

The Office of the Public Prosecutor:
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Ms. Molly Groom
Counsel of the accused:
Mr. Nuno Pinheiro Torres, Beatriz Sanchez, Alvaro Maria Freitas

JUDGEMENT

**THE PROSECUTOR
v.
AGUSTINHO DA COSTA**

Judgement of: 11 October 2001

Registrar: Joao Naro

Judge Sylvester Ntukamazina, Presiding
Judge Maria Natercia Gusmao Pereira
Judge Benfeito Mossos Ramos

Before:

IN THE TRIAL CHAMBER

Case No. 07/2000
Date: 11/10/2001
Original: Bahasa Indonesia

SPECIAL PANEL for SERIOUS CRIMES

DILI DISTRICT COURT
East Timorese Transitional Administration

ETTA

UNITED NATIONS



NATIONS UNIES

INTRODUCTION

The trial of Agostinho da Costa (aged 30, married and father of three children, farmer, born in the village of Lasaun, Sub-district of Atsabe, District of Ermera, East Timor,) before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereafter: the “Special Panel”), responsible for the handling of serious criminal offences, commenced on the 9th May 2001 and concluded today, the 11th October 2001 with the rendering of the decision.

After considering all the evidence presented during the trial, and the written and oral statements from the office of the Prosecutor General (hereafter: the “Public Prosecutor”) and also the defendant and the defense for the defendant, the Special Panel

HEREBY RENDERS ITS JUDGEMENT.

A. THE SPECIAL PANEL

The Special Panels were established, within the District Court in Dili, pursuant to Section (hereafter “Sect.”) 10 of UNTAET Regulation (hereafter “U.R.”) no. 2000/11, in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of U. R. 2000/15. With regard to the serious criminal offences of murder and sexual offences, the Panels shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999, pursuant to Section 2.3 of U.R.2000/30.

B. PROCEDURAL BACKGROUND

On 30 November 2000, the Public Prosecutor presented before the Dili District Court a written indictment (in English version) with a charge of murder against Agostinho da Costa. Attached to the indictment were copies of the following documents, in Indonesian and Tetum (typed and handwritten): the statements of the accused (30.05.2000), the statements of the witnesses Ilda de Deus (22.12.1999 and 18.11.2000), Joaquina de Oliveira (29.12.1999) and Agapito Goncalves (29.12.1999), Report of Postmortem Examination dated 13 July 2000.

The Court clerk provided notification of the receipt of the indictment to the accused and to his legal representative, pursuant to Sect. 26.1 and 26.2 U.R. 2000/30 (pp.83-84).

On the 15th May 2001, the Public Prosecutor submitted to the Court the following original documents in English and Tetum language: Original statement of Joachina de Oliveira, Original statement of Agapito Goncalves, original statement of Augustino da Costa. On 13 June 2001, the Public Prosecutor also submitted additional documents, namely the original statement of the witness Ilda de Deus(22.12.1999) and the original autopsy report of Manuel de Oliveira.

Agustinho da Costa was arrested and detained on 30 May 2000. His arrest was then confirmed and ordered by the Investigating Judge. The Court decided to review the detention on the 22nd February 2001. On the 27th February 2001, the Defendant was granted conditional release, and the Court ordered his home detention as an alternative measure to an order of detention. Nevertheless, the accused was rearrested on 10 July 2001 by a decision of this court.

The preliminary hearing commenced on the 29th January and finished on the 9th May 2001. On 29 January 2001, the Defense requested to have the indictment translated in Tetum, since the accused does not understand English, language in which the indictment was presented before the Court. In response to that request, the Court ordered the Public Prosecutor to provide the translation of the indictment into tetum language. The preliminary hearing was postponed to 9 May 2001 for the Defence to prepare the case.

On 9 May 2001, the Court clarified with the accused the issue of his real name. The accused submitted that he was called Julio before he was given the baptist name of Augustino (p.221). The Public Defender argued that the documents submitted to the Court by the Public Prosecutor were without signatures and were only photocopies. He admitted also that he had lost some documents given by the Public Prosecutor. It was decided that the Public Defender could get the copies of the documents he needs from the Court which has in its possession original signed documents (pp.148-149).

The Public Prosecutor presented the request to amend the indictment filed on 7 March 2001 in order to clarify the theory of criminal liability. The Court rejected the proposed amendment as it was not relevant to the facts and would make the indictment unclear (p.92).

The Court checked if the defendant had read the indictment or if the indictment had been read to him, and asked if he understood the nature of the charges, his right to be represented by a legal advisor, his right to remain silent, to plead guilty or not guilty to the charge, as provided for in Sect. 30.4 U.R. 30/2000. The Defendant made a statement that he had read the indictment and understood the charges against him. The Court then accepted the list of evidence submitted by the Public Prosecutor. The Defence did not submit any list of evidence.

The Defendant did not enter a plea of guilt. He stated that he would surrender everything to his Public Defender. The Public Defender objected and requested to be given time to consult with the Defendant and then the Defendant made a statement and pleaded not guilty (p.150).

The ordinary trial was scheduled for the 21st June 2001 (p.150).

The trial was conducted over two sessions (21 June 2001 and 28 June 2001). On the 21st May 2001, the Court notified both parties that the rapporteur judge, considering that there were no audio or video recording apparatus, no stenographers and no shorthand writers available to the judicial administration in East Timor, would provide the record of the hearing. The rapporteur judge made a record after summarizing as accurately as possible in shorthand the statements and questions made by the parties and the questions, orders and decisions of judges during the hearing. The notes would then be typed in Indonesian and later be translated into English version. The Special Panel decided that this record was authoritative with regard to the one made by the Court clerk.

The Public Prosecutor read out the indictment in an open hearing, the Defendant did not wish to make any statement. The Court then examined the following witnesses under oath: Joaquina de Deus de Oliveira, Ilda de Deus and Agapito Goncalves.

The Defense requested that the Defendant be given an opportunity to make a statement, then be examined by the Court and both parties pursuant to Section 30.5 UR 2000/30. The Public Prosecutor objected by saying that this would not be the correct procedure. It would not be in accordance with the law and unfair if the Defendant was to make a statement and then be examined by the Court and both parties, after everyone else and the evidence had already been examined. The Public Prosecutor felt that if the Defendant wanted to address the Court pursuant Section 30.7 UR 2000/30, it is within the rights of the

Defendant and in accordance with the law, however the Defendant could not be examined by the Court and both parties.

The Defence submitted that it is in accordance of the rights of the accused to make such statement according to Section 33.1 and Section 30.5 of UNTAET Regulation 2000/30.

The Court rejected the request from the Defense and only allowed the Defendant to address the Court regarding any issue raised during the hearing, pursuant to Section 30.7 U.R.2000/30. The Court decided that it was not possible for the Defendant to make his statement according to Section 33.1 and 30.5 U.R.2000/30. First, the accused told the Court at the beginning of the trial that he does not wish to make any statement. Secondly, the law provides the rule concerning the sequence of presentation of evidence, which has to be followed unless otherwise ordered by the Court. In the present case, there was no request submitted by the defense to change that sequence of presentation of evidence. To ask for it after the presentation and hearing of evidence is too late. Moreover, the grounds advanced by the Defense for such a request are not relevant since the Defence simply advanced that the request is made in order to protect the rights of the accused, without specifying what kind of rights the Court has to protect.

The Accused decided to address the Court pursuant to Section 30.7 and substantially told the Court that there was no plan to kill. He was only carrying out an order and was afraid of Paul Babinsa (p.24).

The Public Prosecutor requested to consider as evidence the text A, C and D of Annex A to the indictment (Statement of the accused, Report regarding sketch diagram of exhumation of Manuel de Oliveira, Sketch plan of the grave site, Photographing the exhumation and autopsy site, Post mortem examination on the body of Manuel de Oliveira, as well as the photographs of the exhumation and gravesite, and photographs of the autopsy).

The Public Defender argued that the statement of the Defendant made before the Police previously could not be accepted as evidence (p.160)

The Court decided to grant the request of the Public Prosecutor, except for the statement of the accused, pursuant to Section 36.3 UR 2000/30. The Court decided that the statement of the accused made before Civpol cannot be considered as evidence, but can only be used to refresh the memory of the accused (p.161).

The court closed the presentation and hearing of evidence and then postponed the hearing to the 28th June 2001 for the parties to prepare their final statements.

On the 28th June 2001, the Public Prosecutor and the Public Defender submitted their respective final statements in writing (In English version only) and read them out. Then the court gave an opportunity to the Defendant to make any additional statement. He preferred to remain silent.

On the 10th July 2001, the Court read out to the public the verdict and sentence and adjourned the hearing to the 26th July 2001 to release the written judgment.

The hearing was postponed to the 11th October 2001 due to a trial of an important and complex case (Los Palos case) every day during July, August and September 2001.

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

C. APPLICABLE LAW

27 As specified in UNTAET Regulations No.1/1999, No.11/2000 and No. 15/2000, the Special Panel for Serious Crimes shall apply:

UNTAET Regulations and directives;
Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
Pursuant to Sect. 3 UNTAET Regulation No.1/1999, the law applied in East Timor prior to 25.10.1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as they do not conflict with the internationally recognized human rights standards, the fulfillment of the mandate given to UNTAET under the United Nations Security Council Resolution 1272 (1999), or UNTAET Regulations or directives.

Therefore, the Court will apply U.R.2000/15, U.R.2000/11, the Penal Code of Indonesia (hereafter PCI) and U.R.2000/30 on Transitional Rules of Criminal Procedure.

D. THE FACTS

Factual allegations of the case

The Prosecutor's factual allegations may briefly be set out as follows:

The Public Prosecutor alleged that Agustinho da Costa was a member of Team Pancasila from April 1999. He then performed service as a guard at the militia checkpoint at Lasaun village. On the 30 August 1999, the day of the ballot in East Timor, members of the armed forces of Indonesia identified the UNAMET staff member Manuel de Oliveira as a supporter of Falintil, who frequently hosted Falintil members at his home. Indonesian Military commanders therefore ordered the militia to chase Manuel de Oliveira. As Manuel knew that the militias were searching for him he hid outside his house in the bushes, and on the 31st August 1999, he went to the house of Agapito Goncalves in Batubale Atara. There, the two of them hid behind a stone. On the 31st August 1999, Team Pancasila Militia has formed two groups to search for Falintil members in the Lausan area in order to kill them. The accused Agustinho da Costa was part of the group and was carrying a rifle. At approximately 200PM militias members discovered Manuel de Oliveira and Agapito in their hiding place. They were arrested and tied up. Manuel was heavily beaten and stabbed by the militiamen. While Agapito Gonsalves was left at his house, Manuel was taken to the village office in Atara and was again heavily mistreated until he fell unconscious. The Defendant Agustinho was present at the village office and took part in the maltreatment of Manuel de Oliveira. Militia leader Babinsa Paul then ordered Augustino da Costa to take Manuel de Oliveira away and to kill him. The Defendant Agustinho da Costa and several other militia members forced Manuel Oliveira who was awoken from unconsciousness to walk towards the bridge across River Manledodo. Upon arrival the Defendant Agustinho da Costa, with other militia members, cut both hands of Manuel. They beat him until his teeth were removed and then cut his tongue. However, Manuel was still alive and the Defendant Agustinho da Costa fired two shots at him hitting him in his back, which finally caused his death. Another militia member by the name of Apolinario fired as well. The militia then buried the body at the scene of the crime.

In his final statement, the Public Prosecutor submitted that it was clear that Manuel died on the 31st August 1999, and it was not challenged that his death was caused by the shots of a rifle as this was in accordance with the autopsy report. Three witnesses that were presented, namely Joaquina, Ilda and

Agapito gave clear testimony that supported this fact without inconsistencies, and their evidence was not disputed. The witnesses identified that the Defendant was present when the arrest took place and also after the arrest, he was also present during the torture of the victim Manuel de Oliveira. It has been proven beyond doubt that the Defendant had deliberate intent and premeditation

The Defence admitted that Agostinho da Costa was among the militia member who killed Manuel de Oliveira. In the preliminary hearing and up until the final session the Defendant admitted positively his involvement in the killing of Manuel de Oliveira. But the circumstances surrounded the time when the murder was committed must be taken into account. The Public Defender submitted that the Defendant was only a small component in the large-scale plan that was planned by Indonesian leaders who wished to carry out a large-scale plan of intimidation and threats. The Defendant was only a tool in this complex web. The only eyewitness presented by the Prosecutor in this case was Joaquina, the daughter of the victim Manuel de Oliveira. It was stated in the courtroom that from the moment her father was captured in his hiding place until the moment he was killed the witness was following from a considerable distance, from such a distance she couldn't see exactly what was happening and what was said between the large groups of militia. The autopsy report stated that the victim was shot ten times, not three times, who fired the other shots? The Public Defender submitted that the statements of the Defendant during the final hearing and the preliminary hearings, which in essence stated that the Defendant was ordered and afraid that he would be killed, were not contested by any evidence presented by the Public Prosecutor, therefore should be considered as evidence.

Factual findings

33 The Court deems that the following facts have been proved in relation to what was charged and what the defendant acknowledged and the defense affirmed during the trial:

The conduct of the accused

The victims' cause of death and the link between the conduct and the outcome proved

The conduct of the accused

It is undisputed that the accused Augustino da Costa was a member of Team Pancasila Atsabe Militia. The Public Prosecutor submitted that the accused joined the militia group in April 1999 and that he was performing service as a guard at the militia check point at Lasaun village. The accused himself admitted before the Court that he was a militiaman who was acting under his leaders orders: "*I was carrying out an order of the militia leader Paul Babinsas*".

The fact the accused was a militia was also well known by other persons. The witness Joaquim Oliveira told the Court that "*(...) Julio was a militia member who came with a group to attack my village*". She knew already the accused before the attack and was able to recognize him before the Court (p.223). It is the same for the Witness Agapito Gonsalves who knew the accused before, because he lives in the village near by and they used to go to Same church together. He pointed towards Julio in the Courtroom and recognized him as a militia member who attacked Manuel de Oliveira.

It is also undisputed that, on 30 August 1999, the accused with other members of Team Pancasila Militia, carrying out an order of TNI Commanders, went to chase Manuel de Oliveira and discovered him on 31 August 1999 in his hiding place. He was arrested, tied up, beaten and finally killed by the militiamen including the accused Augustino da Costa.

During the preliminary hearing, the accused himself said before the Court that he was carrying arms and took part in the murder of Manuel de Oliveira.: "*(...) I was forced, I was following an order. If I did not obey the order, I would be killed. They told me that I would be in trouble. I felt afraid. The person who forced me fled to West Timor. I am the only one here. It was not my own decision, my own initiative, my own will*"(p.161)

The Public Defender agreed on that, based on what was stated by the Defendant. He recognized that Augustino da Costa was among the militiamen who killed Manuel de Oliveira, and that he himself had shot at the victim. For the Defense "*it seems quite easy to solve the question wether Augustino da Costa was involved, or not, in the killing of Manuel de Oliveira. Augustino da Costa himself admitted positively to his involvement in the killing*"(p.248).

What was admitted by the defendant in his statement and the Defense for the defendant must be considered in light of what was stated before the court by the witnesses Joaquina de Deus de Oliveira, Agapito Gonsalves and Ilda de Deus.

The eyewitness Joaquina de Deus de Oliveira, aged 16, a daughter of the victim Manuel de Oliveira, reported on what happened in the aforementioned village on the 31st August 1999 and on the death of her beloved father: “(...) *In 1999, at the end of August, the Militia (they) came and attacked our village (Atara). There was many of them, some had guns and some had machetes and knives. (...) They took my father out from behind the rock (...) they beat him, there was a lot of blood that came out of my father’s body (...) and finally Julio shot him dead. I knew Julio prior to that and I also knew Paul Berlelo (...) Delfin, Moises, they took my father out from his hiding place behind the rock. (...) Julio (...) came with a group to attack my village. (...) they took my father from the village office and headed toward the bridge/river. (...) I followed my father from a considerable distance but I could clearly see*” (p.222).

Then the witness confirmed several photographs of the scene of the crime where her father was killed, namely photograph no.3 (three). The witness showed to the court on the picture the place close to the bridge where her father was killed, the place where the witness was standing and the place where her father was buried. After witnessing all those cruel acts the witness went back to inform her mother.

The witness Ilda de Deus, mother of 12 children and wife of the deceased Manuel de Oliveira did not see the militiamen who attacked and killed her husband. It is her daughter who told her that her husband has been killed. She declared before the Court: “(...) *I only heard from my daughter Joaquina that my husband had been killed and buried near the bridge/river and I asked who killed him (p.232). Did you ask who killed him? Yes she said Julio killed him(p.234).*

Agapito Goncalves, the third witness presented by the Public Prosecutor, was with the victim Manuel when he was found by the Militia hiding behind the rock. They were taken and beaten by the militia including the Defendant Agustinho who fired shots. This witness stated that Julio fired shots. Prior to that the victim was beaten. This witness was also severely beaten unconscious. The witness admitted that he did not see how the victim Manuel was killed but he saw that Agustinho da Costa was one of the people beating him, however he then acknowledged that he was suffering as a result of his own beating. He reported to the court :” *I was hiding with Manuel behind a rock at a distance of about 7 metres (...) the person who arrested Manuel (...) was Julio, namely the defendant, Paul Berlelo, Moises, Delfin, they beat him, stabbed him in the stomach with a knife and the Defendant Julio shot him in the hand, then dragged him into the street and took him away to the bridge/river (...) I was also beaten and was tied up and I have suffered a respiratory illness since*”

(p.235). The witness did not see how Manuel de Oliveira was killed: “(...) *I saw him clearly until they brought him to the Office of the head of the village, then to the bridge, where he was killed. That was something I did not see because I was unconscious*”(p.235).

From the statement of the accused, which are corroborated by the statements of the witnesses, the Court concludes that there was an attack on 31 August 1999 against the victim Manuel de Oliveira. The Court deems also that the accused Agostino da Costa, as member of Team Pancasila Militia, participated in the attack against the victim. By searching him, finding him, beating him, and finally shooting him, the accused obviously participated, with others, to cause multiple wounds to Manuel Oliveira.

The victims’ cause of death and the link between the conduct and the outcome proved

It is not disputed that Manuel de Oliveira died. The body was able to be identified by the child and the wife of the victim. After informed by her daughter about the death of her husband, Ilda de Deus went to ask for the body of her husband, as she told the court during her testimony “(...) *After that I went with my children and other locals to obtain the body of my husband (...) I asked permission from the Indonesian Military in Atsabe to obtain the body of my husband but the Indonesian Military said that I had to obtain permission from Babinsa Paul (...) I went and return up to 45 times, I found Babinsa Paul and he gave permission. Therefore, I together with the local villagers could take my husband’s body*(p.233). The witness recognized the photo of the cemetery where her husband was buried. She also told the Court that she still remember UNTAET civpol staff who exhumed her husband body from the grave. She herself showed the grave, saw and was able to recognize her husband dead body”(p.234).

It is also not disputed that the cause of death was many shots fired against him. All the parties agreed on that and the eyewitness Joaquina Oliveira describes how her father died. She said: “ *[I] saw the militia prick my father many times with knives but he did not die. My father fell to the ground. I saw a man called Julio pointing a gun at my father as he laid on the ground and I heard 3 shots. I saw a lot of militia with guns but it was only Julio who was pointing a gun at my father when I heard the shots. My father did not move again after the shots were fired(...). I was crying and I went to my mother who was hiding near our house at Atara and I told my mother what I had seen happening to my father.*”

The autopsy report indicated that the victim's cause of death was a multiple gunshot wounds: one gunshot wound of neck and mouth, one gunshot wound on chest, four gunshots wound of abdomen, one gunshot wound of pelvis, one gunshot wound of left arm, one gunshot wound of right forearm, and one gunshot wound of right arms. There was also a blunt force injuries of left chest (pp.43-44).

The Public Defender only raise the issue of knowing which shots caused the wounds and the death of the victim. Because the autopsy report was not the same as what was stated by the witness Joaquina de Deus, where the witness stated that she saw the defendant fire three shots whereas the autopsy report proved that there were approximately ten wounds that caused the death of the victim, and not three.

The Defendant did not deny in his statements that he shot the victim. During the preliminary hearing and the trial hearing, he indicated that he shot the victim. During the trial hearing, the Defendant admitted also that he shot the victim twice, but said that he was not the only perpetrator and it was not him who shot dead the victim Manuel de Oliveira. It was the shot fired by his colleague Apolonario. He emphasised that his colleagues fired and he also fired but not in any particular direction. *"I only fired two shots in no particular direction"* (p. 27, no.5).

The Public Prosecutor objected that this statement of the accused could not be considered as evidence because made during the final hearing as an adress to the Court.

The Public Defender submitted that the statements of the Defendant during the final hearing as well as the one made during the preliminary hearing, which in essence stated that the Defendant was ordered and afraid that he would be killed, were not contested by any evidence presented by the Prosecutor, therefore these statements should be considered as evidence.

This Court does not consider the adress of the accused as evidence, but as a defendant's conclusion, which is not contested by any other evidence presented by the Public Prosecutor. Instead, it is corroborated by some other evidence that the accused was not the only person who shot the deaceded. Other members of his group also took part in the shooting and not he alone.

The autopsy report clearly shows that around ten shots have been fired against the victim's body. It is also the opinion of the Court that those shots

have been fired some by the accused, others by his colleagues members of Team Pancasila. The Court agrees with the accused when he says “*I was not the only one who fired a shot*” (p.27 no.5)

The Court did not agree that the accused fired only two shots in the air. This allegation of the accused is not logical and is different from the evidence before the Court. The witness Joaquina de Oliveira saw the accused point a gun to her father laid on the ground and she heard three shots (p.229).

From the statement of the accused and the testimonies of the witness Joaquina de Deus, it is clear that the accused shot, with others, the victim Manuel de Oliveira. On which part of the body? The Public Prosecutor said that the accused Augustino da Costa fired two shots at him hitting him in the back (p.3). But any witness was able to tell the Court where exactly the accused shot the victim.

The Public Prosecutor advanced also that Manuel da Costa was still alive when the accused shot him "*finally causing his death*" (p.3). The witness Ilda de Deus said that her father did not move after the shots made by Augustino da Costa. Does it mean that Augusto da Costa is the one who shot dead the victim? From the witness'testimony, the Court cannot conclude whether or not the accused 'shot were the one fatal for the victim. Many other shots have been done and hit the victim. What is important is that the accused participated in this attack, and caused wounds with others, which are the causes of the death.

As this Court has already find in a previous and similar case (The Public Prosecutor v. Joseph Leki , Judges Sylver Ntukamazina, Marcelo Dolzany da Costa and Maria Natercia Perreira Gusmao), “*regardless any consideration about which bullet caused the fatal wound that killed the victim, there are no doubts hat the accused fired at and also killed the victim*”(p.7).

The victim Manuel de Oliveira was killed because he was pro-independence activist. The witness Ilda de Deus told the Court that the militia knew that her husband was a pro-independence supporter “*(...) the militia had previously identified my husband as a supporter of independence and on a daily basis he gave food to Falintil* (p.231). She recognized herself that her husband was working and providing food for Falintil since 1975 (p.231).

The witness Agapito stated also that the victim was a teacher and also a staff member of UNAMET who at that time was working in the polling station “*(...) I was working with Manuel as a staff member of UNAMET for the*

Referendum which was organised for East Timor, specifically in the village of Lasaun (p.235).

It was submitted by the Public Prosecutor and not contested by the Defence that the pro-autonomy supporters did not tolerate that Manuel de Oliveira supported independence and worked with UNAMET. They took revenge.

The Defense submitted the belief that Babinsa Paul or another Commander gave a gun and threatened the defendant by pointing a pistol at his head in a particular circumstance. The Public Defender justified the actions of the defendant as a reaction to duress from his commander.

The Court has to assess the individual criminal responsibility of the murder and its exemption by duress.

The witness Joaquina stated that she did not see others giving a gun or pointing their guns at Julio to force him to kill her father. She admitted that it was exactly the opposite; Julio pointed his gun at her father and she did not see anyone else giving a gun to Julio. The witness admitted that the gun previously belonged to the Defendant Julio and that the gun was quite big (p.227). This version of facts where the accused were given a gun or pointed a gun is unbelievable.

The alleged duress can be assessed not only the day the accused attacked Manuel de Oliveira, as stressed by the accused who told the Court he was ordered, but also along his whole activity in the militia group. The accused joined the militia four months before the attack. He could refuse to join. The witness Agapito Gonsalves told the Court that in his village, militia forced local population to join. But they refused because they did not wish to kill people. They were able to resist by hiding in the forest. Only one person (and he told the Court his name) agreed to join and became militia (pp.237-238). The Court is of the opinion that from the time he joined until the moment of the attack, he could escape, like many others who went to hide in the forest.

No one should be supposed to stand a heroic behavior by challenging the alleged constraint to join. However, the Court is persuaded that the accused could escape like many other persons who resisted joining the militia. The accused chose to be in line with the militia groups.

By going with other Militia members to attack Manuel de Oliveira carrying guns, knife, with immediate involvement in the attacks, the accused had deliberate intent to provide sufficient means to accomplish the purposes of the

militia group. The attack of Manuela Oliveira in particular was not a casual fact; they were carried out as a part of a longer planning to commit violence against the people who they believed supported independence of East Timor and especially Manuel de Oliveira because he was helping Falantil and working for UNAMET.

Section 14.3 of UR-2000/15 provides that “a person shall be individually responsible and liable for punishment for a crime within the jurisdiction of the panels if that person, (a) commits such a crime, whether as an individual, jointly with another, (...), (c) for the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission, (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the commission of such a crime, aids, abets or otherwise assists in its commission. The accused committed the murder jointly with others. At least he will be responsible for the contribution to the murder of Manuel de Oliveira. The evidence that he was carrying a gun, and that he himself shot towards the victim, as the Court could assess above, enhances his performance to the results. From the time when he joined until the operation, he had many chances to refuse to share the purposes of the militia group. The Court is convinced that his personal condition was not worse nor better than what forced the rest of the population who fled to the forests.

Sect. 19.1(d) of U.R 2000/15 provides that “the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that persons or another person, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be made by other person or constituted by other circumstances beyond that person’s control ”.

The Special Panel deems that the aforementioned circumstance of exclusion of criminal responsibility is not applicable to the murder committed by Augustino da Costa since he joined the purposes of the group. By joining also the operation launched on 30 and 31 August 1999, he previously and intentionally shared the aim of furthering the criminal activity of the group (Sect. 14.3(a)[I] UR-2000/15). Even though he did not share these criminal purposes, the Special Panel has no doubts that the accused gave his contribution

“in the knowledge of the intention of the group to commit the crime” (Sect. 14.3(d)[ii] UR-2000/15).

The accused stated that he was ordered by Babinsa Paul (a Member of TNI), and he was just an ignorant person who was carrying out an order and none of what happened was his intention. (p.161).

“The fact that an accused acted pursuant to an order of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment...” (Sect. 21 of U.R. 2000/15). The accused alleged that he was not willing to kill, but he was following orders. He was afraid and if he did not follow the orders and attack Manuel de Oliveira, he would have been killed. It has been proved that Augustino da Costa was acting following an order of a superior, but, as says the law, such circumstance shall not result in impunity, but in an easing punishment.

The actions of the defendant can not be justified because he is an ignorant person who is illiterate. Even an illiterate person does know to distinguish good things from bad things.

It is clear Augustino da Costa participated in the attack and killing of Manuel de Oliveira, on 31 august 1999, pursuant to what is considered as individual criminal responsibility according to UNTAET regulations.

THE LAW

52 The Special Panel deems that the evidence on record proves beyond any reasonable doubt that all the essential elements of murder – as alleged in the charge made by the Public Prosecutor – are met.

Pursuant to Sect. 8 U.R. 15/2000 and Article 340 PCI, “the person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished...”

The evidence clearly show that the element of “the person” in this case is Julio da Costa who was given the baptist name of Agustinho da Costa

The *actus reus* of murder is "taking the life of another person". The evidence clearly shows that Agustinho da Costa and his co-perpetrators attacked Manuel de Oliveira and killed him. He was one of the people who shot Manuel de Oliveira. More than ten shots struck the body of the victim and

caused his death.

The mental element for murder is deliberate intent and premeditation. A deliberate intent is that in law, a person intent the consequences of his voluntary act when he desires the consequences to happen, whether or not he foresees that it probably will happen, or when he foresees it probably will happen, whether he desires it or not. It is clear that Augustino da Costa shot the victim many times. The distance between Agustinho da Costa and the victim was very close, a position where it would not be difficult to think about the result. It was clear that the Defendant Agustinho da Costa intended the death of the victim.

Premeditation is often used to denote a plan, and means that there is a time between when the intent to murder arises and when the intent is actually realized. Agustinho da Costa knew and could calmly think about how the murder is to be committed. For him, it was sufficient to be aware he was contributing to all the results he had undertaken by joining the group. The evidence shows that Manuel de Oliveira had been identified by members of the military and militia for some time because of his involvement with Falintil and pro-independence supports. The militiamen had been looking for him since the day the Referendum for East Timor was carried out, namely the 30 August 1999. However, they were unsuccessful. On the 31st August when Manuel was hiding behind a rock with the intention of protecting himself, the militia group came and arrested, tortured, beat and killed him. The time between when the decision arose to search for the victim and when the shots were fired can be assessed as the element of *premeditation*.

Even if Agustinho da Costa was not the main murder perpetrator, his individual responsibility is met in Sect. 14.3(c and d) of UR-2000/15.

Pursuant to the consideration of the aforementioned elements, it is found legitimately and in accordance with the law that the Defendant has committed on the 31st August 1999 the crime of murder as specified in Sect. 8 U.R. 2000/15 and 340 of PCI.

F. VERDICT

75 For the aforementioned reasons, the Special Panel is satisfied that the Public Prosecutor has proved the case against the accused beyond reasonable doubt and therefore finds Agustinho da Costa guilty of murder, as a violation of Sect. 8 U.R. 2000/15 and article 340 of PCI.

G. SENTENCING

Pursuant to these findings of guilt, the Special Panel will proceed to sentence Agustinho da Costa, in order to determine the appropriate penalty.

According to the applicable law, in particular Art. 340 of PCI, the penalties that the Special Panel could impose on a person convicted of murder are capital punishment, life imprisonment or a maximum of 20 years of detention. U.R. # 1999/1, Sect. 3.3, excludes capital punishment. Finally, U.R. # 15/2000, Sect. 10, excludes life imprisonment by providing that it has to be for a specified numbers of years, which may not exceed a maximum of 25 years.

The Public Prosecutor urge the Court to take the following factors into consideration, in passing the sentence: (a) the time or the period the offence was committed, (b) the victim, (c) the manner in which the crime was committed.

(a) For the Public Prosecutor, this was a period that the two groups that supported and opposed integration agreed to have a free and fair ballot to decide this issue. Thus it was uncumbent on each of the groups to honour this agreement and to safeguard the rights of the citizens. Therefore the attack on the victim who was a member of the UNAMET staff is not only an attack on the individual but also should be considered as an attack on the civil society that tries to uphold democracy.

(b) The victim was wounded and tortured merely because his thinking differed from the perpetrators of this crime. It is not an isolated incident, but a premeditated and a planned attack by a lethally armed gang against an innocent unarmed citizen who was trying to run for his life. He was targeted because he worked for the UN as a UNAMET staff member and because he had fed FALANTIL members. He left behind a wife and 12 children.

(c) The manner in which the offence was committed. The Autopsy report gives a good description of the number of injuries the victim suffered. It totals

more than ten. According to witnesses, victim was not killed at once, he was made to suffer. After stabbing and shooting the victim at place where he was detained, he was dragged and taken to the village office. The daughter said her father was lying on the village office floor for a long time and then from there he was made to walk all the way to the bridge. On the way too he was tortured before he was finally shot. The Public Prosecutor then submitted that the accused had acted in a most inhuman way, which cannot be condoned by any measure.

The Prosecutor then recommended a sentence of at least 15 years.

The defendant did not plead guilty and the trial had to be conducted.

The Public Defender underlined that Agustinho da Costa, since the preliminary hearing freely admitted the participation in the killing of Manuel de Oliveira. He did not deny the participation in the murder nor plead no guilty. He always acted in good faith during the proceedings. He acted pursuant to an order of a superior. All his actions were taken under the authority of the Indonesian leader Paul Babinsa.

The Special Panel has taken into account the following:

Aggravating circumstances:

The Special Panel is of the opinion that the victim was killed because of his political opinion different from the perpetrators of the crime. He was targeted because he was pro-independence activist, he had fed Falintil members and was working for UNAMET. He left behind a wife and 12 children.

Before the victim Manuel was killed he was beaten, wounded and tortured in the most sadistic and inhumane way, a situation that the Defendant could have avoided. On the contrary the Defendant acted with the group in carrying out a most sadistic murder.

Mitigating circumstances

The defendant was ordered to look for and kill pro-independence and Falintil supporters. The Defendant carried out an order of Paul Babinsa. Therefore the Special Panel deems that this specific circumstance is provided for in Section 21 U.R. 2000/15 and can be applied in this case.

The Special Panel bears in mind that the accused is married with three children. However this may be said of many accused persons and cannot be given any significant weight in a case of this gravity. Moreover, he did not feel sorry to kill the victim, married like him and father of 12 children.

The accused has no previous convictions.

Sentencing policy

According to Sect. 10 U.R. 2000/15, for the crimes referred to in Sect. 8 of the aforementioned regulation “the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor (i.e. the PCI) shall apply”. “In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person”.

The penalties imposed on accused persons found guilty by the Special Panel must be directed, on one hand, as retribution of the said accused, who must see their crimes punished (*punitur quia peccatur*). Over and above that, on other hand, as deterrence, namely to dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of law and human rights (*punitur ne peccetur*).

Finally, the objective to prosecute and punish the perpetrators of the serious crimes committed in East Timor in 1999 is to avoid impunity and thereby to promote national reconciliation and the restoration of peace.

Taking into account the mitigating circumstances, the gravity of the crime and the abovementioned consideration, the Special Panel, deems appropriate the punishment of 15 (fifteen) years imprisonment.

H. DISPOSITION

69 For the aforementioned reasons, having considered all the evidence (statements from the witnesses and the defendant before the Court, the reports that supports the indictment, photographs of the exhumation, of the gravesite and of the autopsy) and the arguments of the parties, the transitional rules of Criminal Procedure, the Special Panel finds and imposes sentence as follows:
With respect to the defendant AGUSTINHO DA COSTA:

GUILTY for the charge of murder, in violation of Section 8 of UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia;

In punishment of the crime, sentences AGUSTINHO DA COSTA to an imprisonment of 15 (fifteen) years.

Orders the defendant to pay the costs of the criminal procedure

Credit for time served

70 According to Section 10.3 U.R. 15/2000, section 42.5 UR-30/2000 and Article 33 of Indonesian Penal Code, the Special Panel deducts the time spent in detention by AGUSTINHO DA COSTA, due to an order of an East Timorese Court. The defendant AGUSTINHO DA COSTA was arrested on 30 May 2000 and released on the 27 February 2001. He was rearrested on 16 July 2001. The defendant was detained for 11 months and 23 days, accordingly, previous detention shall be deducted from the sentence today imposed. Together with such additional time, he may serve pending the determination of any final appeal.

Enforcement of sentence

Pursuant to Sections 42.1 and 42.5 of UR-2000/30, the convicted shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.

The sentence shall be executed immediately.

This decision is provided in one copy to the Defendant and his legal representative, Public Prosecutor and to the prison manager as a Warrant of Arrest.

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

This Judgment was rendered and delivered on the 11th July 2001 in the District Court of Dili by

Judge Sylver NTUKAMAZINA (presiding)
Judge MARIA NATERCIA Gusmão Pereira
Judge Benfeito MOSSO RAMOS

(Done in English and Bahasa Indonesia, the English text being authoritative)