

# Summary in English of the Timbul Silaen Judgment

## SUMMARY OF EVIDENCE

The Court summarised the evidence given by the witnesses for the prosecution. The prosecution's witnesses were as follows:

- Wiranto (Menhankam/Pangab)
- Adam Rahmat Damiri (Panglima of IX Udayana from 15 July 1998 to 27 April 1999)
- M. Noer Muis (Danrem 164 Wira Dharma from 13 August 1999 until March 2000)
- Leo Pardede (Kapusodalops Polda Timor-Timur)
- Joseph Joshua Sitompul (worked at Polda Timor-Timur as Kadit Diklat)
- Muafi Sahudji (Wakil Kepala Polda Timor-Timur)
- Adios Salova (Kapolres Liquisa from the end of July 1998 until July 1999)
- Hulman Gultom (Kapolres Dili)
- Gatot Subyaktoro (Kapolres Covalima)
- Carlo Brix Tewu (sekretaris direktorat reserse Polda Timor-Timur)
- Charle Marpaung (Kapolres Baucau)
- Munikh Susilo (Kapolres Bobonaro and also had the position of Dan Satgas Res operation Hanoen Lorosae 1999)
- Emilio Bareto\*
- Joao Ferreira\*
- Raja Karina Brahmana (Sekwilda Pemda Timor-Timur)
- Asep Kuswani (komandan Kodim Liquisa)
- Nelio Mesquita Da Costa Rego\*
- Joao Bernandino Soares\*
- Maria Ferreira Soares\*
- Marcelino Martins Ximenez (member of Aitarak with Danki C)

Evidence from the last four witnesses was simply read into evidence because although the witnesses were called to give evidence in court, they did not attend. The witnesses marked with an asterisk are all victims (saksi korban). The first two were victims of the Liquisa Church massacre and the final three were victims of the attack on the Diocese of Dili office.

The Court then summarised the evidence given by witnesses called by the accused's legal counsel. Those witnesses were as follows:

- Drs. Koesparmono Irsan (member of Komnas HAM who worked in East Timor on four occasions between 7 March 1998 and September 1999)

- Joko Sugianto, S.H (Joko Sugianto, S.H)
- Benyamin Mangkudilaga, S.H (worked in East Timor from 17 April 1999 to 1 September 1999 as a member of Komnas HAM and a member of KPS)
- Armindo Soares Mariano (worked in East Timor (on and off) from 1997 to 1999 as the Ketua DPRD TK I (Head of Level One East Timor local Parliament) Timor-Timur)
- Drs. Agus Tarmidzi (Head of Satgas P3TT)
- Albert Kuhon (Reporter from SCTV who was in East Timor in the lead up to the popular consultation and immediately following the announcement of the result)
- Louisa Leite (former government employee from the Office of the East Timorese Governor).
- Faisal Tanjung (Co-ordinating Minister for police and security and Head of security arrangements for the agreement on popular consultation)
- Ali Alatas (Indonesian Foreign Minister)

The Court then summarised the evidence given by expert witnesses. Those witnesses were as follows:

- DR. Indria Samego
- Prof.Dr. Hikmahanto Juwana, S.H (International public law expert)
- DR. Dodi Haryadi (Psychology of the masses expert)

The Court then summarised the evidence of the accused.

Further documentary evidence received by the Court was listed as follows :

- A copy of the plans for operation Hanoen Lorosae 1999 No. Pol. Ren Ops/04/V/1999
- A copy of the plans for operation Hanoen Lorosae 1999 No. Pol. Ren Ops/04/VIII/1999
- A letter from Bishop Bello to Timbul Silaen dated 10 June 2002 thanking the accused for all his help during his time as head of the police in East Timor.
- A letter from Manuel Carascalao dated 6 October 2000 thanking the accused for his protection.
- A statement written and signed by Manuel Viegas Carascalao dated 14 June 2002.
- A private letter from Leandro Isaac written to the accused personally, dated 23 June 2002 in which Isaac thanks the accused for his service and sacrifice at the Mahkota Dili hotel.
- A statement written and signed by Pastor Jose Antonio Da Costa, Vikaris Generalis Keuskupan Dili dated 13 June 2002.
- A statement written by the Head of the Indonesian National Police and signed by the acting Deputy of the National Police (Operational Sector), Drs. Dewa K.G. Astika, dated 16 June 2002 – which explains that on the 5<sup>th</sup> April the accused took

part in the operational rollout (gelar operasional???) and on 16 April 1999 took part in a National Police strategic meeting designed to prepare for the popular consultation in September.

- A telegram from the accused to Pangkoops TNI Nusra dated 6 September 1999.

### **FINDINGS OF FACT**

On the basis of all the evidence presented the Court made thirty findings of fact. The most significant findings were as follows:

- According to the New York Agreement, security and community law and order, in the context of carrying out the popular consultation in East Timor, became the responsibility of the Indonesian National Police.
- Even though the National Police were said to be responsible for security in East Timor in the context of the popular consultation, in 1999 the National Police were really a de facto part of the Indonesian Armed Forces together with the TNI.
- In order to uphold the law in the context of the popular consultation process, the accused made an operation plan known as Hanoen Lorosae 1999. In addition the police in East Timor released a plan for refugee security known as Hanoen Lorosae II 1999
- On 6 April a pro-integration group attacked a pro-independence group inside the Liquisa Church complex. Of the 5-9 people killed and of the people injured – all were civilians.
- On 6 April the accused was not in East Timor until 2.00pm.
- After receiving reports of the incident from Kapuskodalops, Leo Pardede, and the Kapolres Liquisa, on 7 April 1999 the accused went with the Kapuskodalops, Danrem and Bishop Bello to the scene of the incident.
- The accused ordered Kapolres and Sekretaris direktorat reserse Polda Timor-Timur, Carlo Brix Tewu, to investigate the incident.
- That investigation revealed 5 suspects who, on the accused's orders, were detained in the East Timorese Police Headquarters.
- About two months after the incident, the accused resolved to replace the head of the police in Liquisa, Adios Salova, with a Brimob person on the basis that, in anticipation of future events, it was necessary to have someone quick and sharp in the position.
- The accused came to know of the pro-integration group's attack on the pro-independence group, which was aimed at the houses of Manuel Viegas Carascalao and Leandro Isaac, when he was briefed at the airport by his Deputy.
- Hearing the report, the accused went straight to the scene of the incident to monitor and check the situation but no one remained at the scene – there was only broken glass, blood stains and police tape left there.
- On the morning of the attack there was a ceremony held in the garden of the Governor's office by PamSwakarsa which was attended by more than 1000 people and which, on invitation, was also attended by the Governor. The accused did not attend because he was not in East Timor on that morning.

- During that ceremony, on the 17th of April, the head of Dili police had already received orders, from the accused through his deputy, Muafi Sahudi, to put in place security.
- After the ceremony was over the participants went in a procession to Manuel Carascalao's house where there were pro-independence people and attacked them. 12 people were killed in the attack including one of Manuel Carascalao's sons.
- After the incident on 17 April 1999, the accused instructed the Seditserse Polda Timor-Timur, Carlo Brix Tewu, to carry out an investigation and immediately arrest the alleged perpetrators.
- The result of the investigation was that 10 suspects were arrested and detained in the East Timorese Police Headquarters.
- The work and duties of the Head of security for the East Timorese popular consultation were, in accordance with the Tri-partite agreement, to have finished on 30 September 1999. However, in reality, the accused carried out the relevant work and duties until the announcement of the result of the vote on 4 September 1999. At that point the situation in Dili was uncertain and many frightened citizens sought protection and refuge in places which were reasonably safe such as the Diocese of Dili office, the Hosana church, the police headquarters and Bishop Bello's house.
- On 5 September command responsibility for security was shifted from the police to the Indonesian Armed Forces/TNI and in particular to Major General Adam Rahmat Damiri.
- 5 September was characterized by increasing chaos and fires whereby pro-integrationists were looking for pro-independence supporters while refugees were being evacuated. A pro-integration mob who had lost the popular consultation expressed their dissatisfaction by burning and attacking, complete with firearms and sharp weapons, a pro-independence group, made up entirely of civilians, who had taken refuge inside Diocese of Dili office. They burnt the Diocese buildings. Two people died in the attack and several people were injured.
- On 6 September 1999 a pro-integration mob, complete with weapons including standard and homemade firearms and sharp weapons, attacked a pro-independence group which included children, women and elderly people who were being protected at Bishop Bello's house. Also on that day, an attack occurred on the Ave Maria Church in Suai Covalima where a pro-independence group had taken refuge. 27 civilians died in the attack.
- On the 5<sup>th</sup> and 6<sup>th</sup> of September 1999 the Dili police and police force took preventative steps and saved Bishop Bello and foreign staff and evacuated refugees and the UNAMET headquarters. However, the personnel and the facilities that were available were insufficient to overcome the chaos and the situation (such as it was) and in addition all lines of communication were down.

## **ELEMENTS OF THE CRIME**

### **Charge One**

The Court then considered whether, on the basis of the facts as found, there was sufficient evidence to warrant conviction under s 42(2) – that is, in the case of the first charge, whether there was sufficient evidence to find that the accused had police command responsibility for a crime against humanity (s 7(b)) in the form of murder committed as part of a widespread or systematic attack on the civilian population (s 9(a)). The Court considered that the elements of the first charge, which had to be proved were as follows:

1. the accused was a police commandant.
2. there was a gross violation of human rights committed by the accused's subordinates who were under his effective power and control.
3. the accused did not exercise appropriate and proper control over his subordinates, that is he knew or deliberately ignored information which clearly showed that his subordinates were committing or had just committed gross human rights violations and the accused did not take the appropriate and necessary steps, which were within the scope of his authority, to prevent or stop the violations from occurring or did not hand over the perpetrators to the appropriate authorities to be investigated, examined and charged.
4. that there was a crime against humanity.
5. that there was a murder.

### **Was there a murder?**

Article 9(a) states that murder may be one type of crime against humanity. According to the explanation s 9(a), murder in the context of that subsection has the same meaning given to it in article 340 of the Indonesian Criminal Code. That article states that murder is the deliberate and pre-mediated taking of another person's life. According to established jurisprudence a person's action is deliberate if it represents the will of that person and if the person is aware of what the consequence of their action will be. An action is premeditated if the person who performs the action has over a period (short or long) thought in a composed way about how they will perform the action and evaluated what the consequences of that action will be.

On the basis of the facts presented to the Court, the Court found that it was proven that those who carried out the attacks referred to in the indictment deliberately and in a pre-mediated way took the lives of others – specifically, they murdered approximately 9 people at the church in Liquisa on 6 April 1999; approximately 12 people at the house of Manuel Carascalao on 17 April 1999; approximately 2 people at the Dili Diocese and

approximately 27 people at the Ave Maria Church in Suai and Bishop Bello's house in Dili on the 5 and 6 September 1999.

This finding was based on the following consideration:

- a. in each case the perpetrators used firearms and sharp weapons such that they would have realized and anticipated that their actions would result in deaths.
- b. The perpetrators had time to prepare the instruments and method of their attack and to think about what the consequences of their actions would be.
- c. Even though there is not an autopsy report for the victims which states from a forensic perspective what were the causes of the victims' deaths, the practice of international courts dealing with crimes against humanity is that autopsy reports do not have to be produced to prove the cause of death, rather it is sufficient to rely on the evidence of witnesses and in this case there are witnesses who have already stated that there were a number of casualties in respect of each incident.

On the basis of that evidence and reasoning the Court was satisfied that a murder had been committed.

#### **Was the accused a police commander?**

The Court was satisfied that the accused was in a police command position because he had been appointed as the head of the police in East Timor and acted in that position from 30 March 1998 to the end of September 1999. He had 2400 personnel under his command.

#### **Was there a gross violation of human rights committed by the accused subordinates who were under his effective power and control?**

According to the Law 26/00, a gross violation of human rights includes a crime against humanity (s7(b)). A crime against humanity, in turn, includes a murder committed as part of a widespread or systematic attack on the civilian population of which the perpetrator is aware (s9(a)).

##### ***a) Were the murders committed part of a wide spread or systematic attack directed towards the civilian population?***

The Court found that because the terms "widespread" and "systematic" were not defined in the Indonesian law the Court must look to international jurisprudence and literature for a definition of those terms. After a brief summary of the international law position, the Court decided that the five incidents, which were the subject of the indictment, were part of a widespread or systematic attack on the civilian population for the following reasons:

1. a large number (massive number) of people died in the five attacks. A number of those killed or injured in the attack were women, children and elderly who were civilians. The attacks also resulted in the burning of buildings in the Dili Diocese Complex and other residences.
2. those casualties which occurred were a result of attacks on several places, that is the Liquisa Church, the house of Manuel Carascalao, the home of Bishop Bello, the Diocese Office and the Ave Maria Church at Suai.
3. the above incidents happened in a number of different districts of East Timor and were all aimed at a particular group who were all in one place in large and concentrated numbers, that is the pro-independence group and civilians, such that all the incidents were closely connected to each other.
4. the incidents were carried out in a systematic way, which is evident from the organised nature of the attacking group who were from the pro-integrationist camp and who used firearms and sharp weapons to deliberately carry out murders and mistreatment which they intended would result in death and injury of their victims. These incidents occurred after the attacking group had time to gather in the hundreds even thousands.
5. the fact that these attacking groups were organised is evidenced by the fact that they had a leader and were even divided into sub-groups – the Aitarak group; the Besi Merah Putih group and Pam Swakarsa were joined as part of the pro-integration group and there was a de-facto relationship between those who commanded them or those who inspired their organised terror.

The Court again dismissed the argument put forward by the defence team that to prove the charge it was necessary to present clear evidence about who died and what was the cause of their death.

***b) Were the perpetrators the accused's subordinates who were under his effective power and control?***

The Court found that it was not proven that there was police involvement in the attack on the Liquisa Church – either by the accused's direct subordinate, the head of the Liquisa police, or by the accused's indirect subordinates, that is the police under the control of the head of the Liquisa police. The Court found that there was evidence from two witnesses, Nelio Mesquita Da Costa Rego and Maria Ferreira Soares, that there were police involved in the attack but the Court found that there was no evidence to show that they were acting on the orders of their superiors or that the attack was part of a plan by their superiors and therefore the police involved in the attack were personally responsible for their own actions.

The Court found that there was no evidence to suggest that any attack was a result of a verbal or written command given by the accused in his role as head of the police in East Timor.

The Court found that the accused went to Manuel Carascalao's house after the attack there and ordered that an investigation be carried out into the attack.

The Court found that in respect of the attacks on the Dili Diocese and Bishop Bello's house – the situation in Dili had already become so chaotic that it was no longer possible for the police to properly carry out their responsibilities in relation to law and order and security and, at any rate, at that point the responsibility for national security shifted to the army and therefore, the efforts of the police were concentrated on helping refugees.

The Court considered whether, given that there was no evidence that the accused subordinates had carried out gross violations of human rights or that the accused had ignored information, was it appropriate for him to be held responsible in any way for the gross violations of human rights which occurred in East Timor, remembering that what is meant by responsibility in this situation is command responsibility.

The Court found that when someone is charged with command responsibility in respect of a crime against humanity there is no need to show that the person charged, the person in the command position, had a criminal intent. This was said to be based on the Akayesu case in the ICTR.

The Court explained that if someone is to be responsible for gross human rights violation committed by their subordinate there has to be an effective command relationship between the commandant and the subordinate who commits the offence. The Court explained that what is meant by command responsibility is that within a unit there is a chain of command. Orders/decisions come from the top and pass through the hierarchy to the bottom where they are put into effect. A decision to do something can only be executed by someone who has a position in the chain of command.

*[There was no consideration by the Court of whether any commandant/subordinate relationship existed between the militias and the accused. The Court talked a little, as summarised above, about the concept of a chain of command and command responsibility but this was in the abstract. The Court was satisfied that given there was no evidence of police involvement – that was the end of the inquiry in terms of whether the accused might have command responsibility in relation to any of the five incidents. Given there was no evidence presented to establish a connection between the accused and the militia, it is unlikely that it would have had any impact on the result.]*

**Did the accused do everything within his authority to prevent or stop the gross human rights violations committed by his subordinates and/or did he hand over the accused for investigation, questioning and arrest?**

The Court found that there was no evidence that the crimes were committed by the accused's subordinates and therefore the Court found that it was not necessary to consider this question.

### **Charge Two**

The Court found that the elements of the second charge – whereby the accused was charged with police command responsibility for a crime against humanity (s 7(b)) in the form of mistreatment/assault (penganiayaan) towards a particular group, committed as part of a widespread or systematic attack on the civilian population (s 9(h)) – were the same as the elements of the first charge, with the exception that, rather than considering whether a murder had been committed, the Court was required to consider whether there had been mistreatment/assault directed towards a particular group.

#### **Was there mistreatment/assault directed towards a particular group?**

The Court found that based on the facts as found, it was apparent that those who carried out the attacks were from a conglomeration of pro-integration groups which included Aitarak and that the attackers used firearms and other sharp weapons and knives and deliberately assaulted (melakukan penganiayaan) their victims, namely, civilians who were at the places where the five incidents mentioned in the indictment took place.

The attacks which occurred at those places left five people injured at the residence of Pastor Rafael in Liquisa, two people injured at Manuel Carascalao's house, five people at the Diocese of Dili office, and eight people at the Ave Maria Suai church and Bishop Bello's house.

The Court was satisfied that the attacks that occurred involved mistreatment/assault of a particular group.

However, the same elements that were not satisfied in relation to the first offence were also not satisfied in relation to the second.

Before concluding their deliberations in relation to the second charge – the Court mentioned some further considerations. One such consideration was that the police had carried out their function in relation to the election in a way which was impartial and that in the chaos following the announcement of the result – the police headquarters, along with Church complexes and Pastors' houses, became one place where people from the pro-independence group, leading figures and UNAMET staff, sought protection. Another consideration was that the Court had received evidence, including letters from victims like Bishop Bello and Manuel Carascalao, which show that the accused carried out his duties despite the difficult circumstances.

The Court then held that the second charge against the accused was also not proven.