



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 a** / 2003
Date: 25 November 2004
Original: English

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

The Deputy Prosecutor-General for Serious Crimes
v.

Anton Lelan Sufa

JUDGEMENT

For the Prosecution:
Mr. Charles Nsabimana

Defense Counsel:
Ms. Maria Rocheteau

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 the Democratic Republic of East Timor No.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 against the accused (and seven co-accused), charging him 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.

5. The Preliminary Hearing according to Sec. 29 Reg. 2000/15 was held on 18 September 2003 for the accused, for the 7 co-accused on 24 October 2003.

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 they might plead guilty, Court Orders were issued requesting the Defense to state unequivocally within a certain time limit whether they will plead guilty; if not, to specify evidence and name witnesses according to Sec. 29.2 (e) Reg. 2000/30.

The Defense Counsels of these co-accused 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.

6. Following a Court Order dated 11 March 2004 that had pointed out to the Prosecution that (inter alia) it could not be ascertained from the facts alleged in the indictment which accused persons were charged with which form of responsibility, the prosecution on 22 March 2004 sought amendments, inter alia replacing the charge of the Crime against Humanity of Torture by the Crime against Humanity of Other Inhumane Acts, and charging the accused with being responsible as an individual "or" as a superior (counts 1, 3, 5). 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 persons were insufficiently aware of the charges, and hampered in preparing their defense, wherefore the Defense on behalf of the accused persons prayed for the indictment to be rejected.

7. A Court Order dated 20 April 2004 pointed out (inter alia) to the Prosecution that in view of Sec. 6.3 (b), 24.1 (b) and (c) Reg. 2000/30 as regards the (present) charges against the accused Anton Lelan Sufa of being criminally responsible "either as an individual or as a superior", the Prosecution should state whether he is being charged according to Sec. 14 or according to Sec. 16 Reg. 2000/15, as his defense obviously would have to be different for each alternative.

The Court also, in case the prosecution intended to alter its application to amend the indictment, gave leave to do so until 7 April 2004.

8. As the Prosecution did not respond, the Court in a decision issued on 11 May 2004 pointed out again (inter alia) that the accused cannot be charged with being responsible as an individual "or" as a superior; due to the

fundamental rule of fair trial (Sec. 2.1 Reg. 2000/30) this requirement has to be interpreted in such a way that the accused must be informed of the alleged form of responsibility (whether as an individual or as a superior); if this requirement were to be interpreted otherwise, it would not only violate the right of the accused to be informed in detail of the nature of the charges against him (Sec. 6.3 (b) Reg. 2000/30), but also hamper his right to an effective defense (Sec. 34.3 Constitution of the Democratic Republic of East Timor); if for example the prosecution alleged responsibility as a superior, and would therefore have to prove the requirement "failure to punish subordinates" stipulated in Sec. 16 Reg. 2000/30, the defence must be able to search and find possible witnesses who could testify to the contrary, which under the prevailing conditions in this country could be time consuming.

The Prosecution responded by applying on 3 June 2004 for leave to further amend the indictment, charging the accused with responsibility as an individual "and" as a superior.

After the Court granted leave in a decision dated 6 July 2004 to further amend the indictment in other respects in accordance with the views expressed in that decision, an amended indictment was submitted on 23 July 2004, to which the Defense objected and prayed for a court order to call upon the prosecution to remedy this defect.

The Court on 13 September 2004 decided to reject the prayer of the Defense, and gave leave to amend the indictment.

9. 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 uncertain.

10. The trial hearing commenced on 22 October 2004. After the accused, unlike several co-accused, did not plead guilty, his case was severed on 25 October 2004, and renumbered **4 a / 2003**, so that the Court could go ahead sentencing those co-accused, which was done on 27 October 2004.

On the next day the Court continued with the trial against the accused by hearing witnesses, with further sessions on 29 October, 3, 4 and 8 November 2004, when the accused made a guilty plea, and was sentenced accordingly.

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

C. ACCOUNT OF THE PROVEN FACTS

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

11. According to the guilty plea of the accused, which was credible, as it was corroborated by witness testimony and by the guilty pleas made before the same panel by the co-accused Agostinho Cloe, Agostinho Cab, Lazarus Fuli and Antonio Lelan (all Case 4 / 2003), Lino Beno (Case 4 b / 2003) and Domingos Metan (Case 4 c / 2003), the Court is convinced of the following facts:

12. In September 1999 the accused, an East Timorese farmer and volunteer teacher aged about 38, 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 Beto, Leonardo Anin and Francisco Beto had been suspected as such.

The accused, who had been forced by a severe beating in April 1999 to join the militia, was its leader for village of Bebo; his group consisted inter alia of Agostinho Cloe, Agostinho Cab, Lazarus Fuli, Lino Beno, Antonio Lelan and Domingos Metan, all of whom accepted his authority and regarded him as their "commandante".

On 16 September 1999, in the village of Netensuan in Oecussi, East Timor, the accused (acting himself on instructions by the village chief Martinho Lelan) ordered members of his militia group to attack Anton Beto, Leonardo Anin and Francisco Beto.

a) The accused specifically ordered Agostinho Cloe(Case 4 / 2003), Lino Beno (Case 4b /2003) and Domingos Metan (Case 4c /2003), to kill **Anton Beto**. Following this order, 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) Then the accused specifically ordered Agostinho Cloe, Lazarus Fuli and Antonio Lelan (all Case 4/ 2003) to kill **Leonardo Anin**, and to cut off and bring back an ear as proof. Following this order, Agostinho Cloe, Lazarus Fuli and Antonio Lelan led Leonardo Anin behind a house, where Antonio Lelan struck Leonardo Anin with a machete, and Lazarus Fuli stabbed him with a knife. The victim died quickly of these wounds; the accused knew that this would be likely.

Lazarus Fuli cut off an ear as ordered, and brought it to the accused who later passed it on to the village chief.

c) Again, on orders by the accused, **Francisco Beto** was dragged by militia members to a clump of bamboo where he was tied up. Agostinho Cloe and Lazarus Fuli together with Lino Beno and Domingos Metan severely beat and kicked him for about half an hour in front of other villagers, with the accused joining in. After a discussion whether he should be killed, the accused decided to release him.

13. 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 was aware of this context.

14. Afterwards, the accused declared to his followers that he would take responsibility for these acts before the government, the church and the "Adat" (sum of traditional customs). He later gave to the family of a victim as compensation a piece of livestock.

15. After his arrest, he was in detention from 21 December 1999 until 28 September 2000.

D. LEGAL FINDINGS

1. Crime against Humanity of Murder

16. The accused, by ordering the abovementioned members of his militia group to kill Anton Beto and Leonardo Anin, knowing they would follow his orders and were able and sufficiently armed to do so, bears **individual** criminal responsibility according to Sec. 14.3 (b) Reg. 2000/30.

17. Because the accused had effective control over the militia members who committed the killings, and because he neither prevented the commission of the criminal acts nor punished his subordinates afterwards, also bears **superior** responsibility according to Sec. 16 Reg. 2000/30.

18. The more indirect form of liability (of being merely a superior who did not prevent the criminal acts or punish his subordinates) is **subsidiary** to the more direct form of participation (ordering the killings).

20. The Court is aware that different solutions have been found for the concurrence (coinciding) of individual and superior responsibility:

The ICTY was of the view that in such cases the type of responsibility incurred "may be better characterized" as personal liability (Kordic, Judgement, 26 February 2001, para. 371), and that superior responsibility "is subsumed" under the Article (of the ICTY statute) referring to individual responsibility (Krstic, Judgement, 2 August, 2001, para. 605).

On the other hand, the ICTR has held an accused individually responsible and "additionally" responsible as a superior (Kayishema and Ruzindana, Judgement, 21 May 1999, para. 555), and has considered convicting the same person under both forms of liability as "perfectly appropriate" (Delalic, 16 November 1998, Judgement, para. 1222).

21. However, the Court is of the opinion that, when certain facts of the case support both types of liability, one of them cannot simply be "characterized" as another or "subsumed" under the provision of the other, because this would imply that the Court has some sort of discretion to choose one or the other, although this would violate one of the basic principles of criminal law, apart from Sec. 12.2 Reg. 2000/15.

Rather, in a first stage, it has to be acknowledged that both types of responsibility exist, and in a second stage it must be decided whether they continue to co-exist or whether one is displaced by the other.

In this second stage, the Court took recourse to legal instruments developed in "civil law" jurisdictions to resolve the concurrence:

In "civil law" jurisdictions, a person who intentionally participates in the commission of a crime by ordering it, is regarded as a perpetrator of that crime himself, whereas a superior who fails to prevent a crime by his subordinates is not regarded as the perpetrator of that crime but of a separate crime of omission (failure to supervise).

In such a case it is an undisputed principle that the separate crime of omission (by negligence) is subsidiary to the (intentionally) ordered crime.

This principle also applies to international criminal law (Ambos in Cassese et al, The Rome Statute (Oxford, 2002), 843).

22. This view is supported by the following:

Since a superior who orders a crime (Sec. 14.3 (b) Reg. 2000/15) must also be regarded as committing it "through another person" in the sense of Sec. 14.3 (a) Reg. 2000/15, and since the various forms of individual responsibility enumerated in Sec. 14.3 have a distinct ranking - from the most direct form of commission in *lit.* (a) to the most indirect form of participation in *lit.* (d) - the more indirect form of responsibility incurred for the same conduct must be

subsidiary to a more direct one, if violation of the principle *ne bis in idem* is to be avoided.

The principle of subsidiarity has found expression in Article 65.2 Penal Code of Indonesia (still applicable, *supra* para.3), which reads:

“ If for an act that falls under a general penal provision there exists a special penal provision, only the special penal provision shall be considered.”

Similarly, this view is also supported by the notion underlying Sec. 32.4 Reg. 2000/30 according to which “a crime which is a lesser included offense of an offense which is stated in the indictment, shall be deemed to be included in the indictment”: Had the lesser offense not existed in the first place (but later become subsidiary by the more serious one), it could not be deemed to be included in the indictment.

Finally, it is widely held that no necessity is apparent to make use of superior responsibility for other purposes than as a “fall back liability” in the event that the ordering of a crime (“direct command responsibility”) cannot be proven.

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

24. 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.

25. 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.

Therefore, 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.

26. Unlike the crime of Murder under the national law of many countries, the Crime against Humanity of Murder under international law does not require 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 the accused was aware of.

27. There are no grounds for exclusion of criminal responsibility: According to the accused, since he was “only a little commander” he “had to follow the wishes of the bigger commander”, who had said that if he did not order the attack, “others will do it”.

No threat of *imminent* death (as required by Sec. 19.1 (d) Reg. 2000/15) can be inferred from this, wherefore the accused cannot successfully plead duress.

28. 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, and the offense was committed in East Timor, the issue 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

29. The accused, by joining in the beating and kicking of Francisco Beto (by Agostinho Cab, Lazarus Fuli, 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, knowing this was part of a systematic attack on the civilian population, 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 acted “jointly” with others (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 the accused alone would have surpassed the required threshold of gravity.

30. For this crime the accused bears threefold liability:

- superior responsibility by failing to prevent the crime or punish his subordinates according to Sec. 16 Reg. 2000/15,

- individual responsibility by “ordering” the crime according to Sec. 14.3 (b) Reg. 2000/15,

- individual responsibility by committing the crime “jointly with another” according to Sec. 14.3 (a) Reg. 2000/30.

For the reasons stated (*supra* para. 21) superior responsibility is subsidiary to individual responsibility.

As regards the two forms of individual responsibility, taking into account an undisputed principle of “civil law” jurisdictions, that a less direct (less intense) form of participation is subsidiary to a more direct and more intense form, in this case the less direct form of ordering the crime is subsidiary to the more intense form of co-perpetration (joining in the beating).

For the reasons stated (*supra* para. 27) there are no grounds for exclusion of responsibility

31. What was referred to *supra* (paras. 25, 27) in the context of murder regarding the nature of Crimes against Humanity and the jurisdiction of the Special Panel, here also applies.

3. Conjunction of punishable acts

32. Since the accused committed several acts (even after the subsidiarity referred to *supra* paras. 18 and 30), 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 accused committed the acts (ordering of the murders of Anton Beto and Leonardo Anin, as well as participating in the beating of Francisco Beto) in close proximity of space and time, and as part of a single attack on the inhabitants of a certain village, borne out of the same motivation, they appear 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 has to be imposed, instead of several (and a total) as in the case of Art. 65 IPC.

E. SENTENCING

1) Aggravating and mitigating circumstances

33. Aggravating is that, although the accused as a minor militia commander was under pressure to order the killing of suspected independence supporters, he was by no means forced to, and had not attempted to dodge the instructions by the village chief; but chose the easy way of passing them on to his followers.

Although after the crime, he had grandiloquently declared he would take full responsibility, he did not plead guilty before the Court at an early stage, but only after overwhelming witness testimony against him, so that the guilty plea has only minor mitigating effect. Also, he showed little remorse, and only after he was specifically asked by the Court.

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

34. Mitigating is that he had joined the militia only after he had been severely beaten up himself. Also, he must be considered a victim of circumstance, as he would not have committed the crimes without the despicable system of the Indonesian Armed Forces (TNI) of pitting one part of the local population against the other, and the campaign of militia violence unleashed by TNI after the popular consultation turned out to be unfavourable to them.

The Court also took into account that he has to provide for a wife and 6 children, 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

35. 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 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).

36. In East Timor there is an additional requirement for deterrence because just across a hard-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 that in many areas effectively amounted to civil war. Reprobation in the case of this accused is less important because, unlike the militia members he had ordered to commit the crimes, he showed little remorse.

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

37. 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, the Court ordered him to start his prison term only after 4 weeks.

Against this requirement of the accused the Court weighed the risk of him fleeing, but deemed this risk as comparatively small due to his many dependants and due to the strong Timorese tradition, rooted in "Adat", of paying respect to authority.

38. For the foregoing reasons the Court on 8 November 2004 rendered the following

Disposition of the Decision

The Court convicts and sentences the accused Anton Lelan Sufa 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 and 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 7 (seven) 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.

39. From this prison term shall be discounted according to Sec. 42.5 Reg. 2000/30 the 9 months and seven days the convict has already spent in detention (*supra* para. 15).

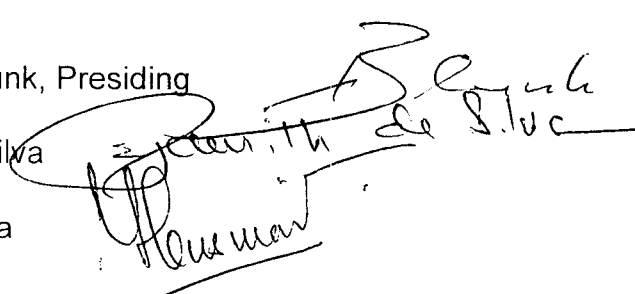
40. The convict shall serve his prison term in East Timor.

41. 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

Handwritten signatures of the judges. The signature for Siegfried Blunk is at the top right, for Samith de Silva is in the middle, and for Maria Pereira is at the bottom left. There are some scribbles and overlapping lines between the signatures.

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