe maximum punishment.

160 Therefore the Court deems it relevant to sentence Benjamin Sarmiento to a single punishment of 12 years imprisonment for all the crimes of which he is convicted, and for Romeiro Tilman 8 (eight) years imprisonment.

## **I. DISPOSITION**

161 For the aforementioned reasons, having found the both accused persons BENJAMIN SARMENTO and ROMEIRO TILMAN guilty, considering the arguments of the parties including the submissions of the parties in their joints documents of agreement submitted to the Court on the 30<sup>th</sup> June 2003, the evidence presented at the sentencing hearing, the transitional rules of Criminal Procedure, the Special Panel finds and imposes sentence as follows:

**With respect to the accused Benjamin Sarmiento;**

162 The Court sentences the accused Benjamin Sarmiento of:

163 Murder of Carlito de Araujo aka Tilman (Maulito), on or about 17<sup>th</sup> April 1999 in Grotu Lau Village, Same Sub District, Manufahi District,

as Crimes Against Humanity, contrary to Section 5.1(a) UNTAET Regulation 2000/15. In punishment for this crime sentences the Accused for 9 (nine) years imprisonment.

- 164 Murder of Luis Boco Siri and Agapito de Araujo, on or about 17<sup>th</sup> April 1999 in Orluli Village, Same Sub District, Manufahi District, as Crimes Against Humanity, contrary to Section 5.1(a) UNTAET Regulation 2000/15. In punishment for this crime sentences the Accused for 9 (nine) years imprisonment.
- 165 Murder of Afonso da Costa, on or about 24<sup>th</sup> April 1999 in Orema Village, Same Sub District, Manufahi District, as Crimes Against Humanity, contrary to Section 5.1(a) UNTAET Regulation 2000/15. In punishment for this crime sentence the Accused for 9 (nine) years imprisonment.
- 166 Murder of Lorenzo Tilman, on or about 9 September 1999 in Datina Village, Same Sub District, Manufahi District, as Crimes Against Humanity, contrary to Section 5.1(a) UNTAET Regulation 2000/15. In punishment for this crime sentences the Accused for 9 (nine) years imprisonment.
- 167 Deportation or Forcible Transfer of Population from Same Sub District, Manufahi District, in particular from Grotu Lau village, Orema village, Datina village, Leubrema Village, Trilolo village and other neighbouring villages in East Timor to West Timor during September 1999 as Crimes Against Humanity, contrary to Section 5.1(d) UNTAET Regulation 2000/15. In the punishment for this crime sentences the Accused for 5 (five) years imprisonment.
- 168 The maximum total punishment for these crimes is the collective total of the maximum punishments imposed on those crimes, but that in accordance with Article 65.2 of the Indonesian Criminal Code, this total must not exceed one third beyond the most severe maximum punishment, which in this case is 12 (twelve) years;
- 169 Orders the Accused to pay the costs of the criminal procedure.

**With respect to the Accused Romeiro Tilman;**

- 170 The Court sentences the accused Romeiro Tilman of:

- 171 Murder of Armindo da Costa (Armindo Tilman) and Carlito da Costa (Alberto Ximenes), on or about 30<sup>th</sup> August 1999 in Datina Village, Same Sub District, Manufahi District, as Crimes Against Humanity, contrary to Section 5.1(a) UNTAET Regulation 2000/15. In punishment for this crime sentences the Accused for 6 (six) years imprisonment.
- 172 Deportation or Forcible Transfer of Population from Same Sub District, Manufahi District, in particular from Grotu Lau village, Orema village, Datina village, Leubrema Village, Trilolo village and other neighboring villages in East Timor to West Timor during September 1999 as Crimes Against Humanity, contrary to Section 5.1(d) UNTAET Regulation 2000/15. In punishment for this crime sentences the Accused for 5 (five) years imprisonment.
- 173 The maximum total punishment for these crimes is the collective total of the maximum punishments imposed on those crimes, but that in accordance with Article 65.2 of the Indonesian Criminal Code, this total must not exceed one third beyond the most severe maximum punishment, which in this case is 8 (eight) years;
- 174 Orders the Accused to pay the costs of the criminal procedure.

**Credit for time served**

- 175 According to Section 10.3 U.R. 15/2000, section 42.5 UR-30/2000 and Article 33 of Indonesian Penal Code; the Special Panel deducts the time spent in detention by both Accused persons BENJAMIN SARMENTO and ROMEIRO TILMAN due to an order of an East Timorese Court.

**With respect to the Accused Benjamin Sarmento;**

- 176 Benjamin Sarmento was arrested and detained since 11 September 2000 and the Court released him under substitutes restrictive measures on 27 February 2001. On 12 March 2001 the Accused have been re-arrested up to date. Therefore he was under detention for 2 (two) years 9 (nine) months and 20 days. Accordingly, previous detention shall be deducted from the sentence today imposed, together with such additional time he may serve pending the determination of any final appeal.

**With respect to the Accused Romeiro Tilman;**

177 Romeiro Tilman was arrested and detained since 25 March 2000 and the Court released him under substitutes restrictive measures on 27 February 2001. On 12 March 2001 the Accused have been re-arrested up to date. Therefore he was under detention for 3 (three) years 3 (three) months and 6 (six) days. Accordingly, previous detention shall be deducted from the sentence today imposed, together with such additional time he may serve pending the determination of any final appeal.

#### **Enforcement of sentence**

178 Pursuant to Sections 42.1 and 42.5 of UR-2000/30, the both convicted person Benjamin Sarmiento and Romeiro Tilman shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.

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

180 This decision is provided in one copy to the Defendants and their legal representative, Public Prosecutor and to the prison manager.

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

This Judgment was rendered and delivered on the 16<sup>th</sup> July 2003 in the District Court of Dili by

Judge Maria Natércia Gusmão Pereira, Presiding

Judge Sylver Ntukamazina

Judge Siegfried Blunk

(Done in English)

DEMOCRATIC REPUBLIC OF EAST TIMOR

DISTRICT COURT OF DILI

SPECIAL PANELS FOR SERIOUS CRIMES

CASE: 18 /2001 (Benjamin Sarmiento & Romeiro Tilman)

CORRIGENDA

The word "or" should read "and" (as this is a writing mistake) in the following decisions:

1. Conviction

of Benjamin Sarmiento in lit. e)

of Romeiro Tilman in lit. b)

2. Disposition

regarding Benjamin Sarmiento in lit. i)

regarding Romeiro Tilman in lit. c).

Maria Natércia Gusmão Pereira

Sylver Ntukamazina

Siegfried Blunk,

Judges of the Special Panel for Serious Crimes