



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

DISTRICT COURT of DILI
SPECIAL PANELS for SERIOUS CRIMES

Case No. 4 b / 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.

Lino Beno

JUDGEMENT

For the Prosecution:
Mr. Charles Nsabimana

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

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 10/2003 published on 10 December 2003.

B. PROCEDURAL BACKGROUND

4. On 15 February 2003 in Case 4 / 2003 the Public Prosecutor filed before the Special Panel an indictment inter alia against the accused, charging him with the Crimes against Humanity of Murder (killing of Anton Beto) and Torture (beating of Francisco Beto).

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 Counsel of the accused Lino Beno had stated during the Preliminary Hearing that she would discuss with the Prosecutor about her client (regarding a possible plea - agreement) a Court Order was issued on 10 March 2004 requesting the Defense Counsel to state unequivocally until 23 March 2004 whether the accused will plead partially guilty; if not, to specify evidence and name witnesses according to Sec. 29.2 (e) Reg. 2000/30.

The Defense Counsel on 12 March 2004 requested extension of the time limit, asserting that due to lack of a bridge over a flooded river it had not been possible to consult with the accused in his village.

The Court on 15 March 2004 issued an order extending the time limit until 20 April 2004 and scheduling 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 individual" without specifying with which of the various categories (theories) of responsibility according to Sec. 14.3 (a) – (d) Reg. 2000/15 he was 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 is insufficiently aware of the charges, and is hampered in preparing his 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.

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 he is being charged with, the panel in its present composition and its majority does not regard this as a compulsory, rather as a voluntary requirement because given the difficulties of investigation and translation on 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 as the availability of one International Judge until the end of the trial was doubtful.

The trial hearing commenced on 22 October 2003.

When the accused pleaded guilty only to the charge of Other Inhumane Acts (beating of Francisco Beto) but not to the charge of Murder, asserting that when he stabbed Anton Beto the victim was already dead, the Court on 27 October 2004 severed his case, renumbered it as Case 4 b, and went ahead with the trial of those co-accused who had pleaded (totally) guilty and convicted them on the same day.

8. In the case of the accused, the Court according to Sec. 29 A.4 Reg. 2000/30 requested the Prosecution to present additional evidence.

After the former co-accused Agostinho Cab (Case 4 / 2003) and Domingos Metan (Case 4 c / 2003) who had both been already sentenced had given testimony as witnesses (that the victim, when stabbed, was still alive) the accused also pleaded guilty to the charge of Murder.

Interpreters for English, Tetum and Baiceno (a language spoken in the province of Oecussi) assisted before the Court.

C. ACCOUNT OF THE PROVEN FACTS

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

9. According to the final guilty plea of the accused which in itself was credible, was corroborated by the testimony given by the witnesses Agostinho Cab and Domingos Metan on 27 October 2004, and which was consistent with the statements the co-accused Agostinho Cloe, Agostinho Cab, Lazarus Fuli, Antonio Lelan and Domingos Metan made before the same panel in their trial (Case 4 / 2003) on 25 October 2004 in the context of their guilty pleas, the Court is convinced of the following facts:

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 he is being charged with, the panel in its present composition and its majority does not regard this as a compulsory, rather as a voluntary requirement because given the difficulties of investigation and translation on 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 as the availability of one International Judge until the end of the trial was doubtful.

When the accused pleaded guilty only to the charge of Other Inhumane Acts (beating of Francisco Beto) but not to the charge of Murder, asserting that when he stabbed Anton Beto the victim was already dead, the Court on 27 October 2004 severed his case, renumbered it as Case 4 b, and went ahead with the trial of those co-accused who had pleaded (totally) guilty and convicted them on the same day.

8. In the case of the accused, the Court according to Sec. 29 A.4 Reg. 2000/30 requested the Prosecution to present additional evidence. After the former co-accused Agostinho Cab (Case 4 / 2003) and Domingos Metan (Case 4 c / 2003) who had both been already sentenced had given testimony as witnesses (that the victim, when stabbed, was still alive) the accused also pleaded guilty to the charge of Murder.

Interpreters for English, Tetum and Baiceno (a language spoken in the province of Oecussi) assisted before the Court.

C. ACCOUNT OF THE PROVEN FACTS (pursuant to Sec. 39.3 (c), (d) Reg. 2000/30)

9. According to the final guilty plea of the accused which in itself was credible, was corroborated by the testimony given by the witnesses Agostinho Cab and Domingos Metan on 27 October 2004, and which was consistent with the statements the co-accused Agostinho Cloe, Agostinho Cab, Lazarus Fuli, Antonio Lelan and Domingos Metan made before the same panel in their trial (Case 4 / 2003) on 25 October 2004 in the context of their guilty pleas, the Court is convinced of the following facts:

10. In September 1999 the accused, an illiterate subsistence farmer aged about 20, was a member 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 and Francisco Beto had been suspected as such.

The leader of the "Sakunar" militia for Bebo village was Anton Lelan Sufa, who commanded a militia group, of which the accused was a member.

On 16 September 1999 in the village of Netensuan in Oecussi, East Timor, the accused, together with two other members of this group, namely Agostinho Cab and Domingos Metan, received orders by Anton Lelan Sufa to kill Anton Beto, and to beat up Francisco Beto, whereupon the accused committed the following acts:

a) He intentionally stabbed the Anton Beto with a knife. Agostinho Cab had shot an arrow into the throat of the victim and hit him on the head with a stone, whereas Domingos Metan had stabbed him as well. As a result of these combined wounds the victim died within minutes.

The accused knew that these wounds were likely to cause death.

b) He, together with Agostinho Cloe, Lazarus Fuli and Domingos Metan severely beat and kicked in front of other villagers for about half an hour Francisco Beto who was helpless, having been tied to a clump of bamboo.

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 at the Popular Consultation held on 30 August 1999 had overwhelmingly voted against remaining an (autonomous) province of Indonesia.

The accused was aware of this context.

D. LEGAL FINDINGS

1. Crime against Humanity of Murder

12. The accused Lino Beno, by taking part in the attack committed against Anton Beto with arrows and knives, and by stabbing the victim himself with a knife, intentionally contributed to the victim's death.

He acted purposely in collaboration with Agostinho Cab and Domingos Metan, and therefore has to be held accountable as co-perpetrator for causing the death of Anton Beto, without the Court having to determine whether death would have been caused solely by the wound inflicted by him.

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

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 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."

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 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 the accused did.

The 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 the accused that he followed Sufa's orders, because he was illiterate and scared, and when ordered by the "big bosses", he has to follow, failed to provide an imminent threat of death, as would be required by Sec. 19.1 (d) Reg. 2000/15) for a plea of coercion. The same applies to his claim, that Sufa would have made him crawl on hands and knees.

b) Even if Anton Lelan Sufa were to be considered as the accused's "superior" in the sense of Sec. 21 Reg. 2000/15 pursuant to whose orders he acted, this would not relieve him 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 open in the case of this accused.

17. The Special Panels have exclusive jurisdiction over the Crimes against Humanity of Murder and Other Inhumane Acts according to Sec.1.1 Reg. 2000/15.

Since both the accused and the victims are East Timorese, 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, who knew he was taking part in a systematic attack on the civilian population, by participating in the beating and kicking of Francisco Beto by several persons 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 the accused again acted jointly with others (Sec. 14.3 (a) Reg. 200015) he is accountable for the beating and kicking acts of his co-perpetrators, without the Court having to determine whether the acts of this 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 committed several acts the Court according to Sec. 3.1 Reg. 1999/1 has to apply Articles 63 - 65 of the Indonesian Penal Code (IPC), which 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 Panel, 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 killing of Anton Beto, and the extent of the degrading and vicious beating of the defenceless Francisco Beto.

Particularly despicable however, is that the accused Lino Beno committed these crimes against his fellow-countrymen in the interest of a foreign power that was illegally occupying his home country.

Mitigating is that he was only about 20 years of age and an illiterate farmer who must be considered a victim of circumstance himself, as he would not have committed the crimes without the campaign of militia violence unleashed by the Indonesian Armed Forces (TNI) after the popular consultation had turned out to be unfavourable to them.

A further mitigating factor is that he felt compelled to follow orders by Sufa, whom he considered as his commander.

Although he pleaded guilty to all charges only after the hearing of two witnesses, he then showed remorse, and regretted his crimes.

The Court also took into account that he has to provide by farming for a wife, 3 children, his parents and a younger brother, 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 he could not be spared a prison sentence.

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 the accused and the gravity of his offenses

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).

22. In East Timor there is an additional requirement for deterrence because just across a hard - to - guard 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 effectively constituted a civil war.

Reprobation in the case of this accused however plays a lesser role since, as stated above, he was the victim of a singular historical situation, and is unlikely to commit similar crimes in future.

Under the circumstances a term of five years of imprisonment is necessary but also sufficient to achieve the above sentencing aims.

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

Against these requirements of the accused the Court weighed the risk of flight, but deemed this risk as 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 Decision:

The Court convicts and sentences the accused Lino Beno 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 Anton Beto ,
in conjunction with (in the sense of 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 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.

25. The convict shall serve his prison term in East Timor.

26. The convict is informed that he can appeal this decision 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)

