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

**DISTRICT COURT of DILI**  
**SPECIAL PANEL for SERIOUS CRIMES**

Case No. 11 /2003  
Date: 11 December 2003  
Original: English

Before: Judge Siegfried Blunk, Presiding  
Judge Maria Pereira Gusmao  
Judge Sylver Ntukamazina

Registrar: Joao Naro

The Prosecutor  
v.  
**Marcelino SOARES**

**JUDGEMENT**

Public Prosecutor:  
Mr. Per Halsbog

Defence Counsel:  
Ms. Pamela Reusch

## **A. THE SPECIAL PANELS**

1. The Special Panels for Serious Crimes within the District Court of Dili 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 over the criminal offences (inter alia) of Crimes against Humanity, as specified in Sec. 5 Reg. 2000/15.

All Reg. referred to in this judgement, have been upheld, after East Timor was recognized as independent on 20 May 2002, by Section 165 of the Constitution of the Democratic Republic of East Timor, which came into force the same day.

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" are Indonesian laws (Prosecutor v. Joao Sarmento and Domingos Mendonca, Decision, 24 July 2003). This opinion was confirmed by a law passed by Parliament on 6 October 2003 and promulgated on 20 November 2003.

Among the "subsequent laws of democratically established institutions" is first and foremost the abovementioned Constitution.

## **B. PROCEDURAL BACKGROUND**

4. The accused was detained from 19 – 22 November 2002 (see p. 243, 254 of the file).

On 28 February 2001 the Public Prosecutor filed before the Special Panel a written indictment in English against the accused charging him with the Crimes against Humanity of Murder, Torture and Persecution.

The Court Clerk provided a notification of the receipt of the indictment to the accused on 11 March 2003 pursuant to Section 26 Reg. 2000/30.

After the judge to whom the case had been assigned, returned to his home country, the case was reassigned to the present Presiding Judge on 2 June 2003.

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

The trial hearing commenced on 7 August 2003.

Interpreters for English and Tetum assisted before the Court.

### **C. Factual Findings**

#### **1. Account of the proven facts (according to Sec. 39.3 (c) Reg. 2000/30)**

5. In April 1999 the accused was the "Babinsa" (Village Level Commander) of the Indonesian Armed Forces (TNI) in the village of Hera, District of Dili in East Timor.

East Timor at the time was illegally occupied by the Republic of Indonesia, although it had declared its independence on 28 November 1975 (according to the Preamble and to Sec. 1.2 of the Constitution of the Democratic Republic of East Timor).

There were two bodies of TNI soldiers stationed at Hera:

1. Timorese TNI, unarmed
2. Indonesian TNI ("Rajawali"), armed.

Whereas the Indonesian Rajawali soldiers were commanded by an Indonesian officer, the accused had direct command and control over the Timorese soldiers. The accused however liased closely with the commander of the Rajawali.

On 20 April 1999 seven members of ESTAFET, a clandestine resistance group against Indonesian occupation and for independence, had come to Hera from Remexio to collect food and other assistance for the resistance movement from sympathisers. They went to the house of Carlos Pinto, who however was absent. They were noticed by Rajawali and by the accused, who (on a suggestion by a Rajawali) gave orders to the Timorese soldiers to arrest them. Four of them escaped, while three were arrested around 9 a.m., namely

- Luis Dias Soares (hereinafter: Luis)
- Rafael de Jesus Amaral (hereinafter: Rafael)
- Felipe de Sousa (hereinafter: Felipe).

The arrest was made by Antonio Pinto, Mario Malekat and Mario Liklaku.

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Luis, because he wore long hair, and carried a knife and a letter asking for assistance to ESTAFET, was perceived to be a member of FALINTIL, a resistance movement against Indonesian occupation and for independence.

The three prisoners, who at first had been taken to the TNI Command Post (hereinafter: the Post), on orders by the accused were soon brought to an empty building a few meters away, detained, interrogated and maltreated by Timorese and Indonesian TNI members in the following ways:

#### 1. Luis

was repeatedly beaten by the accused with a wooden stick and with a solid iron bar about a metre long and 3-4 cm thick. He was also repeatedly beaten by Timorese soldiers under the command of the accused and in his presence, without him intervening or punishing them afterwards.

When later during the day 2 trucks with Indonesian military arrived, who started kicking and beating him further up, although he was severely hurt and suffering from serious wounds already, the accused made no attempt to intervene.

The beatings went on for most of the day; later he was placed in a separate room. At night Mario Liklaku, a Timorese soldier, said, that he was dangerous and ought to be killed.

During the night Luis died of the severe wounds inflicted on him; his corpse was put in rice sacks, taken away in a truck and buried near the road to Metinaro, where it was later exhumed. The accused later claimed, that he had "escaped".

The accused was aware that the death of Luis would occur in the ordinary course of events as a result of the severe injuries inflicted.

#### 2. Rafael

too was beaten by the accused with the massive iron bar about 1 metre long; he was hit on the knees and fell to the ground. Antonio P., a soldier under the command of the accused, cut him on the head with a machete. Another one cut his face with a ring when he landed a blow. Another one heated up the buckle of his belt over a fire and put it on his leg. He was beaten by Timorese soldiers in the presence of the accused until he bled from several wounds on his body, and his face was smashed up.

The Indonesian soldiers who during the day had arrived on two trucks beat him up further without the accused attempting to intervene.

The beatings went on for most of the day. He was placed in a separate room and guarded by Timorese soldiers. At night, after he was told by one of them that he and the other prisoners would be killed at 3 a.m. by being drowned in the sea, he

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freed himself of the ropes with which he had been bound and escaped by jumping out of the window.

**3. Felipe**

was cut by the accused with a knife on several parts of his body, a scar remaining on the left arm. Another scar remained on the top of his head where the skull was broken after the accused landed a massive blow with the iron bar. He was also beaten up by other soldiers, without the accused attempting to intervene.

After he had been taken to a separate room and detained for 3 days he was released by the intervention of a relative.

**6.** The accused knew that neither he nor his subordinates were entitled to arrest, detain and inflict serious bodily harm on independence supporters. He never punished his subordinates for these acts.

**7.** The acts and omissions by the accused and the acts of his subordinates were part of a widespread attack by the Indonesian military on the civilian population to terrorize those civilians who resisted the Indonesian occupation and wanted independence. This context was known to the accused.

**2. Factual grounds** (according to Sec. 39.3 (d) Reg. 2000/30)

a) The above account of the proven facts is based on the following:

**8.** The account of the arrest, beatings and detention of the victims and of the death of Luis is based on the testimony given before the Court by Rafael de Jesus Amaral, Filipe de Sousa, Francisco Baretto, Luis da Silva, Domingos da Costa, Duarte de Araujo and Julio da Silva (twice), which insofar seemed credible and in the main issues consistent with each other.

Observations made by the court during a visit to the crime scene in Hera on 11 October 2003 were taken into account, especially the unobstructed line of view from Julio da Silva's house toward the Post (see below b)).

The Autopsy Report (page 178 of the file) and the Forensic Anthropology Report (p.181) were used as evidence for the death of Luis:

According to witness testimony (especially that of Francisco Baretto given on 25 Sept. 2003) a body in a sack was taken out of the room in which Luis had been tortured and detained, and driven away in a car. The amount and nature of the fractures of the exhumed skeleton (as described in the Autopsy Report) concur with witness testimony about the severe bodily harm inflicted on Luis. Because of

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this the Court is convinced beyond reasonable doubt that Luis was killed, and the later claim by the accused that he had escaped was a cover-up (especially as according to this witness he was present at the post during that night). Apart from that, not even the Defence called into doubt the death of Luis.

**9.** As evidence for the systematic attack on the civilian population to intimidate supporters of independence from Indonesia after the announcement of the popular consultation on 27 January 1999, use was made of the Identical Letters dated 31 January 2000 from the Secretary General, the Report of the Indonesian Commission on Human Rights, the Report of HCHR and the Note by the SG, because the Defense (who had been supplied with copies for 9 months) made no objections to their use, and the contents of these documents seemed credible and in compliance with witness testimony about Indonesian policy of intimidating the population not to vote for independence at the upcoming referendum. -Since not a single witness testified that the accused made an attempt to punish his subordinates for inflicting serious injuries on the victims, but on the contrary did so himself (even with an iron pipe), the Court is convinced that he never punished the perpetrators of the acts in the sense of Sec.16 Reg. 2000/30.

**10.** Since not one of the many witnesses (although most of them come from the small and closely-knit community of Hera and are therefore in a position to know) testified that the accused made an attempt to punish his subordinates for inflicting serious injuries on the victims, on the contrary did so himself (even with an iron pipe), the Court is convinced that he never punished the perpetrators of the acts in the sense of Sec.16 Reg. 2000/30.

Not used as evidence was the transcript of a suspect interview of the accused, as this was unnecessary in view of the more direct evidence heard (Sec. 33.3 Reg. 2000/30).

b) The claims made by the Defense proved unfounded:

**11.** The claim that the accused was not present at the time of the arrest, because he attended a meeting in Dili, was not proven by the testimony of Innocencio da Costa, as his assertion that of the more than 50 similar weekly meetings, where the Indonesians kept repeating themselves about the agenda, he still remembered the one on 20 April 1999 and the presence of the accused (among more than 10 other Babinsas), was totally incredible. It was also contradicted by the 2 surviving victims, who testified he severely injured them immediately after the arrest. According to the testimony of Julio da Costa he clearly saw the accused immediately after the arrest standing in front of the post, and the Court convinced itself at the crime scene that this was possible.

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The claim that the victims were only beaten up by Rajawali soldiers and these beat Luis until he died, was based on the testimony of Baptista da Costa, which witness however was untrustworthy: During his testimony on 12 September 2003 he repeatedly looked towards the accused as if waiting for guidance on what he should say, and he stubbornly evaded questions by a judge about his relationship to the accused. Moreover, when confronted on 25 September 2003 by his suspect interview made on 19 November 2002 (p.146) ,he had to concede that he saw the Timorese soldiers Mario Maulek and Manuel Tilman (who were under the effective control of the accused) take part in the beatings.

Likewise the claim by the Defense in the closing statement that the 2 trucks with Indonesian military that later took part in the beatings arrived only "late at night" proved unfounded. Not a single witness confirmed this. According to the convincing testimony of Franciso Baretto he guarded that night from 9 p.m. until 3 a.m. but no persons came, except to take away Luis' body (Testimony 25 Sept. 2003 page 11). Nor does it follow from the testimony of Rafael that the trucks only arrived late at night: rather the opposite, because after the arrival of the trucks he was punched with small rings on the face, and cut on the head with a machete by Antonio P., who however had no business to be there at night.

The notion of the Defense that the accused had "no power to arrest", is disproved by the fact that his subordinates on his orders actually made the arrest, that he even was able to torture the victims, keep them in detention and have them guarded by his subordinates. He and no one else expressly ordered the witness Francisco Baretto (according to his testimony) to guard during the night when Luis died.

Even if the Rajawali had theoretical power to override orders given by the accused as Babinsa regarding arrest and beatings during detention, or if they had power to give orders directly to Timorese soldiers, not the slightest indication has been presented or surfaced during the trial, that the Rajawali in this particular case tried to do so; what they might have done on joint patrols is irrelevant in this context.

- Whether the assertion that it was illegal under Indonesian law for civilians to carry "weapons" is true, can be left undecided , as no proof was offered that ordinary knives were such "weapons", and such proof is unlikely to be forthcoming as an indispensable working tool for the agrarian population of Timor was and is the katana (similar to the Indonesian parang) which is larger and more dangerous than an ordinary knife.

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**D. LEGAL GROUNDS** (according to Sec. 39.4(d) Reg. 2000/30)

**a) Killing of Luis**

**12.** As mentioned above (para. 8) the Court is convinced that Luis died during the night after the arrest due to the severe wounds inflicted by the Indonesian TNI and by the Timorese TNI under the command of the accused. Since the amount and the severity of wounds inflicted by the Timorese TNI were a substantial cause for the death, the wounds inflicted by the Indonesian TNI are not in the nature to sever the chain of cause and effect.

**13.** Thus the death resulted from an omission by the accused to take measures against his subordinates to prevent them from inflicting severe wounds on the victim. Even if he had reason to assume that the Indonesian TNI were intent on inflicting severe wounds, and if he had reason to respect these soldiers (because they unlike his subordinates were armed), he could have ordered his men not to inflict wounds of such severe nature that they were likely to cause death. He therefore bears command responsibility according to Sec. 16 Reg. 2000/15 for the acts of his subordinates.

The Court considered whether he also bears individual responsibility according to Sec. 14.3 (a) Reg. 2000/15 by inflicting severe wounds himself, but since he had not been indicted of this, and the request made shortly before the trial to amend the indictment accordingly would have led to further delay and therefore was not granted, the question was not pursued further.

**14.** The accused as an experienced soldier knew that the grievous bodily harm was reckless and likely to cause the death of the victim.

**15.** He also knew that these acts were part of a systematic attack on the civilian population, because as a Babinsa he had attended many weekly meetings at the headquarters of the Indonesian Military and knew of their methodical plan executed on a very large scale to intimidate by violence members of the resistance and of the pro-independence movement in view of the upcoming referendum.

The claim by the Defense that there was no systematic or widespread attack in the town of Hera in the month of April 1999 is irrelevant, as it is sufficient that the act is part of a country-wide campaign against civilians (ICTY, Tadic Judgement, 7 May 1997 para. 649).

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, and Art. 7.1 (a) ICC Statute, and pursuant to Sec. 5.1(a) Reg. 2000/15.

**16.** The fact that Reg. 2000/15 did not yet exist when the criminal act was 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."

**17.** 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.

**18.** 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).

**19.** The Special Panels have exclusive jurisdiction over the Crime against Humanity of Murder according to Sec. 2.1 Regulation 2000/15.

Since both the accused and the victim are East Timorese, and the offence was committed in East Timor, the question of the universal jurisdiction of the Special Panels (Sec. 2.2. Reg. 2000/15) does not arise.

**b) Torture of Rafael, Felipe and Luis**

20. From the testimony of Rafael, Felipe and others it is abundantly clear, that severe pain was inflicted not only by the accused himself on the three victims by beating them with a stick and an iron rod, but also by his subordinates, although the victims were in his custody.

The Court holds, in accordance with Art. 7 (1)(f) of the ICC Finalised Draft Text of the Elements of Crimes, that no specific purpose is required for this crime.

For the reasons given above (para. 15) the torturing was part of a systematic attack on a civilian population, and the accused had knowledge of this.

The accused bears both personal responsibility (Sec. 14 (a) Reg. 2000/30) and command responsibility according to Sec. 16 Reg. 2000/15.

The accused therefore committed the **Crime against Humanity of Torture** under customary international law as recognized by Art. 5 (f) ICTY Statute, Art. 3 (f) ICTR Statute, Art. 7.1 (f) ICC Statute, and pursuant to Sec. 5.1 (f) Reg. 2000/15.

What was mentioned above regarding the principle of *nullum crimen sine lege* and the jurisdiction of the Special Panels also applies here.

**c) Persecution by illegal detention of Rafael, Felipe and Luis**

21. In the present case this would according to Sec. 5.1 (h) and 5.2 (f) Reg. 2000/15 require the intentional and severe deprivation of fundamental rights contrary to international law against an identifiable group targeted on political grounds that are universally recognized as impermissible under international law, in connection with the crime of Torture, and as part of a systematic attack on a civilian population, with knowledge of the attack and with discriminatory intent (see Special Panels, Marques Judgement, 10 December 2001, paras. 663 – 669).

Since the victims were deprived of the fundamental right of liberty (Felipe according to his testimony for 3 days) because they were identified as pro-independence supporters, and (as mentioned above para. 15) the accused knew this was part of a systematic attack on a civilian population, only the requirement of violation of international law remains to be discussed:

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Since the occupation of East Timor by Indonesia was illegal according to the Preamble of the Constitution of the Democratic Republic of East Timor (and this for the undersigned judges who have sworn to respect and apply the Constitution) is binding, it follows that arrests and detentions carried out by the Indonesian Armed Forces were illegal too, and must be considered as arbitrary in the sense of Art. 9.1 ICCPR.

Again, the accused took part in a systematic attack on the civilian population, and was aware of this.

Since the accused made the arrests and detentions "through" others in the sense of Sec. 14 (a) Reg. 2000/15, he bears personal responsibility for the persecution apart from command responsibility according to Sec. 16 Reg. 2000/15.

The accused has therefore committed the **Crime against Humanity of Persecution** under customary international law, as recognized by Art. 5 (h) ICTY Statute, Art. 3 (h) ICTR Statute, Art. 5.1 (h) ICC Statute, and pursuant to Sec. 5.1 (h) Reg. 2000/15.

### **3. Conjunction of punishable acts**

**23.** In this respect according to Sec. 3.1 Reg. 1999/1 the Court has to apply Articles 63 - 65 of the Indonesian Penal Code (IPC), which leads to the following results:

#### **1. Torture**

##### **a) Individual and command responsibility:**

The accused regarding this count is charged with being responsible both as an "individual and superior". However, in case an accused for the same act bears both command and individual responsibility, the command responsibility is consumed by the individual one (ICTY, Krstic Judgement, 2 August 2001 para. 605), which is in accordance with Art. 63.1 IPC.

##### **b) Several victims**

The torture of the three victims has been considered as one continuous act in the sense of Art. 64.1 IPC, because a preconceived intent to torture the arrested group was executed in various stages.

#### **2. Persecution**

The reasons above 1) apply.

### 3. Torture and persecution

Although the physical acts underlying Torture and Persecution are the same, Persecution requires a different mens rea, namely a discriminatory intent. Therefore Art. 63 IPC which presupposes one and the same act, does not apply, but Art. 65.1 IPC.

### 4. Murder and torture of Luis

Because the responsibility of the accused for the murder of Luis is based on the omission to control his subordinates, whereas the torture of Luis was committed by his own hands, these acts must be considered as separate in the sense of Art. 65.1 IPC.

24. According to Art. 65.2 IPC the maximum (total) punishment for these crimes must **not exceed** the most severe (single) punishment plus one third of this; it does not have to be identical to this sum.

## 4. Sentencing

### a) Aggravating and mitigating circumstances

25. The following circumstances are aggravating:

The accused himself took part in the beating by his subordinates of Luis, who was completely helpless, savagely using a stick and a solid iron bar, thereby setting a bad example for his subordinates and inciting them to further violence.

As regards the torture, all victims were helpless civilians who could expect protection during their custody, instead of barbarous treatment.

The persecution was particularly mean, because it was committed on his fellow countrymen in the interest of a foreign power that was illegally occupying his homeland. The victims did not just belong to any political group, but were patriots fighting for the freedom of their motherland, and they should have been an example for him instead of objects of barbaric acts.

Furthermore the accused during the trial hearing did not show the slightest sign of regret but appeared pleased with himself, when the victims of his torture testified to his savage cruelty, and showed the severe wounds inflicted by him. The Court can find no favourable social prognosis for him.

26. The only mitigating circumstance that can be found, is that he has no previous conviction, at least none is known to the Court.

**b) Sentencing policy**

**27.** 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 the accused and the gravity of his offences.

**28.** The sentencing aims for 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).

**29.** 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.

The aim of reconciliation is particularly important in East Timor after a quarter century of strife and turmoil.

Reprobation in the case of this accused however can be ruled out, because, as stated above, the accused shows no signs of regretting his crimes.

**E. Disposition**

For the abovementioned reasons the Court convicts and sentences as follows:

1.The accused is

a) Guilty of the Crime against Humanity of Murder committed against Luis Dias Soares , according to Sec. 5.1 (a) Reg. 2000/15 and for this is sentenced to 9 (nine) years of imprisonment

b) Guilty of the crime against Humanity of Torture committed against Rafael de Jesus Amaral, Felipe de Sousa and Luis Dias Soares

according to Sec. 5.1 (f) Reg. 2000/15 and for this is sentenced to 6 (six) years of imprisonment

c) Guilty of the Crime against Humanity of Persecution committed against Rafael de Jesus Amaral, Felipe de Sousa and Luis Dias Soares according to Sec. 5.1 (h) Reg. 2000/15 and for this is sentenced to 3 (three) years of imprisonment.

Out of these single punishments the Court constitutes a **total** punishment of **11** (eleven) years of imprisonment.

2. From this prison term the 4 days already spent in detention have to be deducted according to Sec. 10.3 Reg. 2000/30.

3. The convict shall be imprisoned immediately according to Sec. 42.6 Reg. 2000/15 and shall serve his sentence in East Timor.

4. The convict has to bear the cost of the proceedings.

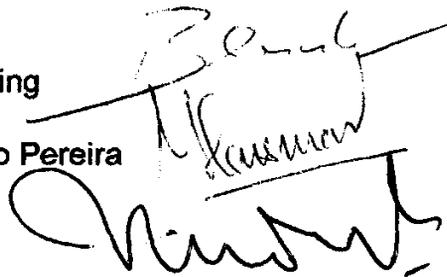
Copy of this sentence shall be provided to the convict, his Defense Counsel, the Prosecutor, and the Director of Prison.

Rendered and delivered on 11 December 2003

Judge Siegfried Blunk, Presiding

Judge Maria Natércia Gusmão Pereira

Judge Sylver Ntukamazina



(Rendered in English and Tetum, the English text being authoritative)