



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

**TRIBUNAL DISTRICTAL de DILI
SECÇÃO CRIMES GRAVES**

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Case No. 1/2003

Date: 10/12/2003

Original: English

DOUTOR.

Judge Maria Naterçia Gusmão Pereira, Presiding

Judge Sylver Ntukamazina

Judge Siegfried Blunk

Registrar: Joao Naro

Judgement of: 10 December 2003

THE PUBLIC PROSECUTOR

V.

DAMIAO DA COSTA NUNES

JUDGEMENT

The Office of the Public Prosecutor:

Mrs. Shyamala Alagendra

Counsel of the accused:

Mr. Ramavarma Regunathan Thamburan

Mrs. Chithra Subramoni

INTRODUCTION

1. The trial of Damiao Da Costa Nunes aka Dami (26 years old, married, born in Alastehen village, Mota Ulun Subvillage, Fatumean Sub District, East Timor, unemployed) before the Special Panels for Serious Crimes in the District Court of Dili (hereafter: the "Special Panel"), commenced on 29 October 2003, and concluded today, 10 December 2003 with the rendering of the decision.
2. After considering all the evidence presented during the trial, all the written and oral statements from the Prosecutor General (hereafter: the "Public Prosecutor") and from the defense counsel for the defendant, considering the arguments of the parties including their final statements of 8 December 2003, the Special Panel,

HEREBY RENDERS ITS JUDGEMENT

A. THE SPECIAL PANELS

3. The Special Panels were established, within the District Court of Dili, pursuant to Section (hereafter "Sect.") 10 of UNTAET Regulation (hereafter "U.R.") 2000/11 as amended by U.R. 2001/25, 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.

B. PROCEDURAL BACKGROUND

4. On 17 December 2002, the Public Prosecutor filed before the Dili District Court a written indictment (in English) against Damiao Da Costa Nunes aka Damianus.
5. The accused was charged with three counts of Crimes Against Humanity in the form of murder. Damiao da Costa was accused of the following crimes: The murder of Jaime Da Costa Nunes (count 1), the murder of Albino Nahak aka Albino De Neri (count 2) and the murder of Jose Dos Reis (count 3). Count 2 would later be changed and described by the prosecution as individual inhumane acts in the form of persecution as a crime against humanity.

6. The list of the victims was attached to the indictment as Annex A. The list of evidence was attached as Annex B.
7. The accused Damiao Da Costa Nunes was arrested on 28 August 2002 and kept in detention. The detention was extended on several occasions. On 17 December 2002 the Public Prosecutor, together with the Indictment, requested the extension of detention until the conclusion of the trial. A detention review hearing took place on 18 December 2002, and on 20 December 2002 the Court granted the request of the Prosecution.
8. The Preliminary hearing was initially scheduled for 23 March 2003. However, at the request of the defense, it was postponed to 29 May 2003.
9. During the Preliminary hearing, on 29 May 2003, the Court checked whether the defendant Damiao Da Costa had read the indictment or if the indictment had been read to him, and asked him if he understood the nature of the charges, his right to be represented by a legal advisor, his right to remain silent, and to plead guilty or not guilty, as provided for in Sect. 30.4 U.R. 30/2000. The Defendant refused to make any statement.
10. During the preliminary hearing the Defense counsel raised a motion for the release of the accused from prison. The Court ordered the continuation of the detention. By the same decision the Court ordered the defense to submit a witness list containing witness details and summary of their evidence.
11. The trial hearing was scheduled for 14 July 2003 but a change of the legal representative of the accused forced its postponement to 22 September 2003. The hearing was postponed again, and finally started on 29 October 2003.
12. The hearing continued on 30 October 2003 and was then postponed until 10 and 11 November 2003, later to 24 November 2003. On 8 December 2003 the parties read their closing statements and the Court delivered the Disposition on 10 December 2003.

13. Interpreters for English, Bahasa Indonesian, and Tetum Assisted before the Court.

APPLICABLE LAW

14. As on the date of the rendering of the Disposition Law No.10/2003 of the Democratic Republic of East Timor had come into force, which is authoritative:

Section 2

Sources of law;

1. Legislation is the only immediate source of law in Timor-Leste.
2. Legislation is generic provisions issued by the competent organs of the State;
3. The sources of law in the Democratic Republic of Timor-Leste are:
 - (a) The Constitution of the Republic;
 - (b) Laws emanated from the National Parliament and from the Government of the Republic;
 - (c) Subsidiarily, regulations and other legal instruments from UNTAET, as long as these are not repealed, as well as Indonesian legislation under the terms of section 1 of the present law.

Section 3

Effects;

The present law shall take effect as from 20 May 2002.

As regards the UNTAET Regulations mentioned in Sec. 2.3 (c) of Law No.10/2003, mainly U.R. 2000/15 and U.R. 2000/30 as amended by U.R. 2001/15 are applicable.

According to Sec. 3.1 (b) U.R. 2000/15 as amended recognized principles and norms of international law shall also apply.

C. FACTS OF THE CASE

15. The facts of the case, as presented in the indictment by the Public Prosecutor, can be summarized as follows:

16. Between January 1999 and October 1999 the Laksaur militia group operated throughout Covalima District. It comprised of hundreds of

members. The Laksaur militia operated in collaboration with units of the TNI and the POLRI in Covalima. During this period members of the Laksaur militia carried out acts of violence directed against civilians who were perceived to be members or supporters of FALINTIL (Armed Forces for the Liberation of East Timor), supporters of independence or linked to or sympathetic to the independence cause. The attack included acts of intimidations, threats, unlawful detention, arsons, murders, forcible deportation and other acts of persecution.

17. The accused was a Platoon Commander and/or a member of the Laksaur militia group, and he carried out his militia activities jointly with other members of the Laksaur militia and members of the TNI.

Murder of Jaime Da Costa Nunes

18. Jaime Da Costa Nunes was a known supporter of independence. Jaime Da Costa would go to villagers to encourage them to vote for the independence of East Timor. Members of the Laksaur militia were aware of the independence activities of Jaime Da Costa Nunes, and wanted to kill him.
19. On or about 24 June 1999 the male villagers of Mota Ulun including Jaime Da Costa Nunes were told by the village chief to go to the militia headquarters in Belulik Leten where members of the Laksaur militia were raising the Indonesian flag.
20. At the militia headquarters, Jaime Da Costa was beaten by members of the Laksaur militia.
21. On or about 25 August 1999, Jaime Da Costa Nunes and another villager were tasked to deliver voting cards to all the villages in Fatumean. They were told to give the voting cards to clandestine members.
22. On or about 25 August 1999, Jaime Da Costa Nunes left the Suai Church where they were hiding and proceeded to Mota Ulun, Belulik Leten. Or on about 26 August 1999, they arrived in Mota Ulun Subvillage, where they delivered the cards to Raimundo Mali and Martino Do Rego before they proceeded to Aisik Village.

23. On 26 August 1999, members of the Laksaur militia including Damiao Da Costa Nunes went to the home of Jaime Da Costa Nunes looking for him.
24. On or about 27 August 1999 about 7 o'clock in the morning, Jaime Da Costa Nunes was hiding in the bushes in Aikfotu area in Mota Ulun sub-village. Members of the Laksaur militia group including Damiao Da Costa Nunes, Jose Pereira aka Manek Pahak aka Manek Casa and Manuel Luan together with a villager were walking down the road when Damiao Da Costa Nunes saw Jaime Da Costa Nunes hiding. Damiao Da Costa and the other militia members present were all armed with swords.
25. Damiao Da Costa Nunes grabbed Jaime Da Costa Nunes out of the bushes onto the pathway. Damiao Da Costa then held Jaime Da Costa Nunes tightly across his body while Jose Pereira aka Manek Pahak aka Manek Casa cut him across his forehead. Damiao Da Costa then held Jaime Da Costa Nunes by the arms again, and Jose Pereira aka Manek Pahak aka Manek Casa stabbed Jaime Da Costa Nunes. Damiao Da Costa Nunes then pushed Jaime Da Costa Nunes into the bushes. Jaime Da Costa Nunes died as a result of his injuries.
26. After the killing of Jaime Da Costa Nunes, Damiao Da Costa Nunes ordered all the villagers from Mota Ulun not to use the pathway where the killing had taken place.

Persecution of Albino Nahak aka Albino De Neri

27. Sometime in September 1999, members of the Laksaur Militia ordered villagers to go to West Timor. On or about 6 September 1999, Albino Nahak aka Albino De Neri was together with several other villagers waiting by the side of the road in Suai for transportation to go to West Timor.
28. Whilst the villagers were waiting by the side of the road, members of Laksaur militia Baltazar Da Costa Nunes aka Baltazar Moruk and Damaio Da Costa Nunes arrived on a motorcycle. Baltazar Moruk and Damaio Da Costa Nunes were armed with a gun and a knife respectively. When the militia arrived, Damaio Da Costa Nunes aka

Damianus identified Albino Nahak aka Albino De Niri as a pro-independence supporter.

29. Damaio Da Costa Nunes then handcuffed Albino Nahak aka Albino De Neri's hands behind him and took him away on the motorcycle. Albino Nahak was made to sit in between Baltazar Moruk and Damaio Da Costa Nunes aka Damianus on the motorcycle and they drove away. Albino Nahak aka Albino De Niri was never seen again. Sometime after 6 September 1999, family members of Albino Nahak aka Albino De Niri were informed that he had been killed.
30. On or about 15 October 1999, family members of Albino Nahak aka Albino De Niri located his remains in Legore Village in Suai Sub-District and buried them.

Murder of Jose Dos Reis

31. Jose Dos Reis was a clandestine supporter of Falintil and provided assistance to Falintil members who were hiding in the mountains. The militia became aware of the clandestine activities of Jose Dos Reis. During the month of April 1999, members of the Laksaur militia were looking for Jose Dos Reis. Sometime in April 1999, members of the Laksaur militia found Jose Dos Reis at his house and arrested him. He was taken to the Militia Headquarters in Legore. Later, on the same day, Jose Dos Reis was returned back to his home by members of the Laksaur militia.
32. On or about 5 September 1999 members of the Laksaur militia went to Mata Air village, where they ordered all the villagers to leave the village and go to West Timor because the militia was going to burn down all the houses. All the villagers fled from their homes and sought refuge in the Electrical Compound in Mata Air Village. At the material time, Jose Dos Reis and his family were hiding in the house of a villager, Victor Laku.
33. On or about 7 September members of the Laksaur militia including Damaio Da Costa Nunes arrested Jose Dos Reis from the house of Victor Laku and took him to the house of a TNI member, Raul Halek, which was next to Victor Laku's house. There, Jose Dos Reis was tied up and interrogated as to why he had not left East Timor and gone to

West Timor. Jose Dos Reis told the militia that East Timor was his land and he would live or die only in East Timor. Jose Dos Reis was then severely beaten by the militia.

34. Jose Dos Reis was then carried and placed inside the truck. Some members of the militia and TNI present got into the truck and drove away, and the others followed the truck on motorbikes. They were going in the direction of Maucatar village.
35. En route to Maucatar Village, the truck stopped. Members of the Laksaur Militia including Damaio Da Costa Nunes dragged Jose Dos Reis out of the truck and took him to a nearby corn plantation.
36. At the plantation Damaio Da Costa Nunes aka Damianus stabbed Jose Dos Reis in his chest with a knife and Simao Nahak, a TNI, hit him on his back with his rifle. Jose Dos Reis died as a result of the attack.

FINDINGS OF THE COURT

The attack against the civilian population and related requirements

37. It is undisputed between the parties that the facts mentioned under para. 16 constitute a systematic and widespread attack on the civilian population, and that the accused acted in this context.
38. Systematic attacks were directed against the civilian population in East Timor in 1999. The attacks occurred during two interconnected periods of intensified violence. The first period followed the announcement on 27 January 1999 by the Government of Indonesia that the people of East Timor would be allowed to choose between autonomy within the Republic of Indonesia or independence. This period ended on 4 September 1999, the date of the announcement of the result of the popular consultation in which 78.5 per cent voted against the autonomy proposal. The second period followed the announcement of the result of the popular consultation on 4 September through 25 October 1999.
39. These attacks were part of an orchestrated campaign of violence, that included among other things incitement, threats to life, intimidation,

unlawful confinement, assaults, forced displacement, arson, murders, rapes, and other forms of violence carried out by members of the pro-autonomy militia, members of the Indonesian Armed Forces, ABRI (*Angkatan Bersenjata Republik Indonesia*) renamed TNI (*Tentara Nasional Indonesia*) in 1999, and members of the Indonesian Police Forces (*POLRI*) with the acquiescence and active participation of Civilian and Military authorities.

40. In 1999, more than twenty-five militia groups operated throughout East Timor. Their goal was to support autonomy within Indonesia. The Integration Fighting Forces (PPI), (*Pasukan Pejuang Integrasi*) under the command of Joao Tavares was the umbrella organization under which these militia groups were organized. It had the backing of the TNI and the Civil Administration. PPI Commanders issued, called upon and incited militia groups and their members to intimidate independence supporters and those perceived to support them. The militia groups participated in the widespread or systematic attack and acted and operated with impunity.
41. These large-scale attacks were directed against civilians of all age groups, predominantly against individuals who supported or were perceived to support independence and resulted in lethal injury including death by sharp force injury, gun shot injury, blunt force trauma or a combination of the three.
42. Systematic attacks were also carried out against property and livestock, including mass destruction of houses by fire, stealing of property, killing and stealing of livestock.
43. These attacks resulted in the internal displacement of thousands of persons. Additionally, the forcible transfer and deportation of the civilian population within East Timor and to West Timor, Indonesia was an essential feature of that orchestrated campaign of violence.
44. Under the terms of the 5 May 1999 Agreements, between Indonesia, Portugal and the United Nations on the popular consultation, the Indonesian security authorities had the responsibility to ensure a safe environment devoid of violence or other forms of intimidation as well as the general maintenance of law and order before and during the popular consultation. The TNI and POLRI (which were the



Indonesian Security Authorities) failed to meet these obligations and made no attempt to disarm or neutralize the militia groups. They were allowed to act with impunity.

45. Apart from that, it is now a well-known historical fact that there was this attack on the civilian population of East Timor in 1999, and matters, which are well known, according to Art. 184.2 Indonesian Criminal Code of Procedure need not be proved.

Factual findings on the charges against the accused

46. The Court, having weighed the testimonies of the witnesses is convinced that the following facts occurred:

47. Between January 1999 and October 1999 the Laksaur militia group operated throughout Covalima District.

48. Damiao da Costa Nunes was a member of the Laksaur militia [*Testimonies of the witnesses Iria Amaral, Zelia do Carmo, Bendito de Jesus, Lourencio da Costa, Manuel de Lima, Filomena Mendonca, Anito da Costa Nunes, Inazio Alfonso Cardoso, Lucia da Costa Nunes*]. He was a Danton (Platoon commander) within the militia and had command over several of its members [*Testimonies of the witnesses Iria Amaral, Lorencio da Costa, Manuel de Lima*]. A teacher called Baltazar da Costa Nunes aka Guru Balta was a commander or leader of the militia with authority over Damiao da Costa Nunes [*Testimonies of the witnesses Bendito de Jesus, Lourencio da Costa*]. Indonesian military Raul Halek and Simao Nahak were also part of the militia group [*Testimonies of the witnesses Lourencio da Costa, Manuel de Lima, Albertina Mendonca Soares, Filomena Mendonca*]. Jose Manek was also a member of the militia [*Testimonies of the witnesses Bendito de Jesus, Lourencio da Costa Nunes, Manuel de Lima, Luzia da Costa Nunes*].

Murder of Jaime da Costa

49. In 1999 Jaime da Costa Nunes was an independence supporter [*Testimonies of the witnesses Iria Amaral, Judith Borges, Zelia do Carmo, Bendito de Jesus, Manuel de Lima, Anito da Costa Nunes*]. At the end of August he was involved in a campaign of distribution of ballot cards and pro-independence material in Fatumean together with

Bendito de Jesus aka Bene Leki [*Testimonies of the witnesses Bendito de Jesus, Iria Amaral, Judith Borges, Zelia do Carmo, Anito da Costa Nunes*].

50. The militia was aware that Jaime da Costa was an independence supporter. He had been previously arrested and beaten and for a period of time militia members including Damiao Da Costa had asked Jaime's relatives and acquaintances about his whereabouts [*Testimonies of the witnesses Iria Amaral, Judith Borges, Bendito de Jesus, Lourencio Da Costa*]. Jaime was hidden in Suai when he was told to go to Fatumean with Bendito de Jesus to distribute the ballot papers [*Testimonies of the witnesses Iria Amaral, Judith Borges, Bendito de Jesus*] After distributing some of the material, on the night of 26 August Jaime da Costa and Bendito de Jesus split and arranged to meet the following day [*Testimony of the witness Bendito de Jesus*].
51. On the morning of 27 August 1999 the accused spotted Jaime da Costa and called Jose Manek. The accused held Jaime da Costa tight, and Jose Manek cut Jaime on the forehead with a knife or sword. Then Jose Manek stabbed Jaime in the body [*Statement of the deceased Martino do Rego admitted as evidence on 30 October 2003, testimonies of the witnesses Iria Amaral, Zelia do Carmo and Bendito de Jesus quoting Martino do Rego*]. When Jaime died the accused and Jose Manek stayed near the body. Jose Manek's sword was broken and covered with blood; the accused also carried a sword. He had held the victim tight, while Manek cut Jaime with his long knife. [*Statement of Martinho do Rego, admitted into evidence on 30 October 2003 as Exhibit PE 4*].
52. Then Damiao ordered Lourencio Da Costa to bury the body of Jaime Costa [*Testimony of the witness Lourencio Da Costa Nunes*].

Persecution of Albino de Neri aka Albino Nahak

53. In 1999 Albino de Neri aka Albino Nahak was a supporter of independence [*Testimonies of the witnesses Albertina Mendonca Soares, Anito da Costa Nunes and Baltazar Pires*].

54. On 6 September 1999 Albino Nahak was sitting together with other villagers at the side of the road, waiting for transport to go to Atambua. [*Testimonies of the witnesses Albertina Mendonca Soares and Baltazar Pires*].
55. The accused and Baltazar Da Costa Nunes arrived together on a motorcycle. Baltazar was armed with a gun [*Testimonies of the witnesses Albertina Mendonca Soares, Jose da Costa, Baltazar Pires*] and Damiao carried a knife [*Testimonies of the witnesses Jose da Costa, Baltazar Pires*].
56. The accused took a pair of handcuffs and tied Albino Nahak's hands in his back, then they took him away on the motorcycle driven by Baltazar [*Testimonies of the witnesses Albertina Mendonca Soares, Jose da Costa, Baltazar Pires*]. Albino Nahak was never seen alive again.
57. About 17 October 1999, Anito da Costa located the remains of Albino Nahak in Legore Village in Suai Sub-District. Together with the body was found a wallet and an ID card belonging to Albino. [*Testimony of the witness Anito da Costa*]

Murder of Jose dos Reis

58. Jose Dos Reis was supporter of independence. On or about 5 September 1999 villagers of Mata Air village started to seek refuge in different places afraid of the militia activities. Jose Dos Reis and his family were hiding in the house of Victor Laku [*Testimony of the witness Eduarda dos Santos*]
59. On or about 7 September members of the Laksaur militia including the accused and Simao Nahak entered the house of Victor Laku and arrested Jose Dos Reis [*Testimonies of the witness Eduarda dos Santos and Baladina dos Santos*]. The accused carried a sword and a knife. Then Damiao, Simao, Baltazar da Costa, Raul Halek and others took Jose dos Reis, his hands tied in the back, to the house of the militia and TNI member Raul Halek, which was next to Victor Laku's house. [*Testimonies of the witnesses Eduarda dos Santos and Baladina dos Santos*]. In the house of Raul Halek, Jose dos Reis was interrogated and beaten [*Testimonies of the witnesses Eduarda dos*



Santos and Baladina dos Santos]. After about half an hour militia members took him to a truck [*Testimonies of the witnesses Eduarda dos Santos, Baladina dos Santos and Filomena Mendonca*]. Militia members also got in the car, and forced other people like Filomena Mendonca to do so. Other people followed the truck with motorbikes.

60. After about 20 minutes the truck stopped in a place called Leogore. Members of the Laksaur Militia including the accused dragged Jose Dos Reis out of the truck and took him to a nearby corn field [*Testimony of the witness Filomena Mendonca*].
61. At the corn field the accused stabbed Jose Dos Reis in his chest with a knife, and Simao Nahak hit him on his back with his rifle. Jose Dos Reis died as a result of the attack [*Testimony of the witness Filomena Mendonca*].

Responsibility of the accused

62. The accused, Damiao Da Costa Nunes is criminally responsible for having committed the crimes jointly with others according to Sect. 14.3 (a) Reg 2000/15:

14.3 In accordance with the present regulation, a person shall be criminally 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 or through another person, regardless of whether that other person is criminally responsible;

63. As regards the killing of Jaime da Costa, it is irrelevant that the accused himself did not stab him: Because he held him tight while someone else (Jose Manek) stabbed him, he is a co-perpetrator, making it possible for the perpetrator to materially perform the crime (Tadic Judgement, Appeals Chamber, 15 July 1999, para. 192).

d) Legal findings of the case

64. The accused is charged with two counts of murder as a crime against humanity and one count of persecution as a crime against humanity.

Murder as a Crime Against Humanity

65. The offence of Murder as a Crime Against Humanity is provided for in Section 5.1 (a) of UNTAET Regulation 2000/15. The offence is not defined in this regulation but the Special Panel had the opportunity to do so in the case *The Public Prosecutor against Joni Marques*¹. In the mentioned case the Special Panel provided with the following definition of the offence:

“643. The Panel, having assessed the shortcomings in the definition of murder as crime against the humanity in Sec. 5.1 (a) of UR-2000/15 is persuaded of the benefit of the guidance provided by the Preparatory Committee for the Rome Statute of the International Court and the precedents from the International Tribunal, with the remarks foreseen in Sect. 18 of UR-2000/15.

644. The Panel accepts the opinion of the parties in relation to the general mens rea provided by Sect. 18 of UR-2000/15. For this reason, an accused charged with murder, as a crime against humanity shall have his or her mens rea deemed by this Panel insofar as he or she has shown intent to cause the death of the victim or be aware that it will occur in the ordinary course of events. Accordingly, the Panel lists the four requisite elements of murder as a crime against humanity:

645. The victim is dead.

646. The death of the victim is the result of the perpetrator's act.

647. The act must be a substantial cause of the death of the victim.

648. At the time of the killing the accused must have meant to cause the death of the victim or was aware that it would occur in the ordinary course of events.

649. In summary, in a murder, as a crime against humanity, there is no requirement of premeditation as the mental element for murder as a crime pursuant to Sect. 340 of Penal Code

¹ 9-PID.C.G/2000 *General Prosecutor vs. Joni Marques & 9 others, judgement on 11 December 2001*

Indonesia (KUHP). The mens rea is restricted to the deliberate intent to cause the death of the victim or that such result would occur in the ordinary course of events."

66. This definition was followed by the Special Panel in successive decisions, *inter alia* in the case the *Public Prosecutor against Jose Cardoso*² and the *Public Prosecutor against Domingos Mendonca*³.
67. Therefore the Panel must analyze whether the 4 elements of murder are satisfied: 1) The death of the victim; 2) Death as a result of the perpetrator act; 3) Substantial causality; 4) Intention to cause the death or awareness of the possibility.
68. Death of the victim. In the two charges of murder the death of the victims has not been disputed.
69. Death as a result of the perpetrator act. It has been proved that the victims died as a result of attacks where they were stabbed. The accused was identified, armed, in the place of the attack. In the murder of Jose dos Reis he was indeed seen performing the stabbing. In the case of Jaime da Costa the eye-witness of the stabbing died himself and couldn't testify in Court, but in his statement taken on 6 September 2002 which was admitted as evidence by the Court on 30 October 2003, he described how the accused held the victim while Jose Manek stabbed him. Other witnesses saw the accused immediately after the killing at the side of the body.
70. Substantial causality. It has also been proved that the victims died as a consequence of the wounds suffered in the hands of the accused and his partners.
71. Intention to cause the death or awareness of the possibility. The Court considers that at the time of the killing the accused person meant to cause the death of the victims or at least was aware that it would occur in the ordinary course of events. Jaime da Costa and Jose dos Reis were stabbed and beaten more than once. The location of the wounds excludes the possibility of an accidental killing or at least

² 4-PID.C.G/2001 General Prosecutor vs. Jose Cardoso, judgement on 5 April 2003

³ 18b-PID.C.G/2001 General Prosecutor vs. Domingos Mendonca, judgement on 13 October 2003

demonstrates that death constituted a reasonable possibility in ordinary course of events.

72. Since the Panel is also convinced that the accused knew he was acting in the context of a systematic attack on the civilian population (above para. 37 – 45) the elements of murder as a crime against humanity are satisfied.

Persecution as a crime against humanity

73. The offence of persecution as a crime against humanity is provided in Section 5.1 (h) of UNTAET Regulation 2000/15. The lack of definition of the elements of the crime in the UNTAET Regulation gave the Special Panel the opportunity to define them - guided by the works of the Preparatory Committee for the Rome Statute of the International Criminal Court- in the case *The Prosecutor vs. Joni Marques and 9 others*⁴ that reads as follows:

662[...] *these are the elements:*

663. *The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.*

664. *The perpetrator targeted such person or persons by reason of identity of a group or collectivity or target the group or collectivity as such.*

665. *Such targeting was based on political, racial, national, ethnic, cultural, religious, gender, (as defined in article 7, paragraph 3, of the Statute), or other grounds that are universally recognized as impermissible under international law.*

666. *The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.*

667. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*

668. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*

⁴ The Prosecutor vs. Joni Marques and 9 others, case 9/2000, judgement of 11 December 2001

669. Furthermore, the mental element of a discriminatory intent, which is assessed as that the reason for singling out the victim has to be grounded on a particular characteristic of the identity of the group or collectivity.

74. Accordingly persecution is the violation of the right to equality in a serious manner that infringes on the enjoyment of a basic or fundamental right.

75. In the present case the accused together with Baltazar Da Costa identified the victim Albino Nahak as an independence supporter. For this reason they arrested and abducted him violating his right to liberty. There is no doubt that the abduction of Albino Nahak was motivated by his support of independence, and therefore was discriminatory on political grounds. The abduction was in connection with a crime within the jurisdiction of the Special Panels, namely imprisonment according to Sec. 5 (e) U.R. 2000/15.

Again, the accused acted within the context of a systematic attack on the civilian population, and had knowledge of this.

76. Therefore the Court believes that the elements of persecution as a crime against humanity are satisfied.

VERDICT

77. 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 Damiao da Costa Nunes guilty of murder and persecution as crimes against humanity, according to Sections 5.1 (a) and (h) U.R. 2000/15.

SENTENCING

The Special Panel has taken into account the following:

Mitigating circumstances:

78. The Special Panel bears in mind the family background of the accused and the fact that he is married and has children. However this may be said of many accused persons, and cannot be given any significant weight in a case of this gravity.

79. The Special Panel has also taken into consideration the fact that the accused has no previous conviction.

80. Having reviewed all the circumstances of the case, the Special Panel is of the opinion that no exceptional circumstance in mitigation surrounding the crime committed by the accused affords him clemency.

Aggravating circumstances:

81. The accused acting together with a group murdered and caused the disappearance of victims that were defenseless persons, unable to respond to the attacks;

82. The accused held a position of responsibility within his militia group, and therefore was in a position to avoid unnecessary bloodshed.

Sentencing policy

83. According to Sect. 10.1 (a) of UR-2000/15, in determining the terms of imprisonment, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals. "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" (Sect. 10.2).

84. The penalties imposed on accused persons found guilty by the Panel are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished (*punitur quia peccatur*). On the other hand they are intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights (*punitur ne peccetur*). For violations of international law the most important sentencing aim is deterrence (ICTY, Delalic Judgement, 16 November 1998, para. 1234).

85. Finally, the objective of punishing 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.

86. The Panel considered all the aggravating and mitigating circumstances in the practice of East Timorese courts in applying the Penal Code of Indonesia (KUHP) and the standards derived from the International Tribunal for Yugoslavia and the International Tribunal for Rwanda, apart from those provided for under U.R.2000/15, as well as under general principles of law.

Conjunction of punishable acts

87. Because UNTAET Regulations do not provide a solution for the conjunction of several punishable acts, according to Sec. 2.3 (c) Law No. 10/2003 Indonesian Law has to be applied, which here means Art. 63 – 65 Indonesian Penal Code (IPC):

Since the accused killed respectively persecuted three different victims in different locations, each time making up his mind anew, these acts cannot be considered as one continued act in the sense of Art. 64.1 IPC, but as separate acts according to Art. 65.1 IPC.

In consequence, out of the single punishments for the various acts, a collective punishment must be composed, which however must not exceed one-third beyond the most severe single punishment (Art. 65.2 IPC).

DISPOSITION

Sentence

Having considered all the evidence (statements from the witnesses, evidence admitted by order of the Court or consent of parties and the reports that support the indictment), the arguments of the parties, the Transitional Rules of Criminal Procedure, the Special Panel for Serious Crimes finds and imposes sentence as follows:

With respect to the defendant DAMIAO DA COSTA NUNES:

- a) Guilty of the Murder of Jaime da Costa, as a Crime Against Humanity, in violation of Section 5.1(a) of UNTAET Regulation 2000/15;
- b) In punishment of this crime of murder, sentences Damiao da Costa Nunes to 7 years imprisonment;
- c) Guilty of the Murder of Jose dos Reis, as a Crime Against Humanity, in violation of Section 5.1(a) of UNTAET Regulation 2000/15;
- d) In punishment of this crime of murder, sentences Damiao da Costa Nunes to 8 years imprisonment;
- e) Guilty of Persecution of Albino de Neri aka Albino Nahak, as a Crime Against Humanity, in violation of Section 5.1(h) of UNTAET Regulation 2000/15;
- f) In punishment of this crime of Persecution, sentences Damiao da Costa Nunes to 6 years imprisonment;
- g) Holds that the maximum total punishment for these crimes is the collective total of the maximum punishments imposed on those crimes, but that in accordance with Article 65.2 of the Indonesian Criminal Code, this total must not exceed one third beyond the most severe maximum punishment, which in this case is 8 years;
- h) Therefore sentences DAMIAO DA COSTA to a single punishment of 10 years and 6 months imprisonment for all the crimes of which he is convicted, being the most severe punishment (8 years) plus less one third of the punishment;
- i) Relating to the disposal of physical evidence pursuant to Section 39.3(h) UNTAET regulation 2000/30 as amended, the wallet and identification card of victim Albino Nahak, that was seized as evidence during the investigations is to be returned to the victim's mother Albertina Mendonca Soares.
- j) Orders the defendant to pay the costs of the criminal procedure.



Credit for time served

According to Section 10.3 of UNTAET Regulation 15/2000, Section 42.5 of UNTAET Regulation 30/2000 and Article 33 of the Indonesian Penal Code, the Special Panel deducts the time spent in detention by Damiao da Costa Nunes, due to an order of this Court. The defendant Damiao da Costa Nunes was arrested and detained since 21 August 2002 up to date. Therefore he was under detention for 1 year 3 months and 20 days. Accordingly, his period of 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 UNTAET Regulation 2000/30 (as amended by UNTAET Regulation 2001/25), the convicted shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.

The sentence shall be executed immediately, providing this disposition as a warrant of arrest.

One copy of this decision is to be provided to the Defendant and his legal representative, the Public Prosecutor and to the prison manager.

This Judgment was rendered on the 10 December 2003 in the District Court of Dili by

Judge Maria NATERCIA GUSMAO PEREIRA, presiding

Judge Sylver NTUKAMAZINA

Judge Siegfried BLUNK

(Done in English)

according to the dissenting opinion attached

The image shows three handwritten signatures in black ink. The top signature is for Judge Maria Natercia Gusmao Pereira, the middle one for Judge Sylver Ntukamazina, and the bottom one for Judge Siegfried Blunk. The signature for Blunk includes the handwritten note 'according to the dissenting opinion attached' written above it.

Damaio da Costa Nunes
Case No. 1/2003

Dissenting Opinion

regarding the sentence of 8 years in point d) of the disposition:

The generally recognized sentencing aims are deterrence, retribution, reconciliation and reprobation. Most prominent in accordance with the Security Council's general aim of restoring and maintaining peace are 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). This means "dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights" (ICTR, Kambanda Judgement and Sentence, 4 September 1998, para. 28).

In East Timor there is an additional requirement for deterrence because just across the border there are thousands of recalcitrant ex-militia men with the capability of once again destabilizing this country by means of murder.

Sentencing an accused who has committed Murder as a Crime against Humanity by his own hands to only 8 years imprisonment fails to meet these requirements.

10.12.2003


Judge Siegfried Blunk