



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE
RDTL
TRIBUNAL DISTRIITAL de DILI
SECÇÃO CRIMES GRAVES

DISTRICT COURT of DILI
SPECIAL PANELS for SERIOUS CRIMES

Case No. 4 / 2003
Date: 16 November 2004
English original

Before: Judge Siegfried Blunk, Presiding
Judge Samith de Silva
Judge Maria Pereira

The Deputy Prosecutor-General for Serious Crimes
v.

Agostinho Cloe, Aghostinho Cab, Lazarus Fuli, Antonio Lelan

JUDGEMENT

For the Prosecution:
Mr. Charles Nsabimana

Defense Counsels:
Mr. Regu Thamburan, Ms. Radmilla Dimitrijevic, Ms. Chitra Subramoni

A. THE SPECIAL PANELS

1. The Special Panels for Serious Crimes in East Timor (hereinafter: Special Panel) were established within the District Court of Dili pursuant to Sec. 10 UNTAET Regulation (hereafter "Reg.") 2000/11 as amended by Reg. 2001/25, in order to exercise jurisdiction (inter alia) over Crimes against Humanity as specified by Sec. 1.3 (c) Reg. 2000/15, among them the criminal offences of the Crime against Humanity of Murder (Sec. 5.1 (a) Reg. 2000/15), the Crime against Humanity of Torture (Sec. 5.1 (f) Reg. 2000/15), and the Crime against Humanity of other Inhumane Acts (Sec. 5.1 (k) Reg. 2000/15).

All Regulations referred to in this judgement, have been upheld by Section 165 of the Constitution of the Democratic Republic of East Timor, which came into force on 20 May 2002.

2. According to Sec. 3 Reg. 2000/15 the Special Panel shall apply foremost

- the law of East Timor as promulgated by Sec. 3 Reg. 1999/1, which are "the laws applied in East Timor prior to 25 October 1999"
- subsequent UNTAET Regulations.
- subsequent laws of democratically established institutions of East Timor.

3. The Special Panel has held that "the laws applied in East Timor prior to 25 October 1999" were Indonesian laws (Prosecutor v. Joao Sarmiento and Domingos Mendonca, Decision, 24 July 2003). This opinion was confirmed by Sec. 2.3 (c) Law (of East Timor) No.10/2003 published on 10 December 2003.

B. PROCEDURAL BACKGROUND

4. On 15 February 2003 in Case 4 / 2003 against Anton Lelan Sufa & 7 others the Public Prosecutor filed before the Special Panel a written indictment inter alia against the accused charging them with the Crimes against Humanity of Murder and Torture.

The Court Clerk provided a notification of the receipt of the indictment by the accused on 19 March 2003 pursuant to Section 26 Reg.2000/30.

The Preliminary Hearing was held on 24 October 2003 according to Sec. 29 Reg. 2000/15.

After the International Judge to whom the case had been assigned, returned to her home country, the case was reassigned to the present (presiding) International Judge on 5 February 2004.

As the Defense Counsels of several co-accused had insinuated during the Preliminary Hearing that their clients might plead guilty, Court Orders were issued on 27 February and 4 March 2004 requesting the Defense to state unequivocally within a certain time limit whether these co-accused will plead guilty; if not, to specify evidence and name witnesses according to Sec. 29.2 (e) Reg. 2000/30.

The Defense Counsels on 12 March 2004 requested extension of the time limit, asserting that it had not been possible to consult with their clients in their village due to lack of a bridge over a flooded river. The Court on 15 March 2004 issued an order extending the time limit until 20 April 2004, and scheduled a pre-trial conference for 27 April 2004.

5. Following a Court Order dated 11 March 2004 which pointed out to the Prosecution that the facts alleged in the indictment did not sufficiently support the charge of torture, and that it could not be ascertained for a certain count of the indictment which accused persons were charged with which form of responsibility, the prosecution on 22 March 2004 sought amendments, replacing the charge of the Crime against Humanity of Torture by the Crime against Humanity of Other Inhumane Acts, and charging the accused in the remaining counts with being responsible "as individuals" without specifying with which of the various forms (theories) of responsibility according to Sec. 14.3 (a) – (d) Reg. 2000/15 they were being charged.

The Defense on 7 April 2004 objected to this on the grounds that, without specification of a certain form and category of responsibility, the accused were insufficiently aware of the charges, and were hampered in preparing their defense, wherefore the Defense prayed the court to order the prosecution to detail the category of responsibility, and failing that, to dismiss the charges.

After the Court granted leave in a decision dated 6 July 2004 to further amend the indictment in accordance with the views expressed in that decision, an amended indictment was submitted on 23 July 2004, to which the Defense on 9 September 2004 objected mainly on the grounds that it did not state the category of individual responsibility for each offense, and prayed for a court order to call upon the prosecution to remedy this defect.

Also, in the amended indictment the Prosecution withdrew the charge against one co-accused (Lazarus Tael).

6. The Court on 13 September 2004 decided to reject the prayer of the Defense, and gave leave to amend the indictment, stating that although from Reg. 24.1 (b) Reg. 2000/30 can be deduced that the indictment, when it charges the accused with individual responsibility, should state which of the various categories of individual responsibility contained in Sec. 14.3(a) – (d) Reg. 2000/30 they are being charged with, the panel in its present composition and its majority did not regard this as a compulsory, rather as a voluntary requirement because given the difficulties of investigation and translation in Timor-Leste, it will often be difficult to ascertain at the investigational stage the precise category of individual responsibility to be taken into account, and this will often only be clarified during the presentation of evidence before the Court.

7. A fourth member was added to the panel on 18 October 2004 according to Sec. 19.1 Reg. 2000/30, because the availability of an international judge on the panel until the end of the trial was doubtful.

8. The trial hearing commenced on 22 October 2003. After the accused pleaded guilty but several co-accused did not, the cases of the co-accused were severed (and renumbered Case 4 a, 4 b, 4 c / 2003) so that the Court in compliance with OP 8 Security Council Resolution 1543 could finish the case against the accused as soon as possible. Interpreters for English, Tetum and Baiceno (a language spoken in the district of Oecussi) assisted before the Court.

C. ACCOUNT OF THE PROVEN FACTS

(according to Sec. 39.3 (c), (d) Reg. 2000/30)

9. According to the guilty pleas of the accused which in themselves were credible and basically without contradictions, the Court is convinced of the following facts:

10. In September 1999 the accused, illiterate subsistence farmers aged about 44, 28, 47, 24 –29 respectively (in order as p.1) were members of the "Sakunar" militia, that was organized and controlled by the Armed Forces of the Republic of Indonesia which was illegally occupying East Timor despite its declaration of independence on 28 November 1975. The main purpose of this militia was to terrorize civilians who were suspected as independence supporters. The East Timorese civilians Anton Beto, Leonardo Anin and Francisco Beto had been suspected as such.

The leader of the "Sakunar" militia for Bebo village was Anton Lelan Sufa (who was convicted in Case 4a /2003), who commanded a militia group, to which the accused East Timorese citizens belonged.

On 16 September 1999 in the village of Netensuan in Oecussi, East Timor, Anton Lelan Sufa ordered the accused to attack the East Timorese civilians Anton Beto, Leonardo Anin and Francisco Beto.

a) After Anton Lelan Sufa had specifically ordered the accused Agostinho Cloe, and two other members of the group, namely Lino Beno (convicted in Case 4b/ 2003) and Domingos Metan (convicted in Case 4c /2003), to kill **Anton Beto**, the accused Agostinho Cab shot an arrow into Anton Beto's throat and hit him hard on the head with a stone. Lino Beno and Domingos Metan stabbed him with large knives.

As a result of the combined wounds the victim died within minutes. The accused knew that such wounds were likely to cause death.

b) After Anton Lelan Sufa had specifically ordered the accused Agostinho Cloe, Lazarus Fuli and Antonio Lelan to kill **Leonardo Anin**, the accused Agostinho Cloe, Lazarus Fuli and Antonio Lelan led Leonardo Anin behind a house, where the accused Antonio Lelan struck Leonardo Anin with a machete, and the accused Lazaru Fuli stabbed him with a knife.

The victim died quickly of his wounds; the accused knew that this would be likely. The accused Agostinho Cloe (who did not inflict any wounds himself) knew when he took part in leading the victim behind the house that the others were able and willing to kill him.

c) After **Francisco Beto** had been dragged by militia members to a clump of bamboo where he was tied up, the accused Agostinho Cloe and Lazarus Fuli together with Lino Beno and Domingos Metan severely beat and kicked him for about half an hour in view of other villagers.

11. These acts were part of a country-wide campaign of violence organized and controlled by the Indonesian Armed Forces to intimidate and punish independence supporters, particularly after the population of East Timor in the Popular Consultation held on 30 August 1999 had overwhelmingly voted against remaining an (autonomous) province of Indonesia.

The accused were aware of this context.

D. LEGAL FINDINGS

1. Crime against Humanity of Murder

12. The accused, by taking part in the attack against Anton Beto and Leonardo Anin committed with arrows, knives, a machete and a stone intentionally contributed to the victim's death.

They acted purposely in collaboration, and therefore have to be held accountable as co-perpetrators for causing the death of Anton Beto and Leonardo Anin, even if a certain accused did not inflict a wound himself, and without the Court having to determine whether death would have been caused solely by the wounds inflicted by a certain accused.

The accused knew that the criminal acts were part of a systematic attack on a civilian population.

13. The accused therefore committed the Crime against Humanity of Murder under customary International Criminal Law as recognized by Art. 6 (c) Nuremberg Charter, Art.5 (c) Tokyo Charter, Art. 5 (a) ICTY Statute, Art. 3 (a) ICTR Statute, Art. 7.1 (a) ICC Statute, and pursuant to Sec. 5.1(a) Reg. 2000/15.

14. The fact that Reg. 2000/15 did not yet exist when the criminal acts were committed, is irrelevant, because the Crime against Humanity of Murder is not based on written, but on **customary** law, and has been accepted as such by the International Community for more than half a century. In International Criminal Law it is unnecessary to have provisions similar to the ones contained in national penal codes specifying offences; what is necessary are statutes defining the jurisdiction of the International Tribunals. This was expressed with clarity in ICTY, Delalic Decision, 15 Oct. 1999 para 26:

"... the Tribunal's Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which are already part of customary law."

For the same reason the conviction of the accused of a crime under customary International Law cannot violate the principle *nullum crimen sine lege*: unwritten customary law is law (*lege*) just as written law. This is recognized by Sec. 9.1 Timorese Constitution, according to which customary principles of international law are part of the legal system of East Timor. Since this Section is part of the "Fundamental Principles" of the constitution, it obviously takes precedence over the personal right in Sec. 31.5 Timorese Constitution, that criminal law shall not be enforced retroactively.

15. Unlike the crime of Murder under the national law of most countries, the Crime against Humanity of Murder under international law does not require deliberate intent or premeditation (ICTR, Akayesu, Judgement 2 Sept. 1998, para. 589-590; ICTY, Blaskic, Judgement, 3 March 2000 para. 217; Special Panels, Marques, Judgement, 11 Dec. 2001 para. 649). It is sufficient that the perpetrator intended to cause grievous bodily harm with the knowledge that it was likely to cause death, which in this case each accused was aware of.

Each accused committed the offense jointly with others in the sense of Sec. 14.3 (a) Reg. 2000/15, wherefore he bears individual responsibility.

16. There are no grounds for exclusion of criminal responsibility:

a) The assertion by Agostinho Cab that he would have been killed by Anton Lelan Sufa, if he had not followed him, was unsubstantiated and incredible; the assertion by his Defense Counsel that he was afraid he would be killed, as he had seen others been beaten up for disobeying orders, was contradictory. Therefore he cannot successfully plead coercion (Sec. 19.1 (d) Reg. 2000/15).

The same applies to the claim made by the Defense of Antonio Lelan, that in case of disobedience he would be killed "or" have his house burnt down.

Equally unsubstantiated was the assertion by Agostinho Cloe that the Babinsa had told them if they did not leave (as ordered) they "would all be dead"; no threat of *imminent* death (as required by (Sec. 19.1 (d) Reg. 2000/15) can be inferred from this.

The same applies to Lazarus Fuli who asserted that Anton Lelan Sufa had "something sharp in his hands, and he forced us", particularly as the four accused were carrying weapons as well.

b) Even if Anton Lelan Sufa were to be considered as a "superior" in the sense of Sec. 21 Reg. 2000/15 pursuant to whose orders the accused acted, this would not relieve them of criminal responsibility, but would only be a mitigating factor. Since the Court has considered the fact that the accused regarded Sufa as their commander a mitigating circumstance (*infra* para. 20), the issue can be left undecided in the case of these accused (for Anton Lelan Sufa see Case 4a / 2003).

17. The Special Panels have exclusive jurisdiction over the Crime against Humanity of Murder according to Sec. 2.1 Reg. 2000/15. Since both the accused and the victims are East Timorese citizens, and the offense was committed in East Timor, the question of the universal jurisdiction of the Special Panels (Sec. 2.2. Reg. 2000/15) does not arise.

2. Crime against Humanity of Other Inhumane Acts

18. The accused Agostinho Cloe and Lazarus Fuli, knowing they were taking part in a systematic attack on a civilian population, by beating and kicking Francisco Beto (together with Anton Lelan Sufa, Lino Beno and Domingos Metan) for about half an hour in front of the victim's fellow villagers, although he was tied down and helpless, committed the Crime against Humanity of other Inhumane Acts as recognized by Art.6 (c) Nuremberg Charter, Art.5 (c) Tokyo Charter, Art. 5 (i) ICTY Statute, Art. 3 (i) ICTR Statute, and Art. 7.1 (k) ICC Statute, and pursuant to Sec. 5.1(k) Reg. 2000/15.

For this criminal offense it is sufficient to deliberately cause serious physical suffering of comparable gravity to the other crimes against humanity (ICTR, Kayishema and Ruzindana, Sentencing Judgement, 21 May 1999, para. 585) thus committing acts that are similar in gravity to the enumerated acts (ICTY, Tadic, Judgement, 7 May 1997, para. 729). The Court, in the case of the accused, because of the abovementioned special circumstances of the beating considers this threshold of gravity to have been surpassed.

Since each accused again acted "jointly with another" (Sec. 14.3 (a) Reg. 2000/15) he is accountable for the beating and kicking acts of his co-perpetrators, without the Court having to determine whether the acts of each accused alone would have surpassed the required threshold of gravity.

There are no grounds for exclusion of responsibility for the reasons stated *supra* para. 16.

3. Conjunction of punishable acts

19. Since the accused Agostinho Cloe and Lazarus Fuli committed several acts (killing of Leonardo Anin / Anton Beto and beating of Francisco Beto) the Court according to Sec. 3.1 Reg. 1999/1 has to apply Articles 63 - 65 of the Indonesian Penal Code (IPC), which for these two accused leads to the following result:

Since the acts were committed in close proximity of space and time, and as part of a single attack on the inhabitants of a certain village, following orders by the same person, they appeared to the Court as one continuous act in the sense of Art. 64.1 IPC (as in Special Panels, Mendonca, Judgement, 13 October 2003, para. 142) so that only one penalty had to be imposed, instead of several (and a total) as in the case of Art. 65 IPC.

E. SENTENCING

1) Aggravating and mitigating circumstances

20. Aggravating is the brutality and callousness of the killings of Anton Beto and Leonardo Anin, and the extent of the degrading and vicious beating of the defenceless Francisco Beto.

Particularly aggravating is, that the accused committed these crimes against their fellow-countrymen in the interest of a foreign power that was illegally occupying their home country.

A mitigating factor is that they felt compelled to follow orders by Sufa, whom they considered as their commander.

Further mitigating is, that they were illiterate farmers who must be considered as victims of circumstance themselves, as they would not have committed the crimes without the despicable system of the Indonesian Armed Forces (TNI) to pit one part of the local population against another, and the campaign of militia violence unleashed by TNI after the Popular Consultation had turned out to be unfavourable to them.

Each accused pleaded guilty to the charges at an early stage of the trial, thus enabling the Court to turn its resources to other cases.

The Court also took into account that each accused has to provide by farming for a wife, several children and other dependants, so that a prison term is particularly harsh for him. On the other hand, for such grave crimes justice must be seen to be done, so that they could not be spared a prison sentence.

In the case of Agostinho Cloe a mitigating circumstance is, that he alone did not inflict a wound on a murder victim, but only participated in leading Leonardo Anin behind the house, where he was later killed by others.

2. Sentencing policy

21. In its sentencing policy the Court according to Sec.10.1 (a) and 10.2 Reg. 2000/15 had recourse to the general practice in the courts of East Timor and in the International Tribunals, and took into account the individual circumstances of each accused and the gravity of his offenses.

22. The sentencing aims of the Court were deterrence, retribution, reconciliation and reprobation. Most prominent in accordance with the Security Council's general aim of restoring and maintaining peace were deterrence and retribution (see ICTY, Erdomevic Sentencing Judgement, 19 November 1996, para. 58). For violations of international law the most important aim is deterrence (ICTY, Delalic, Judgement, 16 November 1998, para. 1234). In East Timor there is an additional requirement for deterrence because just across the border live hundreds of recalcitrant ex-militia men with the capability of once again destabilizing this country by means of murder.

The aim of reconciliation is particularly important in East Timor after a quarter century of strife and turmoil, which in many parts of the country amounted to civil war.

Reprobation in the case of the accused however plays a lesser role because, as stated above, they were victims of a unique historical situation and are unlikely to commit similar crimes in future.

Under these circumstances, a term of five years of imprisonment for Agostinho Cab, Lazarus Fuli and Antonio Lelan is necessary, but also sufficient to achieve the abovementioned sentencing aims.

For Agostinho Cloe, who did not inflict any wounds himself, four years were considered appropriate.

23. Because all accused pleaded to be able to return home before commencing their prison term in order to make arrangements with their many dependants for their long term of absence, and also to make preparations on their farms for the impending monsoon season, the Court ordered them to start the prison term only after 4 weeks.

Against these requirements of the accused the Court weighed the risk of flight, but deemed this risk comparatively small due to the strong Timorese tradition, rooted in "Adat", of taking responsibility and paying respect to authority.

24. For the foregoing reasons the Court on 27 October 2004 rendered the following

Disposition of the Decisions:

25. The Court convicts and sentences the accused **Agostinho Cloe** as follows:

1. The accused is guilty of
 - a) the Crime against Humanity of Murder according to Sec. 5.1 (a) Reg. 2000/15 committed against Leonardo Anin, in conjunction with (in the sense of Art. 64.1 IPC)
 - b) the Crime against Humanity of Other Inhumane Acts according to Sec. 5.1 (k) Reg. 2000/15 committed against Francisco Beto,

and is sentenced to 4 (four) years of imprisonment.

2. The accused has to bear the cost of the proceedings against him as regulated by law.
3. The accused is ordered according to Sec. 42.6 Reg. 2000/30 to commence his prison term on Thursday 25 November 2004.

26. The Court convicts and sentences the accused **Agostinho Cab** as follows:

1. The accused is guilty of the Crime against Humanity of Murder according to Sec. 5.1 (a) Reg. 2000/15 committed against Anton Beto,

and is sentenced to 5 (five) years of imprisonment.

2. The accused has to bear the cost of the proceedings against him as regulated by law.
3. The accused is ordered according to Sec. 42.6 Reg. 2000/30 to commence his prison term on Thursday 25 November 2004.

27. The Court convicts and sentences the accused **Lazarus Fuli** as follows:

1. The accused is guilty of

a) the Crime against Humanity of Murder according to Sec. 5.1 (a) Reg. 2000/15 committed against Leonardo Anin ,

in conjunction with (in the sense of Art. 64.1 IPC)

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b) the Crime against Humanity of Other Inhumane Acts according to Sec. 5.1 (k) Reg. 2000/15

committed against Francisco Beto

and is sentenced to 5 (five) years of imprisonment.

2. The accused has to bear the costs of the proceedings against him as regulated by law.

3. The accused is ordered according to Sec. 42.6 Reg. 2000/30 to commence his prison term on Thursday 25 November 2004.

28. **Antonio Lelan**, born 3/ 6 / 70 in Bebu, Oecussi
(named in the indictment as "Anton Lelan Simao")

The Court convicts and sentences the accused Antonio Lelan as follows:

1. The accused is guilty of

the Crime against Humanity of Murder according to Sec. 5.1 (a) Reg. 2000/15 committed against Leonardo Anin,

and is sentenced to 5 (five) years of imprisonment.

2. The accused has to bear the costs of the proceedings against him as regulated by law.

3. The accused is ordered according to Sec. 42.6 Reg. 2000/30 to commence his prison term on Thursday 25 November 2004.

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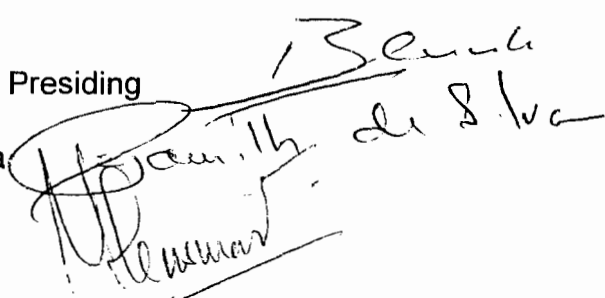
29. The convicts shall serve their prison terms in East Timor.

30. Each convict is informed that he can appeal the decision pertaining to him by filing a Notice of Appeal no later than 10 (ten) days after the release of this decision.

Judge Siegfried Blunk, Presiding

Judge Samith de Silva

Judge Maria Pereira



(To be translated into Tetum, the English text remaining authoritative)