



Summary in English of the Decision of the Ad Hoc Human Rights Court in the Suai Case

JAKARTA 15 August 2002

THE ACCUSED:

HERMAN SEDYONO
LILIEK KOESHADIANTO
GATOT SUBIYAKTO
ACHMAD SYAMSUDIN
SUGITO

SUMMARY OF EVIDENCE

The Court summarized the physical evidence it received, which consisted of 14 items of clothing.

The Court summarized the documentary evidence it received, which consisted of a report dated 30 November 1999 on the excavation of a mass grave of unknown persons that revealed 26 bodies, and which included an autopsy report on the bodies. (This has been returned to the Attorney General of Indonesia for use in other cases).

The Court summarized the evidence received from the witnesses for the prosecution who were as follows:

1. Sonik Iskandar - a TNI soldier from Kodim (District Military Command) 1635 Suai who worked as a driver for the fourth accused.
2. I Wayas Suka Antara who worked at Kodim 1635 Suai.
3. Sulistiono who worked as a truck driver at Kodim 1635 Suai.
4. Jehezkiel Berek who worked in Covalima Suai as a Wakapolres (Deputy police chief of Covalima District Police) when the third accused was the chief.
5. Jacobus Tanamal who worked at the Suai police headquarters.
6. Yopi Lekatompessy who worked as the head of the city of Suai police (Kapolsek city of Suai).
7. Sudharminto who worked at the border under the operation control of the Wemasa Border police who were under the command of the Belu district police.

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8. Julius Basa Bae who worked as the head of the Metamau police post (Kapospol Metamau) in the Wemasa Belu police sector, NTT.
9. Phelipus Kanakadja who worked as the head of the Wemasa Belu police sector NTT (kapolsek Wemasa Belu NTT).
10. Pranoto who was the head of the school SLTP Negeri 1 Suai.
11. Sony Sanjaya who worked under the operational control of the Suai District Police on security for the popular consultation under the command of the third accused.
12. **Dominggas Dos Santos Mauzinho** who was a Suai resident inside the Church at the time of the attack.
13. Muhammad Fadholi Agus Haryanto who worked in the Fohorem sub district in Covalima as a PTT doctor.
14. Ludo Ficus Ulu who was a member of Kodim 1635 Suai and was in command of a Milsas unit.
15. Sumantri who worked as an officer in the logistics and administration sector of the Kodim 1635 Suai.
16. Julio Gusmao, a resident of Suai who was in the Church at the time of the attack.

The Court summarized the evidence of the witnesses for the defence who were as follows:

1. Dr Dodi Haryadi who is an expert in the field of psychology of the masses.
2. Imam Jauhari, a member of the Indonesian Police who worked as a liaison officer for Police Headquarters with UNAMET and who, in that capacity, was responsible for the Covalima district.
3. Syamsudin who worked for the Suai district police.
4. Nursalim who worked in the Covalima district as a private secretary to the first accused.
5. Wenses Laus Nahak who worked as the PLH first assistant to the Sekwilda in the Covalima district.
6. Adam Rachmand Damiri who was the military commander of the Udayana Military District, which included East Timor (Pangdam IX Udayana).
7. Timbul Silaen who was the East Timorese police chief.
8. M Noer Muis who was the East Timorese Military Commander (Danrem 164 Wiradharma Timur-Timur).
9. Budi Sampurna SH, SpH who worked on the excavation of a mass grave in the Belu district of NTT.

The Court noted that the prosecutor had asked to read the statements of those witnesses who had been called to give evidence several times but who had not attended – in the case of Trimo Sungkowo because he had suffered a stroke and in the case of Tobios Dos Santos, Fres Da Costa and Armendo De Deus Grandadeiro because, according to a letter from the East Timorese Attorney General, of security issues. In response to that request the Court had told the Prosecutor to read the witnesses statements as they appeared in full in the prosecutor's dossier (BAP), which is regarded as forming part of the contents of this decision. The five accused objected to the testimony of those witnesses to the extent it was asserted in that testimony that the five accused had committed any criminal acts. The five accused

said that the witness statements were full of lies and requested that those statements not be regarded as evidence.

The Court then summarized the evidence given by the five accused.

FINDINGS OF FACT

Based on the evidence presented, the Court made the following findings of fact:

1. The first accused, Kol. Drs Herman Sedyono was the Bupati (district administrator) of Covalima from September 1994 until this alleged gross violation of human rights case occurred on 6 September 1999. Based on Law 5 of 1974, the first accused's responsibilities in that role included responsibility for governance and district development in the district of Covalima, which meant leading government, coordinating development and being the head of civil life in every area including, amongst other things, by establishing peace and order in the area.
2. The second accused, LetKol. Czi Liliek Koeshadianto was the (PLH) military commander (Dandim) of Kodim 1635 Suai from 29 August 1999 until the incident occurred.
3. The Governor of East Timor announced in May 1999 that a decision had been made to give the East Timorese community the option of choosing independence or integration.
4. As part of putting into effect this independence/integration option, a tri-partite agreement was concluded in New York on 5 May 1999 between Indonesia, Portugal and the United Nations. In the agreement plans were set out for the timetable and implementation of the popular consultation, which would allow the East Timorese community to choose between independence or integration.
5. In accordance with section 3 of the Tripartite Agreement, it was stated that in the implementation of the popular consultation, command over security would rest with the Indonesian Police who would have responsibility for guarding peace and security so that the implementation of the popular consultation could run smoothly, fairly and peacefully in an atmosphere of freedom, without threats or interference from any party without exception.
6. The third accused was the head of the district police (Kapolres) at the time the popular consultation was conducted until the clash at the Ave Maria Church occurred, the first accused was the Bupati, the fourth accused, Mayor Achmad Syamsudin, was the Kodim chef of staff and the fifth accused Sugito was the commander of the Suai military sector command (Komandan Koramil).
7. In the Covalima district it was known that there was a security system made up of Pam Swarkasa and Kamra (sorts of civil guards), which appeared on the initiative of the local community in the context of providing security in the each area and whose tasks included, amongst other things, providing assistance in the area of security and order.
8. In the Covalima district the Laksaur and Mahidi groups, who were part of the pro-integration camp, emerged.
9. Before the popular consultation was conducted, in Covalima there were often clashes between pro-independence and pro-integrationist groups. All of these

- problems were resolved by the government or other relevant authorities peacefully and with actions that accorded with the applicable law.
10. On the 29th, (sic) the popular consultation was held whereby the East Timorese community could choose independence or integration with Indonesia.
 11. The pro-integration community protested to UNAMET about the implementation of the popular consultation, which involved dishonesty both with regard to UNAMET staff who supervised the vote and with regard to the counting of the vote, which was only witnessed by people from the pro-independence community. However these protests were never taken up by UNAMET.
 12. When the pro-integration camp held a demonstration asking UNAMET to take up the matter, the situation became rowdy and was secured by Indonesian police in their capacity as the group responsible for guarding security until the announcement of the results of the popular consultation.
 13. The announcement of the result of the popular consultation was scheduled for 7 September 1999 but, for reasons that were unclear, at the initiative of UNAMET the date was suddenly brought forward to 4 September.
 14. According to the results announced, the popular consultation was won by the pro-independence camp.
 15. There were many refugees from the pro-independence camp in the Suai Covalima Church complex from the time of the popular consultation to the announcement of the vote and after the announcement.
 16. The moment after the announcement of the result, the community inside the church shouted joyfully such that they were asked by the priest to control themselves and remain quiet.
 17. On 5 September 1999 there was a change in operational control from the Indonesian police to the Indonesian Army – with the result that command control over security in Suai shifted to the TNI. However, the police continued to carry out security work such that security in the area of Suai became a cooperative effort.
 18. A peace pact occurred at the official house of the first accused on 3 September 1999 that aimed to bring peace between the pro-independence and pro-integration camps who had been engaged in non-stop conflict for some time.
 19. After the result of the popular consultation was announced, the flow of refugees from Suai towards NTT increased and the refugees numbered in the thousands.
 20. When the pro-integration camp carried out a return protest because they were disappointed at their loss and wanted to ask UNAMET to respond to the fraud in the popular consultation, UNAMET ran to avoid them and asked for protection from the Police and TNI in Suai. With the help of the TNI and the Police all the members of UNAMET were safely evacuated to Dili.
 21. After the result of the popular consultation was announced, the problem that emerged for the Muspida (District Council – made up of the head of the military, police and civil administration) and their subordinates was the shortage of personnel who were still working, the unavailability of transportation and the exhaustion of food and drink supplies necessary to overcome the problem of the refugee flow from Suai to NTT in Indonesia.
 22. The refugee problem and the logistics involved were discussed by the Suai Muspida – that is the first, second and third accused, on 6 September 1999 at

around 11.00 WITA. At that time, at the official house of the first accused there were many refugees who were asking for protection and waiting to ask for refugee transport vehicles.

23. While the first, second and third accused were in discussions at the official house of the Bupati, a man (described in the judgment as an "oknum") suddenly appeared opposite the house. He appeared to be standing with his friends. When the first accused approached him to ask what he needed, Olivio Moruk replied that he was just having a look around. He then left the house with his friends.
24. At 13.00 a shot from a homemade (rakitan) gun was heard at the Ave Maria Church complex.
25. The Suai Ave Maria Church has a perimeter fence and a door which can be locked located next to the Debos market. Inside the church there were several old buildings, a convent, buildings which had just been constructed and the residence of Pastor Hilario.
26. Inside the Ave Maria Church complex a disturbance occurred between the crowd outside the church complex and the refugee community inside. The group who had been outside entered carrying rakitan weapons and sharp weapons in the form of machetes. Following that, shots and screams were heard inside and outside the church and there was a great commotion as the community ran screaming and confused in every direction.
27. The witness, Sonik Iskander, together with the fourth accused, was at the church complex trying to block the crowd from entering into the church and on the order of the fourth accused, Sonik Iskander shot into the air and ordered the confused and chaotic crowd to disperse. Then several members of the Police and a Brimob unit and the TNI joined together to make a fence by crossing their weapons and batons to drive back the group who wanted to enter and to provide a path for those who wanted to get out in order to avoid a disturbance inside the church.
28. The first, second and third accused were outside the church complex and it was suggested that they not enter inside because the gunfire was unpredictable and the people were in chaos.
29. The first, second, third, fourth and fifth accused never entered the church complex and never carried out an attack on that church complex.
30. From where they stopped outside the church complex, the first accused coordinated with the second and third accused to immediately stop the disturbance and then the third accused gave an order to Jehezkiel Berek (Kaposkodolops) to stop the disturbance and immediately undertake an investigation. The second accused gave an order to the fourth accused to immediately stop the disturbance and to evacuate the victims in the church complex.
31. At approximately 16.00 WITA the shooting had begun to subside. The first, second and third accused left the church complex and then several people who had suffered injuries but were still alive were taken to the military headquarters and police headquarters for treatment and protection for a week.
32. Several bullet shells were found in the upper section of the church and several rakitan guns and spears were scattered around together with blood that was already dry.

33. Twenty seven corpses were found, consisting of adult male corpses, adult female corpses and male children's corpses, which were all buried at the Beach in the village of Metamauk in Wemasa, Belu, NTT.
34. A team from the National Commission for Human Rights, the Head Prosecutor's office and the NTT government and medical forensic team exhumed the bodies from a grave on the beach of Metamauk village, Wemasa, Belu, NTT.
35. Twenty six corpses were found and exhumed and there was also an inspection, an inspection of the corpses and an official autopsy report.
36. The corpses were exhumed and brought to Dili and handed over to the East Timorese.
37. Further facts will be discussed in the context of whether the prosecutor's charges have been proven.

THE CHARGES

The Court outlined that the primary charge against all the accused was brought under article 7(b) relying on Art 9(a), Art 37, Art 42(1)(a) and (b) of Law No. 26 of 2000, Art 55(1)-(2) of the Indonesian Criminal Code.

The subsidiary charge against all the accused was brought under Article 41 relying on Art 7(b), Art 9(a), and Art 37 of law No. 26 of 2000.

Further subsidiary charges were brought against each of the accused as follows:

The first accused Kol. Inf. Drs. Herman Sedyono: Article 7(b) relying on Art 9(a), Art 37, Art 42(2)(a) and (b) of Law No. 26 of 2000.

The second accused Kol. Czi. Liliek Koehadianto: article 7(b) relying on Art 9(a), Art 37, Art 42(1)(a) and (b) of Law No. 26 of 2000,.

The third accused Drs. Gatot Subyaktoro: article 7(b) relying on Art 9(a), Art 37, Art 42(1)(a) and (b) of Law No. 26 of 2000.

The fourth accused Mayor Inf, Syamsuddin: article 7(b) relying on Art 9(a), Art 37, Art 42(1)(a) and (b) of Law No. 26 of 2000.

The fifth accused : article 7(b) relying on Art 9(a), Art 37, Art 42(1)(a) of Law No. 26 of 2000.

ELEMENTS OF THE CRIME

The Court explained that the primary charge brought by the prosecution rested on one article that was then qualified and defined by other articles.

According to the Court, the way the relevant articles are arranged it is necessary to answer the following questions:

- I. Did a gross violation of human rights occur?
- II. Who was the perpetrator of that gross human rights violation?
- III. Can the five accused be held accountable for that gross human rights violation?

I. Did a gross violation of human rights occur?

The Court noted that Art7(b) of Law 26/2000 states that a gross violation of human rights includes a crime against humanity. However that article does not explain what is meant by a crime against humanity. To know the formula and meaning of such a crime, one must look to another section and see if the elements of that other section are satisfied or not.

The Court noted that article 9 of Law 26/2000 states that a crime against humanity as referred to in Art 7(b) is an act performed as part of a widespread or systematic attack which is known by the perpetrator to be aimed directly at the civilian population and which takes the form of (a) murder (b) .. and so on.

According to the Court s 9(a) contains the following elements:

- a. An act that is performed as part of a widespread or systematic attack;
- b. That attack is known by the perpetrator to be aimed directly at the civilian population;
- c. The act that is performed takes the form of a murder as defined in Art 340 of the Indonesian Penal Code.

a) was the act performed as part of a widespread or systematic attack?

The Court noted that Law 26/2000 and its accompanying explanation do not give any clear limits or meaning to the term widespread attack. As such, in order to give some meaning and understanding to that element the Court stated that it considered the following things:

- A widespread attack means an action that has a national and international effect; an action that results in great losses both in a material and immaterial sense, an action that is horrifying, a brutal action designed to force a political end; an action that creates a sense of insecurity in individuals and the community, and an action that involves a number of groups or parties and results in a pattern of similar incidents.
- In accordance with facts from the hearing (at number 25 {sic}?) it has been indicated that the occurrence of a disturbance at the Ave Maria Church was triggered by disappointment over the result of the popular consultation announced on 4 September 1999. In addition to the attack, by a pro-integration group made up of Laksaur and Mahidi, on the civilians from the pro-independence camp who were inside the church, there were also shootings and house burnings that occurred not far from the church. In the assessment of the pro-integration camp there were acts of fraud committed by UNAMET in the voting and vote counting during the popular consultation. The witness Dominggas Dos Santos Mauzhino explained that a pro-integration group made up of Laksaur and Mahidi staged an attack, shooting firearms in the direction of the pro-independence group and the houses and buildings inside the church. During the hearing the witnesses Jehezkiel Berek and Pranoto withdrew their earlier statements to the extent that they had earlier

said that there was an attack on the church, and instead changed their testimony to say that there was a clash at the church.

- With respect to this withdrawal of earlier statements the Court's reasoning is as follows: the witness Dominggas Dos Santos Mauzinho stated that the pro-integration Laksaur and Mahidi entered the church and attacked the refugees from the pro-independence camp. She saw Olivio Moruk and his colleagues, wearing black shirts with Laksaur and Mahidi written on them and carrying firearms, stage an attack and kill three priests named Hilario, Dewanto and Fransisco and injure her own daughter Fatimah and other refugees. On the one hand there were unarmed people inside the church for protection because they were afraid and on the other hand there was a pro-integration group who entered the church complex together, armed with rakitan guns and sharp weapons. Therefore the disturbance that occurred was not a clash – a word that would indicate that there was a balance or symmetry in the position, condition and situation. The witnesses who used and then withdrew the words “attack by the members of the pro-integration group on the pro-independence group” so as to replace it with the word “clash” have not provided any logical reason for this. There is nothing to show that the witnesses were unwell when they gave their statements and it has never been proven that there was pressure or force applied by some other party. There is not one bit of evidence to support this withdrawal of the statement except that the witnesses felt emotional and uncertain when they gave their statements to investigators.
- Looking together at the facts as found and the evidence of Dominggas Dos Santos Mauzinho that people from the independence camp were gathered at the Church without weapons, the Court is of the opinion that the withdrawal and alteration of the witnesses' evidence from what was earlier said and recorded in the prosecutor's dossier is without foundation.
- Based on the above discussion, in the view of the Court, the incident that occurred on 6 September 1999 at the Ave Maria Church in Suai was an attack whereby on one hand a pro-integration group actively entered and invaded the church complex with weapons while on the other hand the pro-independence community defended and protected themselves from a passive position and in an unarmed state. As a result of the attack a disturbance occurred, people inside the church screamed and there were casualties some of whom died and others of whom were injured.
- Based on the discussion above the Court is of the view that the element of a widespread attack has been satisfied.

The Court then noted that given they had decided that the element of “a widespread attack” was satisfied it was not necessary to determine in the alternative whether there was a systematic attack. However they added the following comments on the element “systematic attack”:

- What is meant by systematic is something that is planned in that it is a well organized policy or the continuation of a policy – this may occur directly or indirectly. If an act is systematic in the direct sense, then the person who carries out the action directly realizes or makes happen whatever it is that is sought or desired. If an act is systematic in the indirect sense it may involve, for example, allowing someone to do something, or agreeing to it, intending that the act should happen, tolerating certain acts or activities, assisting or making it easier for the perpetrator to realize his or her intentions. These

things may be achieved by working together; or conspiring in a common policy already agreed in advance; or by allowing something to happen so that the actual perpetrator of the act can carry out his or her intentions without any obstacles; or by only acting after the perpetrator has carried out his or her act, that is by not taking immediate steps to stop the perpetrator until the consequences have already occurred.

- Based on the facts revealed, at trial it has been shown that a pro-integration group led by Olivio Moruk had, from 4 September 1999, been intimidating the pro-independence people who were inside the Ave Maria Church. Between the morning of 6 September and the early afternoon before the first explosion of gunfire was heard, Olivio Moruk and the members of his group had enough time to think about consolidating their numbers in preparation for staging a full blown attack. The facts of the trial show that on the signal of an explosion of gunfire, at 14.00 on 6 September a pro-integration group made up of Laksaur and Mahidi attacked together from every direction heading towards the church where the pro-independence refugees were. The attack by this pro-integration group represented a continuation of that group's policy. Both Laksaur and Mahidi were independent community pro-integration groups that existed outside the structures of government.
- Throughout the trial examination, it appeared there was not one piece of evidence indicating that the security forces, that is police, TNI and Brimob, were involved in the attack on the Church.
- The moment after they heard the first explosion of gunfire, the security forces, consisting of police, TNI and Brimob arrived and moved in the direction of the Ave Maria church, in response to orders from their respective superiors, in order to take preventative measures to stop the disturbance from spreading.
- The first, second and third accused arrived together and at the same time the fourth accused arrived at the scene of the disturbance. They immediately coordinated together and the second accused gave orders to the fourth accused to enter the church complex to stop the disturbance and to evacuate the refugees. The third accused ordered Jehezkiel Berek who was acting as the Kaposkodalops to conduct an investigation. Not long thereafter, at around 16.00 the gun fire subsided and the disturbance began to end. The fourth accused carried refugees, some of whom were unharmed and some of whom had suffered injuries, to the military headquarters (Makodim) to be treated and protected over the following week.
- A range of activities, which took the form of preventing and stopping the disturbance, evacuating people and tending to the injured in one place, namely the respective headquarters of the military and police, over the course of a week, are not actions that could be described as allowing the incident to happen.

The result of this discussion was that the Court regarded the first element as satisfied – that is the act was part of a widespread and systematic attack.

b) Was it known by the perpetrator(s) that the attack was aimed directly at the civilian population?

The Court explained that in the explanation to Art 9 it is stated that what is meant by an attack aimed at the civilian population is a series of acts which are carried out

against civilians as a continuation of a policy of those in power or a policy that is connected to an organization.

The Court explained that this meaning is consistent with the meaning given to s7(2) of the Rome Statute, which is as follows: an attack on the civilian population consists of multiple acts against the civilian population carried out in accordance with, or representing the continuation of, a national policy or organizational policy to stage such an attack.

The Court found that the facts of the trial indicated that before the attack on the church occurred – from the morning until approximately 14.00 – a pro-integration group consisting of Laksaur and Mahidi gathered together surrounding the church complex. These facts, the Court found, provided an indication that there was enough time to formulate an organization or pro-integration group strategy to stage the attack on the pro-independence refugees. The Court noted that the witness, Dominggas Dos Santos, explained that those who were inside the church complex were unarmed, pro-independence refugees who were seeking protection because they were afraid. Inside the church complex there was never any other target except the frightened unarmed refugee community. The Court found that it was a fact that could not be refuted that the group of refugees who were gathered inside the church could be classified as a group of civilians who were the target of the attack – a group which consisted of priests, nuns, children and adults.

Based on that reasoning, the Court found that it was apparent that Laksaur and Mahidi had joined together as a pro-integration group and carried out an attack with a single target and had directly attacked the civilian population. With that the Court regarded the second element “aimed directly at the civilian population” as having been satisfied.

c) the act carried out took the form of a murder as defined in article 340 of the Indonesian Penal Code

The Court noted that article 340 of the Penal Code provides that whoever, deliberately and with pre-meditation, takes the life of another shall be guilty of pre-meditated murder and shall be sentenced to death or life imprisonment or 20 years imprisonment.

The Court listed the elements of the offense of murder as follows:

- a. whoever (a person)
- b. deliberately
- c. with pre-meditation
- d. takes the life of another

a) whoever

The Court stated that what is meant by this element is who performed the act. To know this we must consider the question together with the other elements of the offence.

b) Deliberately

The Court explained that an act is deliberate if the person who performs the act is aware that it will take the life of another. The person who performs the act is aware that the consequence will be, in accordance with their desire or intention, the possibility that a person will die, but the person performs the act regardless.

The Court stated that:

- The evidence of Dominggas Dos Santos was that she saw the Laksaur and Mahidi groups enter and attack the refugees. She saw Olivio Moruk, Mertinus Bere, Olivio Mou (sic) and their colleagues, wearing their group shirts, attack and kill three priests named Hilario, Dewanto and Fransisco and injure her daughter Fatimah and other refugees. According to the evidence of Sonny Sanjaya, he saw Olivio Mou in the Church complex being ordered by the second accused to retreat and disperse and leave the church complex but Olivio Mou answered: “no – leave it be that I am responsible.”
- As for those witnesses who withdrew the word “attack” and replaced it with the word “clash”, the Court repeated its comments above on that point and found that what occurred was an armed attack by a pro-integration group on an unarmed pro-independence group and was not a clash.
- They did not agree with the defence lawyers and the prosecutor that what occurred was a clash and instead found that what occurred was an attack by Laksaur and Mahidi who had joined together in a pro-integration group.
- In normal circumstances the members of Laksaur under the leadership of Olivio Moruk realized with sound minds that gunshots and swings from sharp weapons like machetes and spears if directed towards the body of another would definitely, or could be expected to, cause death. The members of Laksaur and Mahidi led by Olivio Moruk and Olivio Mou (sic) knowingly attacked, engulfed by feelings of disappointment because of their defeat in the popular consultation, with the result that approximately 27 victims died.
- On that basis the Court concluded that the element of intent (i.e. deliberately) had been satisfied.

c) With pre-meditation

The Court explained that what is meant by this element is that between forming the intent and performing the act, there must be sufficient contemplative time for the perpetrator to consider calmly how, when and with what instrument the act will be performed. The Court then explained what is meant by sufficient contemplative time.

The Court repeated what it said above about the disappointment of the pro-integration camp and the protests they conducted. The Court further noted that: the pro-independence group were shouting and telling pro-integrationists to leave East Timor, especially Suai, and this sowed the seeds for an increasingly sharp level of hostility. After the announcement of the vote many frightened pro-independence people came to the Church, because they were often intimidated

by Laksaur and Mahidi, until they numbered about 2000. From the night of 5 September, a pro-integration group made threats and surrounded the church complex until mid afternoon the following day. Given the difference in numbers between Laksaur and Mahidi and the refugees, there is a clear indication that they would not have been brave enough to stage the attack or would not have succeeded without first fully weighing up and planning the attack.

The Court considered that given the amount of time between when the group surrounded the Church to the attack, they had sufficient time to plan and contemplate their actions. This included time to prepare their tools and weapons and to decide on how and exactly when they would attack. They had time to change their minds and cancel their plans but they did not consider that an option and instead attacked. They only stopped when security personnel arrived in the form of police, aided by Brimob and TNI, and joined together under the direction of the first, second and third accused, who were outside the gate giving orders to make a human fence to cordon off and block those who wanted to enter and to give those who wanted to get out of the church an opportunity. The witness Jehezkiel Berek explained that only after the disturbance had continued for two hours were the dozens of security personnel, using all their efforts, able to break things up and evacuate the injured and take them to the police or military headquarters. The period of time over which the incident occurred is a clear indication of how organized the pro-integration group who staged the attack was.

On the basis of all the matters discussed the Court concluded that the element of pre-meditation was satisfied.

d) Takes the life of another

The Court noted the autopsy reports number 001/TT.3002/SK.II/XI/1999 to 026/TT.3002/SK/XI/1999 dated 30 November 1999 which were performed in relation to 3 priests named Hilario, Fransisco Soares and Dewanto, 9 unknown women and 14 unknown males. (All exhumed from 3 grave holes on the beach in the village of Metamauk, Wemasa, Belu NTT.) The Court noted that bullet shells and dry blood were found inside the church complex after the attack. Putting all the facts together the Court was satisfied that the Laksaur/Mahidi attack had caused loss of life and so this final element was considered satisfied.

Therefore the Court was satisfied that all the elements of Art7 (b) as defined in Article 9(a) had been satisfied. On that basis the Court answered the first question in the affirmative – YES – A GROSS VIOLATION OF HUMAN RIGHTS DID OCCUR.

II. Who was the perpetrator of that gross human rights violation?

The Court considered that this question was already answered as a result of the above discussion and findings. The gross human rights violation that occurred was perpetrated by Laksaur and Mahidi.

III. Can the five accused be held accountable for that gross human rights violation?

PRIMARY CHARGE:

The Court quoted s42 (1) on military command responsibility and stated that in order for a person to have military command responsibility for the actions of another the following elements have to be satisfied:

- a) the person must be a military commander or effectively acting as a military commander;
- b) the person must be able to be held accountable within the jurisdiction of the Human Rights Court for what has been done by the troops who are under his command and effective control or under his power or effective control;
- c) The criminal activity that occurred was a result of the failure to appropriately exercise control namely:
 - i) The military commander or person knew or based on the circumstances should have known that those troops were committing or had just committed a gross violation of human rights.
 - ii) And so on

a) Were the accused military commanders or effectively acting as military commanders?

FIRST ACCUSED: The Court noted that the first accused had been the Bupati since the end of September 1994 and reiterated what are the responsibilities of a Bupati. The Court stated that even though the first accused was a military person, as the Bupati he was functioning as the head of the district government or civil administration. As such the Court found that in relation to the first accused this element was not satisfied because he was not a military commander or acting as one. Given that the first element was not satisfied the Court found that it was not necessary to discuss the further elements.

SECOND ACCUSED: The Court noted that the second accused was the head of the 1635 Suai military command (Kodim) from 29 August 1999 until the incident occurred. The Court listed the names of 7 soldiers who were under his command, found there was a commander- subordinate relationship within a command hierarchy and decided that, in relation to the second accused, this element was satisfied.

THIRD ACCUSED: The Court noted that the third accused was a member of the Indonesian Police and, after listing the responsibilities of his role, concluded that as a police chief he did not enter into the category of military commander. Therefore in relation to the third accused the Court found that this element was not satisfied.

FOURTH ACCUSED: The Court noted that the fourth accused was the head of staff at the Suai 1635 Kodim. The Court listed his responsibilities. The Court listed the soldiers who were under his command and concluded that there was commander-subordinate relationship between them. The Court found that the fourth accused was therefore a military commander and therefore this element was satisfied.

FIFTH ACCUSED: The Court noted that the fifth accused was the Commander of the Suai District Military Command (Danramil 1635 Suai) and found that people in that role have effective military command over their subordinates. The Court found that this element in relation to the fifth accused was satisfied.

b) Can the accused be held accountable within the jurisdiction of the Human Rights Court for what has been done by the troops who are under their command and effective control or under their power or effective control?

In discussing this element the Court referred to its earlier findings and reasoning on the question of whether there had been a gross violation of human rights. The Court noted that it had found that a crime against humanity in the form of murder was perpetrated by the Laksaur and Mahidi groups who had joined together as a pro-integration group.

The Court found that, in relation to this element, the question to be answered was: Was there a hierarchical line of command and effective control between the five accused and the united Laksaur and Mahidi group or, in the reverse, were the Laksaur and Mahidi group's troops under the command or effective control or power and effective control of any or all of the five accused?

The Court considered that that question should be answered as follows:

- Laksaur and Mahidi were community groups that appeared on their own as a result of the desires of their members who volunteered in order to support a pro-integration victory in the popular consultation. According to the witness, Dominggas, Laksaur and Mahidi, who wore black, white and red shirts with Laksaur and Mahidi written on them, were ordinary members of the East Timorese community. According to the same witness, Laksaur and Mahidi did not wear police, TNI or Brimob uniforms.
- All the accused said that it was not important who won the popular consultation; rather, what was important was that the situation remained safe and under control. Throughout the trial there was no evidence from documents or witnesses to indicate that there was a commander-subordinate relationship between any of the five accused and Laksaur or Mahidi.
- The five accused knew of the existence of, were acquainted with and had a good relationship with Laksaur and Mahidi in the Suai Covalima district.
- According to the legal system of government as it stands, a good relationship and mutual acquaintance between the accused and the community groups of Laksaur and Mahidi does not represent a commander-subordinate relationship. On the contrary it represents the ideal relationship between government, in its role as security and law enforcer on the one hand and citizens who in their every day activities obey the relevant regulations and occasionally break the law. It can not automatically be said that with a relationship of this kind between

government and its community there is a command connection and effective control. In other words, at some point if a member of the community, with all his his or her respective different characteristics, broke the law, that alone would not be enough to say that the government must share the responsibility as the party with effective command control.

- The optimal action to be undertaken by the government when rioting occurs and the district enters into chaos is to immediately return the situation to calm by stopping the incidents, to make things secure and to resolve the problem by coordinating and cooperating with related agencies and personnel.
- On the basis of the above discussion, the Court is of the opinion that there was no command relationship between the five accused and Laksaur and Mahidi.
- On the basis of that finding the Court found that the accused could not be held accountable for the gross human rights violations that occurred.

c) Was the criminal activity that occurred a result of their failure to appropriately exercise control?:

Given the finding above, the Court found that it was not necessary to discuss this element.

THEREFORE THE COURT FOUND THAT THE ELEMENTS OF SECTION 42(1) ON MILITARY COMMAND RESPONSIBILITY WERE NOT SATISFIED (because they found no military commander/subordinate relationship between the accused and Laksaur and Mahidi) AND AS SUCH THE ACCUSED COULD NOT BE HELD ACCOUNTABLE UNDER ARTICLE 42(1) FOR THE GROSS VIOLATIONS OF HUMAN RIGHTS THAT OCCURRED.

SUBSIDIARY CHARGE:

The Court quoted Article 41 which provides that whoever attempts to commit; conspires to commit; or aids in the commission of genocide or a crime against humanity will be liable to the same punishment that he or she would be liable to if he or she had personally committed the offence.

The Court identified two elements:

1. attempting, conspiring or aiding.
2. the commission of an offence under Art 8 (genocide) or Art 9 (crimes against humanity).

The Court noted that if the second element was not satisfied then there would be nothing to consider in relation to the first. The Court referred to its discussions above and reiterated the finding that a crime against humanity in the form of murder had been committed by the members of Laksaur and Mahidi.

a) attempting

The Court noted that there was no definition in the law of “attempting” and stated that therefore the Court looked to Art 53 of the Indonesian Penal Code as a guide. The Court explained the definition found therein but found that given the offence was committed and completed, there was no need to discuss further whether there was an “attempt”.

b) conspiring

The Court explained that what is meant by conspiring is two or more people agreeing to commit a gross violation of human rights. In that context the Court made the following observations/findings:

- All conversations and meetings to the extent that they are not for the purpose of committing a crime can not be described as conspiring.
- There were no witnesses or evidence to indicate that any of the five accused had had discussions with Laksaur or Mahidi at any time or place about the commission of a crime against humanity, like the murders that have been proven.
- According to the facts from the trial, at 10.30am in the morning the first accused talked with Olivio Mendoza Moruk who was accompanied by several people but this discussion was not about the commission of a crime.
- According to the facts from the trial, the third accused had seen and met with Olivio Mendoza Moruk who was known to be the leader of Laksaur in Suai but this meeting was not for the purpose of discussing the commission of a crime.

On that basis the Court was not satisfied that any of the accused had conspired in the commission of the offence.

c) aiding

The Court stated that what is meant by aiding was not explained in Law 26/2000 and therefore they had recourse to Art 56 of the Indonesian Penal Code. That article states that aiding means:

- a) deliberately helping in the commission of an offence;
- b) endeavouring to provide the opportunity, resources (lit: any kind of effort) or information to commit an offence.

DELIBERATELY AIDING IN THE COMMISSION

The Court stated that what is meant by “deliberately” was discussed above in the context of discussing the offence of murder. The Court stated that in order to satisfy the element of aiding there would have to be evidence that one or any or all of the accused joined in the commission of the offence but did not perform all the elements of the offence like the primary perpetrator. The Court stated that a person could be guilty of aiding if they helped before or during the commission of

the offence but not after the offence. In that regard the Court made the following findings/observations:

- The incident that occurred at the Ave Maria Church was something that was not considered in advance by the five accused such that they didn't even know the reasons or motivation of those who caused the disturbance.
- How could the accused have deliberately aided in the offence if the first they knew of the incident was the shots they heard from the direction of the Church on 6 September 1999?
- According to the facts as stated during the trial, the disturbance began to subside and stop after the fourth accused, on the orders of the second accused, entered the church complex with the witness Sonik Iskander to stop the disturbance and evacuate the refugees to the military headquarters.

On the basis of the above, the Court was of the opinion that it had not been proven that the five accused deliberately aided in the commission of the offence.

DELIBERATELY PROVIDING THE OPPORTUNITY, RESOURCES OR INFORMATION TO COMMIT THE OFFENCE

The Court stated that in order to hold a person accountable on the basis of an omission in relation to the activities of those below them, it must be shown that the person had the intention or knowledge that their omission or failure to perform some task could actually, or properly, or would foreseeably lead to the commission of an offence and that that person or superior was in a position or had the capacity to act so as to prevent the offence. (*This paragraph is difficult to follow*)

Deliberately providing the opportunity, resources or information to commit an offence may also encompass a situation where the primary perpetrator takes the initiative to ask for the opportunity, resources or information in order to aid in some criminal activity.

In that regard the Court made the following observations/findings:

- Throughout the trial there has been no evidence that the perpetrators, in this case Laksaur and Mahidi, met with and/or held discussions with the accused with the intention of requesting an opportunity, resources or information of any kind or in any form with a view to aiding their attack on the pro-independence refugees inside the Church.
- At 10.30 the first accused spoke with Olivio Mendoza Moruk who was accompanied by several people but the discussion did not involve a request for information or resources for the commission of the crime. Likewise the third accused had previously met with Olivio Moruk but there was no discussion whereby Moruk asked for permission or the opportunity or resources or information for the attack.
- When the attack occurred the first three accused arrived, stood outside the church, coordinated together and gave orders to their subordinates

to get on top of the situation and make a human fence to prevent people from entering the church.

- The witness Dominggas Dos Santos saw that, while the attack was taking place, the first three accused stood outside the church giving orders to the TNI and police and Brimob to stop the disturbance.
- After the first four accused arrived, the situation became calmer and the disturbance began to subside.
- The witness Fadholi Agus Haryanto stated that the fifth accused, on 6 September 1999 was in Betun looking to borrow vehicles and did not return to Suai until 15.00. The witness Pranoto explained that on 6 September he returned home with the fifth accused from Betun to Suai. When they reached the church, things were already quiet and they found a number of bodies.

Based on the above the Court found that there was not enough to say that the activities of the accused satisfied the elements of “providing the opportunity, resources or information” to commit murder as a crime against humanity.

The Court found:

- the accused were not outside the Church just as passive observers who did not do anything, as was asserted by the prosecutor.
- The accused were not at the scene of the incident, standing outside the church, to prevent the attack. (*This could also be translated as “were not standing outside the Court indifferently”.*)
- The first accused stated that they had not imagined before hand that a disturbance or clash would occur, but that it was possible that anything could happen. This became the basis for the prosecutor’s allegation that the accused provided passive assistance(?). The Court found as follows:

First Accused – With all mass incidents like disturbances or attacks it does not have to be determined whether they were predictable or foreseeable. The first accused, acting in his role as Bupati, in addition to helping break up the disturbance at the Church, in the time before and after the popular consultation undertook sufficient humanitarian activities. Among other things, he endeavoured several times to create peace in the society including by trying to create social acceptance and understanding of the peace agreement from the 3 September meeting (ie by socializing it). He helped in providing food to Fr Hilario’s church, fulfilled the needs of refugees at the Church when there was a water shortage, and handled and finalized the first refugee project in the Betun area of NTT. The activities of the first accused were the actions of someone who was concerned and who wanted to help his community, which needed assistance. The prosecutor’s assertion that the accused allowed or aided the commission of the crime against humanity is at odds with the facts revealed during the trial. As a result, the Court is of the opinion that the first accused did not provide the opportunity, resources or information to aid in the commission of the crime.

SECOND ACCUSED: The basis for asserting that the second accused aided the crime by providing the opportunity, resources or information is that he allowed the city of Suai to be not conducive (*it does not say to what – but the probable implication is to the smooth, fair and peaceful running of the popular consultation or something similar*) and did not prepare preventative measure.

The situation was not conducive (*to peace etc?*) because of the heavy flow of refugees who had to be evacuated and who needed gathering/collection points throughout Suai. In Suai there was non-stop fighting between the pro-integration groups and pro-independence groups that had been going on for some time and that, every time something arose, was resolved with peace talks.

According to the facts revealed at trial, the second accused in his role as PLH Commander of the Kodim carried out his activities in accordance with orders from his superiors; this included helping the police with security for the popular consultation, advising both groups to accept the outcome of the popular consultation whatever it might be, working with the police to safely evacuate members of UNAMET, preventing pro-integration groups from attacking UNAMET as a result of their disappointment at losing the election and because of their accusations that UNAMET had been fraudulent in its electoral activities. The second accused also actively attended and ran the peace meeting on 3 September 1999 at the official house of the first accused. The accused took preventative steps and gathered together refugees at the military headquarters for one week. On that basis, the Court is of the opinion that what is asserted by the prosecution does not accord with what was actually done by the second accused both before, during and after the disturbance at the Church.

As a result, the Court is of the opinion that the second accused did not provide the opportunity, resources or information to aid in the commission of the crime.

THIRD ACCUSED: The basis of the allegation against the third accused is that he did not take preventative steps in relation to the disturbance that occurred at the Ave Maria Suai. Before, during and after the popular consultation the third accused did many things which included providing security so that the popular consultation could run smoothly and safely. The third accused stationed members (of his team) including troops under the operational control of Brimob at a post near the Ave Maria church before the attack occurred on 6 September 1999. The third accused was part of resolving the fighting between the groups through putting all efforts into peace. The third accused arrived at the church to prevent the disturbance from continuing and spreading and subsequently ordered Jehezkiel Berek to investigate the matter. The third accused actively participated in evacuating refugees from Suai, especially the refugees who were at the Church. At their request, the third accused actively participated, with the TNI, in securing and evacuating UNAMET staff to Dili.

Based on the above reasons the Court found that the bases of the prosecution allegations were at odds with the facts revealed at trial.

And concluded that the element “deliberately providing the opportunity, resources or information to aid in the commission of a crime” was not satisfied.

FOURTH ACCUSED: The basis of the prosecutor’s charge against the fourth accused was that he had not predicted the fight, had not heard that there would be an escalation in the conflict and there were no TNI troops or police stationed at the Church complex. According to the facts revealed, the fourth accused with his troops helped the police provide security for the popular consultation. Before, during and after the popular consultation the fourth accused was active in evacuating refugees. On 6 September 1999, the fourth accused and those under his charge headed towards the church complex to prevent the conflict from continuing and spreading. The fourth accused evacuated refugees from the church complex to the military headquarters.

Based on the above reasons the Court found that the basis of the prosecution allegations were at odds with the facts revealed at trial. And concluded that the element “deliberately providing the opportunity, resources or information to aid in the commission of a crime was not satisfied”.

FIFTH ACCUSED: The basis of the prosecution allegations against the fifth accused was that he had neglected his work by not properly preventing the crime that occurred at the church and that he allowed the attack to happen. Based on the facts revealed at the trial, the fifth accused and the members (of his unit) joined together to help the police in providing security for the popular consultation and evacuated refugees from Suai to Betun NTT. On 6 September at approximately 6.00am the fifth accused, with the permission of the fourth accused and the knowledge of the second accused, went to Betun looking to borrow vehicles to transport refugees. The fifth accused, with the witness Pranoto, found 27 bodies in the church complex on 6 September 1999 at 17.30pm and lifted them and piled them together on the top of a vehicle and covered them with a tarpaulin. The fifth accused, with Pranoto, Martinus Bere and several members of the pro-integration group buried the bodies at Metamauk beach in Wemasa NTT. The fifth accused was in Betun from the morning until the late afternoon of 6 September 1999 and therefore could not possibly have taken preventative steps in relation to the disturbance that occurred at the church complex. How could it be said that he allowed the incident at the church to happen when he was not yet or not aware the incident had happened?

Based on the above reasons the Court found that prosecution allegations were not proven. The Court concluded that the element “deliberately providing the opportunity, resources or information to aid in the commission of a crime” was not satisfied.

THE SUBSIDIARY CHARGES AGAINST ALL FIVE ACCUSED WERE NOT PROVEN AND THE ACCUSED WERE ACQUITTED OF THOSE CHARGES

FURTHER SUBSIDIARY CHARGE:

CIVIL COMMAND RESPONSIBILITY CHARGES AGAINST THE FIRST ACCUSED (Art 42(2))

The Court quoted Article 42(2) and listed the elements of the article, which were the same as the elements of Article 42(1) above except that rather than establishing that the accused was a military commander the Court found that it must be established that the accused was a police or civil superior. The Court found that as a Bupati the accused was a civil superior in that he had staff under his control and had authority to give orders to his subordinates. However, for the same reasons as expressed above, the Court found that the accused did not have command relationship with Laksaur or Mahidi and therefore did not bare criminal responsibility for their gross violations of human rights. The first accused was acquitted of the further subsidiary charges brought against him.

MILITARY COMMAND RESPONSIBILITY CHARGE AGAINST THE SECOND ACCUSED (Article 42(1))

The Court referred to its reasoning above in relation to the primary charge brought against the second accused under this article, and found that, for the same reasons, the charge was not proven and acquitted the second accused of the further subsidiary charge against him.

MILITARY COMMAND RESPONSIBILITY CHARGE AGAINST THE THIRD ACCUSED (Article 42(1))

The Court referred to its reasoning above in relation to the primary charge brought against the third accused under this article – and found that, for the same reasons, the charge was not proven and acquitted the second accused of the further subsidiary charge against him. The Court noted, however, that the reason for this finding was not the change of command (from police to TNI) which occurred but because the prosecution charges were not supported by sufficient evidence to prove the allegations made.

MILITARY COMMAND RESPONSIBILITY CHARGE AGAINST THE FOURTH ACCUSED (Article 42(1))

The Court referred to its reasoning above in relation to the primary charge brought against the fourth accused under this article – and found that, for the same reasons, the charge was not proven and acquitted the second accused of the further subsidiary charge against him.

MILITARY COMMAND RESPONSIBILITY CHARGE AGAINST THE FIFTH ACCUSED (Article 42(1))

The Court referred to its reasoning above in relation to the primary charge brought against the fifth accused under this article, and found that, for the same reasons, the

charge was not proven and acquitted the fifth accused of the further subsidiary charge against him.

THEREFORE THE ACCUSED WERE ACQUITTED OF ALL CHARGES.

In closing the Court noted that:

- The issues raised by the defence in their *eksepsi* had been, in the view of the Court, sufficiently discussed and considered in the interlocutory and final decisions of the Court.
- The prosecution's *replik* and the defence's *duplik* only contained repetition and clarification of the two sides' respective arguments and in the view of the Court had been sufficiently dealt with in their decision.
- The third accused's intention to change his testimony at trial on the basis that, in giving his statement earlier, he had been directed by the investigators was not accepted by the Court. The Court found that the third accused, as a police chief, should have already known what the consequences would be if his statement had been steered by someone other than himself. Therefore the statement of the third accused as it appears in the prosecutor's dossier is to be regarded as the valid statement of the accused made during investigation.
- At the request of the prosecutor the evidence of four witnesses was read during the trial as it appears in the officially stamped record of investigation attached to the trial dossier.
- The evidence of Trimo Sungkowo was regarded as valid and could be used as an indicator if it accorded with other evidence presented at trial
- The evidence of Tobias Dos Santos, Fres Da Costa and Armindo Granadeiro that was read at the trial was denied by the accused in its entirety to the extent that it implied the accused had been involved in the disturbance at the church.
- Given that their evidence was denied by the accused the weight of the evidence became very weak and could not be used as material that implicated the accused but only as material that exculpated them.
- There was no good reason for the withdrawal of some witnesses' evidence at trial and that indicated that those witnesses were being dishonest.
- The Prosecutor appeared uncertain in discussing and proving the further subsidiary charges especially in relation to the first accused, and this is reflected in how this judgment is divided between subsidiary and further subsidiary charges, especially in relation to the first accused.

The Judges were as follows:

1. Cicut Setyarso, SH, MH presiding
2. Andriani Nurdin, SH.
3. Abdurrahman, SH, MH.
4. Muhammad Guntur Alfie, SH, MH.
5. Prof. DR. Rachmad Syafei, MA.