



DEMOCRATIC REPUBLIC OF TIMOR-LESTE
RDTL
DISTRICT COURT of DILI
SERIOUS CRIMES SECTION

Unofficial Translation
05/07/2004

Case No. 23/2003
Date:

Original: Portuguese

Before:
Judge Óscar Gomes, Presiding Judge
Judge Francesco Florit
Judge António Helder Viera do Carmo

Court Clerk: João Naro

Sentence: 05/07/2004

The Public Prosecutor
V
Rusdin Maubere

SENTENCE

Prosecutor:
Mr. Per Halsbog

Defence counsel:
Ms. Ana Beatriz Sanchez

INTRODUCTION

At the Serious Crimes Section in the District Court of Dili of the Democratic Republic of Timor-Leste, the Special Panel,

Juiz Óscar Gomes, Presiding Judge and relater,
Juiz Francesco Frorit, Deputy Judge
Juiz Helder do Carmo, Deputy Judge,

Who have participated in all the sessions of the trial,

And being the representative of the Public Prosecution the Prosecutor Mr. **Per Halsbrog**, and the representative of the Defence the defence counsel Ms. **Ana Beatriz Sanchez**

Rusdin Maubere was charged and tried, with the personal information in the court records. The case followed all the usual proceedings, since the detention of the accused until the present day, and in the end of the examining trial was rendered the following,

FINAL DECISION

The Judges of the Special Panel for Serious Crimes in the District Court of Dili have agreed in the following:

The Deputy General Prosecutor for Serious Crimes has filed an indictment against Rusdin Maubere, Timorese, married, 45 years old, born in Metágua Village, Bazarete, District of Liquiça, and presently detained in Becora Prison, imputing him responsibility for the practice of two crimes against the humanity, being

1- enforced disappearance of André de Oliveira for Greda Sub-village, Village of Dato, District of Liquiça, on April 26, 1999, as part of a systematic or generalized attack against the civilian population, with knowledge of that attack, provided and punished under Sect. 5, i) together with Sect. 10, no. 1 and 14, all from UNTAET Regulation 2000/15, and

2- torture of André de Oliveira, in the office of the militias in Maumeta Sub-village, Sub-district of Bazartete, District of Liquiça, committed on the same day of April 26, 1999, as part of a systematic and generalized attack against the civilian population, with knowledge of that

attack, provided and punished under Sect. 5, f) together with Sect. 10, no 1, all from the same UNTAET Regulation 2000/15.

The indictment was submitted in this court on September 23, 2003, and together with it, the Public Prosecution attached a group of evidences to be used in the Examining Hearing, that were essentially statements given by witnesses and reports from several missions that visited Timor-Leste before and after the popular consultation, that took place on August 30, 1999, in order to verify and evaluate the situation of the country in that time, concerning to violations of the human rights.

The indictment was officially notified to the accused and his defence counsel, so, if they wanted, they could present an answer, pursuant to no. 2 and 3 of Section 26 of UNTAET Regulation 2000/30. Elapsed the 45 days allowed by law, nor the defence or the accused have presented any answer.

Jurisdiction of the Special Panel for Serious Crimes

According to the indictment, the criminal facts imputed to the accused were committed in the District of Liquiça, territory of the Republic of Timor-Leste, on April 26, 1999. Therefore, it is of the jurisdiction of the Timorese courts to judge those facts, pursuant to Sect. 8, no. 1, of UNATET Regulation 2001/25.

Considering that those same facts in the indictment are qualified as crimes against the humanity, the jurisdiction for their judgement is attributed to the District Court of Dili, taking into account Sect. 9, no.1, of the same regulation.

It happens that this specific jurisdiction of the District Court of Dili is exclusively done by its Special Section for Serious Crimes (Special Panel for Serious Crimes), according to the dispositions on Sect. 1 and 2 of the same Regulation 2000/15. In fact, the no. 3 of Sect. 1 of that Regulation gives exclusive jurisdiction to the Special Panels of that Section to try the criminal offences of a) genocide, b) war crimes, c) crimes against the humanity, d) Murder, e) Sexual offences and f) Torture.

The Special Panels for Serious Crimes are composed by two international judges and one Timorese judge, as it happens with the present panel, in accordance with Sect. 22 of the same Regulation.

Therefore, this Special Panel for Serious Crimes, has the necessary jurisdiction in terms of matter and territory to try the criminal offences in the indictment of the Public Prosecution.

Defence of the Accused

The accused did not retain a lawyer in the process. However, his defence was always guaranteed and provided by an official defence counsel in all the phases and acts of the process, in this case, Ms. Ana Beatriz Sanchez, designated by the Public Defence Office.

Background of the case:

- On May 1, 2003, the Deputy General Prosecutor requested to the Investigating Judge for Serious Crimes to issue a warrant of arrest against the accused above identified as Rustin Maubere, because there were evidences that he was involved in the commission of two crimes against the humanity (enforced disappearance and torture of André de Oliveira) occurred in April 1999.
- After evaluated the request, this one was conceded and on May 2 it was issued the requested warrant of arrest.
- This warrant was executed on May 3, 2003, date when the accused was arrested and taken to the Becora Prison.
- Two days after, on May 5, the accused was presented to the Investigating Judge, so he could be interrogated and his detention be legalized. At the end of that hearing, the Judge considered the detention legal, and decided that the accused should remain in preventive custody by an initial period of 30 days, based on the grounds that he might try to run away from justice, in case he was released.
- On request of the Public Prosecution, on June 4, the same Investigating Judge extended the preventive custody for more 30 days, setting its term for July 4, 2003.
- The preventive custody of the accused was continuous and extended monthly until October 3, 2003, always on request of the Public Prosecution, and always with the purpose of keeping the accused available to the Timorese justice. In all the situations were taken into account the advantages and disadvantages of the release of the accused, and the possibility of him to escape, in case he was released, was always considered as a real danger.
- Meanwhile, on September 22 of 2003, the Public Prosecution submitted the indictment against the accused, imputing him the responsibility for the commission of two crimes against the humanity – one of enforced disappearance and other of torture -, at the same time that requested also the extension of the preventive custody.
- On October 3, with the case given to this Special Panel in the Serious Crimes Section of the District Court of Dili, the Presiding Judge, with the functions of Investigating Judge, as the law requires, has extended the preventive custody of the accused for more 30 days, and therefore beyond the sixth month from the date of his detention. The term of this provisional remedy was set to November 2, 2003.
- On October 29, by order of the same Presiding Judge acting as Investigating Judge, that same provisional remedy was extended for more three months,

establishing also its term, that due to a lapse of time counting was established for January 2, 2004.

- Meanwhile, this order was later corrected by another order of the same Presiding Judge, dated of December 12, 2003, that corrected the lapse and correctly established the term of the preventive custody for February 2, 2004.
- On November 26, took place the preliminary hearing, pursuant to Sect. 29 of UNTAET Regulation 2000/30. In this hearing, the Court informed the accused of his rights, and has verified and assured that his rights were and have been respected, specially his right to have a defence counsel.
- On request of the Defence, this preliminary hearing was adjourned to February 17, 2004, in order to given time to the defence to list more relevant and crucial evidences. However, the Examining Hearing was right away scheduled to begin on February 23, 2004.
- On January 26, 2004, the Public Prosecution requested an extension of the preventive custody of the accused till the end of the trial, already scheduled to begin on February 23, 2004. By decision of the Presiding Judge, dated of January 29, the preventive custody of the accused was extended until the end of the trial.
- The sessions of the Examining Hearing began on February 23, with the taking of evidence, first presented by the prosecution and then by the defence.
- The hearing continued on 23, 24, 25, 26 and 27 of February, 9 and 11 of March, 1, 2 and 27 of April, ending with the closing statements on May 27, all during the year of 2004.

Examining hearing

The hearings of the trial took place in several sessions, with the taking of evidence presented by the Public Prosecution. This evidence was mainly about hearing the eyewitnesses on the events in the indictment, with special incidence in the ones that were related with the actions of the accused.

From this taking of evidence and from what is on the court records it resulted proved certain facts, together with another ones not proved, because was not presented any evidence about them, or because the taking of evidence was not sufficiently convincing.

Facts alleged in the indictment and considered as proved.

From the alleged facts in the indictment are considered as proved the following ones:

The general context at the time of the events

1. In the territory of what is presently the Republic of Timor-Leste and in the year of 1999, occurred systematic and generalized attacks against the civilian populations. These attacks took place in two consecutive periods of intensified violence. The first period followed the announcement on January 27 by the Government of Indonesia, that the people of Timor-Leste would be allowed to choose between autonomy with the Republic of Indonesia or independence. >>This period ended on 4 September 1999, the date of the announcement of the result of the popular consultation in which 78,5 per cent voted against the proposal of autonomy within Indonesia<<.

2. The second period followed the announcement of the result of the popular consultation on 4 September through 25 October 1999.

3. These generalized and systematic attacks had as target citizens of all social conditions, but especially targeting those who were supporters or believed to be supporters of the Independence of the country, and resulted in serious offences, namely deaths caused by stabbing, guns, machetes and spears.

4. These widespread and systematic attacks were part of an orchestrated campaign of violence, that included, among other things, incitement, threats to life, intimidation, assault, forced displacement, murders, rapes, torture and other forms of violence carried out by members of the pro-autonomy militias, members of the Indonesian Armed Forces, and members of the Indonesian Police Forces with the acquiescence and active participation of civilian and military authorities.

5. These generalized and systematic attacks targeted also properties, killed livestock and destroyed several houses by arsons.

6. With the support of the TNI and Civilian Administration, more than 25 groups of militias operated in Timor-Leste, with the purpose to support the autonomy option. These militias were organized together with the pro-integration forces, the PPI (*Pasukan Perjuangam Integrasi*), and acted with impunity. These militias groups acted with the knowledge of the TNI and Civilian Authorities, that together with the police forces incited the intimidation of the citizens that were supporters of the independence.

7. In 1999 existed in Timor-Leste several groups of militias, organized in a common platform of the pro-integration forces with Indonesia, to who it was allowed to act with impunity, and who have committed several atrocities.

8. These systematic and generalized attacks also caused internal enforced displacements of entire populations, some thousands, that were scared with the events. Many of those populations were also forced to go to West Timor, due to this orchestrated campaign of violence.

9. The Indonesian military forces in Timor-Leste were formed by territorial regular forces and special forces, namely the Army Strategic Command (*KOSTRAD - Komando Strategis Angkatan Darat*), and the Indonesian Military Special Forces (*KOPASSUS - Komando Passucan Khussus*), all with official unities and soldiers in Timor-Leste.

10. From February to October 1999, the Indonesian police forces, the POLRI, were present in Timor-Leste, and had a Police Mobile Brigade, also known as BRIMOP.

11. Under the terms of the 5 May 1999 Agreement, between Indonesia, Portugal and the United Nations on the Popular Consultation, the Indonesian security authorities had the responsibility to ensure peace and security and to create a safe environment devoid of violence or other forms of intimidation as well as to ensure general maintenance of law and order before, during and immediately after the popular consultation in East Timor.

12. The TNI and POLRI failed to take the necessary measures to meet their obligations and made no attempt to disarm or neutralize the militia groups.

13. The BMP militia (*Besi Merah Putih*) was created in 1998 in Liquiçá District, and was under the command and control of the civil administration and military.

14. The members of the militia BMP, during its actions, undertaken a generalized and systematic attack in that District, from January to September 1999, executing operations and attacks against civilians, unlawfully arrests and abducting civilians who were subsequently taken to and interrogated at the militias posts and military barracks.

15. These operations included also acts of intimidation, torture, murders and burning of homes of pro-independence supporters or perceived supporters of independence.

16. Due to the violence, intimidation and insecurity in the district, hundreds of civilians, in particular the male population who were supporters of the independence, fled their houses to seek refuge in other villages or in the mountains, in order to preserve their lives.

17. In this atmosphere of violence and insecurity, the members of the TNI attacked the Liquiçá Church, where hundreds of people were taking shelter due to the continued violence by BMP militia in the district. As a consequence of this attack several people who were sheltered there were killed.

Specific facts of the case in trial

18. In this context, André de Oliveira was one of the persons who fled to the mountains, around April 6, 1999, in order to preserve his life and physical integrity.

19. André de Oliveira was Timorese, driver of a "Microlet", and a member of the pro-independence movement of Timor-Leste.

20. However, due to unknown reasons, he returned from the mountains on April 26, and went to his mother's house, looking for shelter there. By the time, he was together with a friend of Indonesian nationality, whose name is Gab.

21. Fearing his safety at his mother's house, and together with his friend, moved from that house on that same night around 10pm, into the nearby house of Manuel dos Santos, his brother-in-law, married with his sister Ermelinda Tilman.

22. The militias organization got to know about the return of André de Oliveira, and on that same night, under the command of the commander Tomé Diogo, were taken measures in order to capture him.

23. With that purpose and under the orders of the commanders, the members of the militias of Lauhata, among them the accused Rustin Maubere, had a meeting at the militias post in Maumeta, leader by Tomé Diogo.

24. From the post of Maumeta the militias, always under the command of Tomé Diogo, and around 9pm, went in two pick-ups, in convoy, in the direction of the house of André Oliveira's mother, with the purpose to capture him.

25. When they arrived, they came out of the pick-ups and surrounded the house, so no one could get out of the house.

26. After, Tomé Diogo and some other militia's members, being one of them the accused Rustin Maubere, knocked the door of the house of André Oliveira's mother, asking for him, because they thought he was there.

27. From inside the house someone told them that André de Oliveira was not there. It was then, that they went to the nearby house of Manuel dos Santos, which they also surrounded, so no one could escape.

28. Some of the militias had covered their faces with black clothes so they could not be easily recognized.

29. So again, Tomé Diogo, together with some militias, being one of them the accused Rustin Maubere, knocked at the door of the house and shouted to Manuel dos Santos, ordering him to open it.

30. Tomé Diogo was armed with a pistol and the accused Rusdin Maubere took with him a rifle G3.

31. Manuel dos Santos open the door, and immediately the accused Rusdin Maubere enter the house and there found André Oliveira, that meanwhile had get out of the bed where he was sleeping, together with his friend.

32. Still inside the house of the accused Rusdin Maubere he took André Oliveira and dragged him outside, together with Tomé Diogo and other militias. André de Oliveira didn't resist and surrendered with no violence.

33. Some militias members removed his shirt and the militia member Luis Cirilo Sousa de Jesus tied his hands behind his back. At that same time, a TNI soldier, Cipriano, blindfolded his eyes.

34. After that time, the relatives, friends and people that knew him, never saw him again.

35. With his arms tied and blindfolded, the militias members, among who was the accused Rusdin Maubere under the command of Tomé Diogo, took André in one of the pick-ups, and in a convoy took him to the post of militias in Maumeta.

36. When they arrived there, the militia members took André de Oliveira out of the pick-up, and started to beat him violently, until he fell on the ground and got unconscious. Once on the ground, some of the militias members jumped on his body, and continue to beat on him.

37. Once unconscious the same militias members transported the body of the victim André de Oliveira inside the post, and there continue to beat him with violence, and for a long period of time, causing him injuries on his body, that were so serious that he died in consequence of that.

38. Around midnight, a group of militias transported the body of André de Oliveira, already death, in a pick-up, to the village of Aipelo where, close from a big tree that exists there, buried the body in a shallow grave.

39. When all the militias abandoned the post, some of them, among who was Isak Martins, went close from that tree and close by found a grave and a death body, that they said was André de Oliveira.

40. For unknown reasons, that body was not found on that local when the exhumation was carried out.

41. The capture of André de Oliveira followed by the aggressions that were inflicted to him till he died, are part of a systematic and generalized attack that by the time the militias organizations were executing against the civilian populations that supported the independence of Timor-Leste, and that the accused Rusdin Maubere knew about it, as well as the other authors of those crimes.

From the alleged facts in the indictment these are the ones that are proved. In that same indictment were also alleged other facts, that however were not proved. These are the following:

Alleged facts in the indictment but not proved

The following facts are not proved:

1. That the accused used to personally intimidate and threaten the people in the District of Liquiçá.
2. That the accused and Tomé Diogo dragged André Oliveira outside the house of Manuel dos Santos.
3. That André de Oliveira was beaten and kicked soon after being arrested and before enter in the pick-up.

4. That the accused Rusdin Maubere order the other militias to beat in the victim André de Oliveira, saying *pucul, pucul* (that means *beat* in Indonesian).
5. That other members of the militias also shouted *pucul*.
6. That the militias only stopped to beat in the victim when Tomé Diogo told them to stop.
7. That the accused Rusdin Maubere was part of the group of militias that transported the death body of the victim André de Oliveira from the militias post in Maumeta to the Village of Aipelo, and buried him there.
8. That Tomé Diogo pointed his gun towards the militia members, threatened to kill them if they disclosed were the dead body of André de Oliveira was buried.

Legal basis of the matter of fact

General context

About the general context were the facts happened in the year of 1999, the Panel based its opinion on the documents that are part of the court records, as it has happened with other decisions rendered in this Court on cases before this one.

And in fact, has it is known worldwide, the public order and the security of the people in general in Timor-Leste experienced a particular difficult and tumultuous period, that started on January 1999 and ended on October 25 of that same year, with the intervention of the international forces of the INTERFET, which goal was to end with this difficult situation in the territory in terms of human rights.

At that time were hold several inquires in the territory of Timor-Leste, all done by institutions known by its credibility, that after produced reports that describe with fidelity the situation of the time. Some of those reports are part of the court records, and are the followings:

- Report of the International Commission of Inquiry on Timor-Leste, that describes in detail the situation at the time in all the territory, and namely, among others, in the District of Liquiçá.
- Report on the situation of the Human Rights in Timor-Leste, made by the Joint Commission, formed by the Special Representatives of the Human Rights Commission for (i) the summary and arbitrary executions, (ii) for torture, and (iii) for violence against women.
- Report of the Indonesian Commission on Human Rights Violations.
- Report of the Representative of the Secretary General of the United Nations, Mr. Francis M. Deng, to the Human Rights Commission.
- Report of the Security Council Mission to Jakarta and Dili.

These documents prove not only the atmosphere of violence and insecurity lived in the territory of Timor-Leste at that time, as well as the occurrence of the following facts:

- The public announcement that the people of Timor-Leste would be called to vote in a public consultation, to choose to remain as an integrant part of Indonesia in a regime of autonomy or to be an independent country.
- As a result of that announcement were created several groups of citizens politically organized and that designated themselves or adopted the designation of "militias"
- Those "militias" had as first and main political goal to support and defend the option of the Integration of Timor-Leste in the Republic of Indonesia, in an autonomy regime.
- Those "militias" had the means that allowed them to commit acts of violence on the civilian population, and especially on the political organizations and citizens that supported the option of the independence or were perceived as such.
- The actions of the "militias" organizations was deliberated and clearly tolerated by the civil and military authorities or militarised, and who had the competency to control the territory and uphold the law and public order and assure the security of the populations.
- The civilian populations were frequently victims of violence and of violations to their security and integrity, due to unreasonable acts of the "militias" that acted with impunity.
- That most of the times, were the sectors of the civilian population, supporters of the independence option, that most suffer with the acts of violence, that become common in all the territory.

Specific facts to be tried

About the specific facts of the case to be tried, the Panel formed its opinion essentially in the testimonies of the witnesses, that in a general way were sufficiently convincing, and their versions about the facts matched, in particular about the essential and most important points.

Those statements were registered in tape and were transcribed in the court records, where can easily be consulted as matter of evidence of the facts proved.

Before giving evidence, all the witnesses were alerted to the importance of their statement, and all understood the loyalty oath to the truth that they did, and that the Court was only interested in the truth and only the truth. And by the way that those statements were given it is to believe that none of the witnesses tried not to say the truth to the Court.

It is also right, that from the statements it was possible to verify some contradictions between the several versions of the facts, specially about certain details, like for instance, about the colour of the clothes of the victim or of the accused, the distances, the number of people present or the number of participants in certain scene, the time that the facts took place, how long was the hair of the victim or of the accused,

the colour of the vehicles, the number of people that entered in the house where the victim was arrested, etc, etc..

But in fact, these are all minor issues that, if we take into account the time already elapsed since the time the facts took place in April 1999 until today, more than five years, we should not be surprised about the fact that the witnesses can not remember precisely such details, because even a person with a certain level of education does not retain in his/her memory secondary details for a long period of time. Especially when talking about the witnesses that were heard.

In fact, we need to take into account that those witnesses are people of a low social status, extremely modest, illiterate and without studies, and therefore very limited in terms of reasoning capacities and memory. It is therefore very natural that after so much time they confound some details of certain scenes.

This explains those small contradictions, that we prefer to call errors of precision, that in any case do not eliminate the veracity and credibility to the statement.

However, we should highlight that the essence of the facts that the Court wants to investigate, related to the concrete action of the accused Rusdin Maubere and his responsibility, the statements of all the witnesses heard were in general uniformly coincident, both to charge him or to excuse him. And therefore their credibility is reinforced.

From these statements we should highlight as the most relevant and important, the ones that were provided by the witnesses that were present in the events and saw the participation of the accused. These are the one of Manuel dos Santos, owner of the house where the victim was arrested, in his presence, Ermelinda Tilman, his wife and sister of the victim who also saw him being arrested, and also Alcino dos Santos, and others.

About the beatings and fate that André de Oliveira was victim, we have the statements of Isak Martins, Miguel dos Santos, Zacarias da Silva, all very convincing.

The defence argued that most of the witnesses were also involved in the case, and now that they see the accused Rustin Maubere arrested and in danger, all of them are blaming him saying that he was responsible for everything, not saying the truth, with the only purpose of hide their own responsibilities.

In fact, the Court recognizes that, when the facts happened, some of the witnesses enlisted and heard, were also part of the militias organization, being even true that some also participated in the events, and therefore maybe it would be fair to impute them some criminal responsibility in the events, as it is happening with the accused.

However, we have also to recognize that this does not necessarily imply that those witnesses are not telling the truth about the facts on which they are testifying as being committed by the accused, and are from their responsibility. Even because, those same witnesses on their statements did not hide the fact that they also participated in the events, and sometimes in a way not very adequate. The reason why they are not also charged belongs to the past, and it is not important now to investigate.

The law. The applicable law.

The Sect. 5, no. 1 of UNTAET Regulation 2000/15, mentions several crimes that qualifies as “**crime against the humanity**”, when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack.

This means that when some of these criminal behaviours is part or occurs under a generalized or systematic attack against the civilian population, and the author or authors have committed or know about that attack, the crime committed obtains seriousness and is qualified as crime against the humanity, and because of that it is punished more severely, pursuant to Sect. 10, no.1 of the same Regulation.

And these crimes are:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present Regulation or other grounds that are universally recognized as impermissible under international law, in connection with any fact referred to in this paragraph or any crime within the jurisdiction of the panels;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

It exists a generalized or systematic attack if:

- a) it exists an attack,
- b) that attack is targeting the civilian population,
- c) that attack is generalized or systematic,
- d) that the crime was committed on that context,
- e) that the crime is considered as part of that attack, and
- f) that the author or authors of the crime know about that attack.

On the other hand, the Sect. 14, no. 3 of the same regulation stated that a person shall be criminally responsible when commits a crime whether as an individual, jointly with another or thought another person. These are the cases of material authorship.

It is in this juridical-criminal frame that the behaviour of the accused Rusdin Maubere must be considered.

Juridical-criminal qualification of the facts proved

In the indictment, and with the facts imputed to the accused Rusdin Maubere, the Public Prosecution qualifies his behaviour as two crimes against the humanity, being the first the enforced disappearance provided on parag. i) of no. 1, Sect. 5 of UNTAET Regulation, and the second torture, provided on parag. f) of the same section, both punished according to Sections 10 e 14, no. 3 of the same regulation. And he is charged according to this.

We shall now analyse, taking into account the facts proved in the Examining Hearing, and that are described above, if the behaviour of the accused meets this criminal offences.

Crime of enforced disappearance

We will start by the crime of enforced disappearance:

To state that we are before a crime of enforced disappearance of a person, the following constitutive elements must be verified:

- a) the illegal detention or abduction of that person;
- b) that the illegal arrest, detention or abduction of that person was carried out by a State or a political organization, or other, but with their authorization, support or acquiescence;
- c) that that State or political organization or whoever carried out the arrest, detention or abduction with their authorization, support or acquiescence refuses to acknowledge that arrest, detention or abduction;
- d) that this State or political organization or whoever carried out the arrest, detention or abduction with their authorization, support or acquiescence refuses give information on the fate or whereabouts of that person;
- e) that this refusal has as intention to remove him from the protection of the law for a prolonged period of time.

So, it has to be verified an arrest, detention or abduction of that person, carried out, or directly by a State or political organization, or other, but with the authorization, support acquiescence of that State or political organization, followed by a refusal of the authors of that arrest, detention or abduction to give information on the fate or whereabouts of that person, with the intention of removing him from the protection of the law for a prolonged period of time.

In the crime of enforced disappearance it is believed that the person illegally arrested, detained or abducted is, and continues alive, and not knowing about him because whoever arrested, detained or abducted him, refuses to give information on his fate or whereabouts, with the intention of removing him from the protection of his most basic rights, like, for instance, claim for his freedom before the Court or the assistance of a lawyer.

In this criminal type of crime, the person victim of the crime is considered as disappeared and unreachable, against his willing, because was arrested, detained or abducted for someone who keeps him in that situation, hides him and prevents him to contact the authorities or someone he trusts, and also refuses to give information on his whereabouts, with the intention to prevent him to have access to his basic and fundamental rights, according to the protection that the law gives to any citizen.

In the present case, André de Oliveira was in fact arrested by a political organization, the BMP militias, but did not disappeared nor was hidden by anyone while alive. What happened to him was that, after being arrested, was severely beaten until he died, by the same group of militias members that arrested him. After being beaten till he died, in result of the hits, his body, already dead, was taken to the Village of Aipelo and buried there in a shallow grave. When the exhumation was carried out that body was not found in the place where was buried, for reasons not yet clarified.

It is easy to conclude that what disappeared was the corpse of André de Oliveira, and not him while alive. When alive, André de Oliveira did not *disappeared enforced* and against his will, nor anyone made him disappeared, in the sense that was *removed from circulating* and taken to an unknown place.

The militias members did not arrest him to keep him detained and in a hidden place, making not possible for him, in that situation, to look for the authorities or someone he would trust, namely the courts or relatives, to claim his rights. The militias arrested him with the purpose of inflict him severe and violent corporal punishments, ill-treat him and beat him till death, as in fact they did and happened.

These injuries could not be evaluated, because when the authorities wanted to do the exhumation of the body of the victim to examine him and do the necessary forensic exams, did not find him in the grave where he should be, for unknown reasons. But we have no doubts that those injuries were very serious, otherwise they wouldn't have caused the death of André de Oliveira, as in fact they did.

Therefore, we have to conclude that the facts proved do not meet what is provided under Sect. 5, no. 2 parag. h) of UNTAET Regulation 2000/15, as it is defined there the crime of enforced disappearance. What happened was something different from what is provided in that legal disposition.

What happens is that, from the taking of evidence, it is proved all the constitutive elements of a crime of murder consummated, carried out by a group of militias, being the accused part of it, where the means used to reach the result, the death of André de Oliveira, were the violent physical aggressions of several order to the body of the victim, done in a indiscriminate way by the aggressors.

The event took place in the context of a generalized and systematic attack that by the time was being carried out against the civilian population in the District of Liquiçá, and not only, and the aggressors, namely the accused Rusdin Maubere, knew about that attack.

All those facts constitute a crime of murder consummated, and because all of them are in the indictment of the Public Prosecution, nothing says that within that context

we can not do a new juridical-criminal qualification of those same facts, for this legal type of crime, changing the crime of enforced disappearance to the crime of murder, both qualified as crimes against the humanity under Sect. 5, no,1 paragraphs a) and f) of the relevant UNTAET Regulation.

About the accused Rusdin Maubere, the facts that were proved show that he participated actively in the practice of that crime, which facts above described are provided in Sect. 5, no. 1 parag. a) together with the Sect. 14, no. 3 parag. a) and punished according to Sect. 10, no. 1, all from the same Regulation.

Crime of torture

We shall analyse now if the accused committed the crime of torture, as the Public Prosecution states in the indictment.

According to parag. d) of Sect. 5, no. 2, to the end of Sect. 5, no. 1 parag. f) of UNTAET Regulation 2000/15, that qualifies the crime of torture as a crime against the humanity, "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..." as long as not resulting from lawful sanctions, inherent in or incidental. The juridical-criminal value is essential to the health of the person, his psychological and physical state, his "well being" in the context of a situation deprived from freedom.

In the present case it is proved that the group of militias, after arrest André de Oliveira, took him to the militias post in Maumeta, and there, all the group started to ill-treat him, outside and then inside the post, and for a long period of time, in a way and circumstances and he would end dying, in result of the injuries, and in fact it happened, such was the violence and the quantity of the hits and beatings.

In this case, what the militias members really wanted was the death of their prisoner, André de Oliveira, not even caring if for that they would cause him a great suffering with the hits and beatings, as naturally they caused him. The victim died on that same night soon after the beatings, and his death was the direct and immediate result of those injuries, that in return were caused by several physical aggressions that he suffered.

Therefore, as we said already above, with this behaviour the aggressors committed the crime of murder consummated, violating the disposition on parag. a) of no. 1 of Sect. 5. However, in the commission of that crime those same aggressors also violated the disposition on parag. f) of the same no. 1 in Sect. 5, because for the achievement of that crime of murder, also inflicted great suffering and pain to the victim, with the hits and incisions on him, in the circumstances described above.

And the problem that we have now is to decide if in cases like the present that behaviour, like beating and ill-treat a person deprived from his freedom, making him suffering great physical pain caused by violent physical aggressions of several order, but inflicted with the ultimate purpose of causing his death, must be considered has an autonomous crime, and therefore be punished.

As we mentioned above, the behaviour of the aggressors, among them the accused Rusdin Maubere, constitutes a crime of murder consummated, provided on parag. a), no. 1 of Sect. 5, in which the juridical-criminal value protected is the life of a human. But it happens that with his behaviour and in the commission of that crime, the offenders also violated the legal disposition on parag. f) of the same number and Section, where the juridical-criminal values protected are the health and the physical and/or psychological state of the person, his “well being” in a context of deprivation of freedom.

We are before a case of concurrence of offences, where the offenders, with their behaviour, accomplished two types of crimes, one of murder and other of torture. The problem we have now is to know which type of concurrence we are analysing, so we can evaluate if that same behaviour should be punished separately for each one of violations.

As we have seen, in the crime of homicide, the protected juridical-penal value is human life, while in the crime of torture that protected value is the well being and the person's physical and mental state, their “well-being” in a context of the deprivation of their liberty. We also understand that within these two protected juridical-penal values, there exists a relationship of more and less, in order that the values protected by the crime of torture, this being the health and the well-being of the person, is consumed by the protection that is provided in the crime of homicide, their own life. Let us say that the norm that punishes homicide, in a wider sense, consumes the protection that is sought after in the crime of torture. This is the most restrictive one.

We are before a case of competition of infractions that should not have room for an application of the consumed norm, which in the case in judgement, is one of punishment and torture. In this matter, this is what the doctrine qualifies as *legal* or *apparent* competition of infractions.

That is why the Panel will not take into account the accusation for the crime of torture that the Public Prosecutor has made against the accused, Rusdim Maubere.

Final conclusions

Based on the previously shown, this Special Panel for Serious Crimes considers that:

1. The commitment of a crime of a forced disappearance was not proven.
2. In this case, which is now in judgement, the crime of torture is not punishable autonomously.
3. It has been proven that the accused, Rusdin Maubere committed, in co-responsibility with other militia members, a crime of voluntary homicide accomplished in the person of André de Oliveira, practiced within the frame of a general and systematic attack against the civil population, with the accused having full knowledge of this attack.
4. All the constituent facts relating to the commitment of this crime of homicide also consists in the Indictment submitted by the Prosecution.

Consequently, we decide furthermore:

- A) To acquit the accused, Rusdin Maubere, of the crime of a forced disappearance, that is being accused by the Prosecution.
- B) To acquit the same accused of the crime of torture that is also being accused by the Prosecution.
- C) To re-qualify all the material facts consisting in the Indictment submitted by the Prosecution and in relation to the alleged crime of forced disappearance, to consider this as an integral part of an accomplished crime of voluntary homicide.
- D) To consider as proven, that the accused committed, in material co-responsibility with other militia members, a crime against humanity, foreseen in Art. 5 n°. 1 paragraph a) of UNTAET Regulation 2000/30, and punishable in the terms of Article 10 n°. 1 and Article 14 n°. 3, of the same Regulation.

Determination of the sentence

In the determination of the concrete measure of the sentence, the Court should bear in mind all the circumstances that surrounded the criminal act, the accused's degree of blame and all the added mitigations and aggravations in the case that are for and against him, in the sense of whether this worsens or mitigates the blame and the responsibility.

In favour of the accused in the case in analyses are:

- a) His low socio-economical condition,
- b) The fact that he is the father of a family that needs him to provide for them.
- c) The evolving ambient during the time of the events, which was extremely violent and favourable to the commitment of all types of cruelties, insolences and abuses with major impunity, intensely allowed by the very civil and military authorities during the time,
- d) That during the time he was simply a soldier of the Indonesian Army.

To worsen his blame and responsibility, we have to consider the brutal and inhuman and extremely violent form in which the victim, André de Oliveira, was beaten to death, and later buried in whichever manner in a shallow grave, with such a misfortune, that even today it is not yet known where the corpse is.

And in this conformity, balancing the mitigations and the aggravations that compete in the case in judgement, and pondering the accused's degree of blame within all the circumstances that surrounded the facts, the Judges of Special Panel for Serious Crimes agree in condemning the accused, Rusdin Maubere, already properly identified above, to a sentence of 3 (three) years of imprisonment.

Liquidation of the sentence

In conformity with the provisions of n° 3 of Article 10 of UNTAET Regulation 2000/15 and n°. 5 of Article 42 of UNTAET Regulation 2000/30, in relation to the liquidation of the sentence to be complied by the accused, the complete amount of time that he has spent in pre-trial detention will be discounted.

The accused was arrested on May 3, 2003, and ever since then he was detained uninterruptedly in the prison establishment in pre-trial detention, that should now be counted as time of complied sentence, therefore his sentence will terminate on May 2, 2006, and he must be set free on the following day.

He will complete two thirds of the sentence on May 2, 2005, in which he can be granted conditional release, if he deserves it, in accordance with the terms prescribed in the law.

Take the accused to the Prison in order for him to comply with the remaining sentence that needs to be completed.

Via copies of this decision, please notify the Public Prosecution, the Accused, his Defence Council and the Becora Prison, and comply with the law.

City of Dili, on the 5th of July 2004

Judge Óscar Gomes (President and Writer)

Judge Francesco Frorit (Deputy)

Judge António Helder of Carmo (Deputy)