

NATIONS UNIES



UNITED NATIONS

ETPA
East Timorese Public Administration
DILI DISTRICT COURT

SPECIAL PANEL for SERIOUS CRIMES

Case No. 04/2002

Date: 2/12/2002

Original: English

Before:

Judge Maria Natercia Gusmao Pereira, Presiding

Judge Sylver Ntukamazina

Judge Benfeito Mosso Ramos

Registrar: Joao Naro

Judgement of: 2/12/2002

THE PROSECUTOR

v.

“X”

JUDGEMENT

The Office of the Public Prosecutor:

Mr. Charles Nsabimana

Counsel of the accused:

Alan Michael Gutman

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INTRODUCTION

- 1 The trial of “X” (aged—, single, born on the — confidential information) before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereafter: the “Special Panel”), responsible for the handling of serious criminal offences, commenced on the 25th October 2002 and concluded today, the 2 December 2002 with the rendering of the decision.
- 2 After considering the plea of guilty made by the accused, all the evidence presented during the trial hearings, and the written and oral statements from the office of the Prosecutor General (hereafter: the “Public Prosecutor”) and also the defendant and the defense for the defendant, the Special Panel.

HEREBY RENDERS ITS JUDGEMENT.

A. THE SPECIAL PANEL

- 3 The Special Panels were established, within the District Court in Dili, pursuant to Section (hereafter “Sect.”) 10 of UNTAET Regulation (hereafter “U.R.”) No. 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. With regard to the serious criminal offences of murder and sexual offences, the Panels shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999, pursuant to Section 2.3 of U.R.2000/30.

B. PROCEDURAL BACKGROUND

- 4 On 17 May 2002, the Public Prosecutor presented before the Dili District Court a written indictment (in English version) with a charge of Crime Against Humanity, Extermination, crime stipulated under section 5.1 (b) of UNTAET Regulation 2000/15, and Crime Against Humanity, Attempted extermination, a crime stipulated under section 5.1(b) of UNTAET Regulation 2000/15. In alternative, the Public Prosecutor presented in the same indictment a charge of Crime Against Humanity,

Inhuman acts, a crime stipulated under section 5.1(k) of UNTAET Regulation 2000/15, against "X" for being responsible together with others for the extermination of forty-seven men from the villages of Tumin and Kobiselo, Ntibe sub district, Oecussi district, on or around 10 September 1999, as a part of widespread or systematic attack against a civilian population with knowledge of the attack.

- 5 Attached to the indictment were copies of the following documents in English and Bahasa Indonesia: the Statement of the accused (26/4/2002 and 7-14/10/2001), the statements of the witnesses Elias Colo (11/3/02), Marcus Baquin (11/3/02), Pedro Cono (15/10/01), Sebastiao Sufa (15/10/01), Josefino Ulan, Cipriano Babo, Sebastiao Sunef alias Ulan Sufa, Augustinho Ase alias Afoan Ase, Mateus Kusi, Domingos Kulu Kaet (15/10/01), Julio da Cunha (13/10/01), Yakobus Elu (16/10/01), Yasintus Ulan (15/10/01), Baptista Colo (16/10/01), Report of Anthropologic Report on 47 individuals made by Expert Kathy Gruspier, Reports of Forensic Medical Examination of 7 individuals, Report of the Indonesian Commission on Human Rights Violation in East Timor, January 2000, Copy of Letters from the United Nations Secretary General Addressed to the President of General Assembly, Copy of Note by the Secretary General on the Situation of Human Rights in East Timor, Commission on Human Rights Fifty Sixth Session Agenda.
- 6 On 27 May 2002 the Court clerk provided notification of the receipt of the indictment to the accused and to "X" legal representative, pursuant to Sect. 26.1 and 26.2 U.R. 2000/30. The accused did not file any response to the indictment.
- 7 On the 4th September 2002, the Public Prosecutor submitted to the Court the Bahasa Indonesian version of the indictment.
- 8 On the 6th September 2002, the Defence requested, pursuant to sections 28.2 and 45.5 of R.U. 2000/30 as amended by R.U 2001/25 a decision from the Court to protect the name of the accused "X".
- 9 "X" was arrested and detained on the 19th October 2001. "X" arrest was then confirmed and ordered by the Investigating Judge. The order of detention was renewed on the following dates: 20th February 2002, 20 March 2002, 17 April 2002, and 28 June 2002.
- 10 On the 10th September 2002, the Court decided to release the accused "X" with order, as substitute restrictive measures, to report once a week to

Passabe Civpol. The Court also ordered to strictly prohibit the accused to talk with the witnesses and the victims.

- 11 The preliminary hearing commenced on the 25th October 2002.
- 12 During the preliminary hearing, the defence recalled the request to protect the name of "X" and to refer to 'X' as "X". The Court decided to protect 'X' identity pursuant to section 45.5 of UNTAET Regulation 2001/25 and taking into account the age of the accused person. As a result, in following stages of proceedings the name of the accused was replaced by the letter "X".
- 13 The Public Prosecutor filed and presented, during the same preliminary hearing, an amended indictment charging the accused only with murder of three men, in violation of Article 338 of Indonesian penal Code, instead of crimes against humanity, as previously submitted to the Court. Based on the amended indictment, the Prosecution and the Defence submitted a joint motion reflecting an agreement whereby the accused would plead guilty to the count mentioned in the indictment.
- 14 The Court then checked if the defendant had read the indictment or if the indictment had been read to 'X' and asked if 'X' understood the nature of the charges, 'X' right to be represented by a legal advisor, 'X' right to remain silent, to plead guilty or not guilty to the charge, as provided for in Sect. 30.4 U.R. 30/2000. The Defendant made a statement that 'X' had read the indictment and understood the charges against 'X'. 'X' also told the Court that 'X' wants to make a statement concerning the charge against 'X'. The Court gave 'X' an opportunity to make a statement, what 'X' did, by pleading guilty to the charge against 'X' as mentioned in the indictment. The Court then accepted the list of evidence submitted by the Public Prosecutor. The Defence submit provisional agenda about promotion and protection of the rights of children, East Timorese children involved in armed conflict case studies report by UNICEF, report on the case of "X" 11/10/2002, declaration made by Jacinto Punef Ciu and Afonso da Costa. The hearing was postponed on 28 October 2002 for the Court to verify the validity of the guilty plea.
- 15 After verifying the validity of the guilty plea, particularly in light of Section 29A of UNTAET regulation 30/2000, the Special Panel entered a plea of guilty against the accused on 28 October 2002, and convicted 'X' on the charge of the indictment. The hearing was postponed to 8 November 2002 for the pre-sentencing hearing.

- 16 On 29 October 2002, the Defence made a request to allow the accused to return to Oecussi and in order to go to school and to be represented at the next hearing by 'X' legal counsel. The Court granted the request the same day.
- 17 On 8 November 2002, the parties filed their written submissions relating to sentencing and read them out. Then the court gave an opportunity to the Defendant to make any additional statement. 'X' told the Court that 'X' had nothing else to say. The hearing was postponed to 2 December 2002 for the final written decision.
- 18 On 2 December 2002, the Court read out the disposition of the decision and decided to issue later the final written judgement.
- 19 Interpreters into English, Bahasa Indonesian and Tetum, Baiqueno languages, assisted every act before the Court.

C. THE GUILTY PLEA

- 20 As stated earlier, the accused pleaded guilty to the charge set forth in the indictment against 'X'. In accordance with Section 29A of UNTAET Regulation 2000/30 the Court sought to verify the validity of the guilty plea. To this end, the Court asked the Accused:
 - a) If 'X' understood the nature and consequences of the admission of guilty;
 - b) If the admission was made voluntarily, after sufficient consultation with 'X' Counsel;
 - c) If 'X' clearly understood the charges against 'X'
 - d) If 'X' guilty plea was unequivocal, in other words, if 'X' was aware that the said plea could not be refuted by any line of defense.
- 21 The Accused replied in the affirmative to all these questions. The accused replied in the affirmative to all these questions. The Special panel accepted the plea of guilty of the accused. Furthermore, it was found that all the essential facts required to prove the crime to which the admission of guilty

relates have been established as required by Section 29A.2 of regulation 2000/30. The accused “X” was convicted of murder, in violation of Article 338 of Indonesian penal Code.

D. APPLICABLE LAW

21 As specified in UNTAET Regulation No.1/1999, U.R.No.11/2000 as amended by U.R.2001/25 and U.R.No. 15/2000, the Special Panel for Serious Crimes shall apply:

- UNTAET Regulations and directives;
- Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
- Pursuant to Sect. 3 UNTAET Regulation No.1/1999, the law applied in East Timor prior to 25.10.1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as they do not conflict with the internationally recognized human rights standards, the fulfilment of the mandate given to UNTAET under the United Nations Security Council Resolution 1272 (1999), or UNTAET Regulations or directives.

22 Therefore, the Court will apply U.R.2000/15, U.R.2000/11, the Penal Code of Indonesia (hereafter PCI) and U.R.2000/30 on Transitional Rules of Criminal Procedure as amended by U.R.2001/25.

E. FACTS OF THE CASE

23 The prosecutor described how the accused “X”, as member of Sakunar militia, a militia group that operated within the district of Oecussi from approximately April to October 1999, was involved in the murder of three men, in violation of Article 338 of Indonesian Penal code¹. According to the Prosecutor, “X” took part in the killing of the young men. “X” was armed with a machete, which X used to strike to death three young men. “X” made the first two victims to face the river while X stayed on the right side and then hit the first on the left check and the second on the side of his neck causing both victims to fall dead on the

¹ Amended indictment,

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ground. Then after “X” made the third the third victim to face the river while X positioned Xself on his left side and then hit him on the left side of his neck.

24 In his final statement, the Public Prosecutor asked the Court to sentence “X” according to the law. He requested for an imprisonment of eleven months. The accused admitted that X is guilty because X kills ³tree men unidentified. The accused admitted also, with respect to the killing, the evidence and the statements of witnesses submitted by the Prosecution, namely the accused statement, statements of witnesses Elias Colo, Markus Bakin, Pedro Cono, Sebastiao Sufa, Domingos Kelu, Julio da Cunha, Yakobus Elu, Yasintus Ulan and Batista Colo.

F. FACTUAL FINDINGS

25 In light of the admissions of guilty and all the evidence, especially the accused statement, statements of witnesses Elias Colo, Markus Bakin, Pedro Cono, Sebastiao Sufa, Domingos Kelu, Julio da Cunha, Yakobus Elu, Yasintus Ulan and Batista Colo, the Court is convinced that the following facts occurred:

26 The accused “X” was member of Sakunar militia, a militia group that operated within the district of Oecussi from approximately April to October 1999.

27 On 9th September 1999, Gabriel Kolo, police officer and commander of Sakunar militia in Passabe Village went to the village of Nuahake and ordered Sakunar militia members, including “X” to report to the office of the village chief in Passabe. When they arrived at the said office, they met with Sakunar militia members who had come from other villages. There, Gabriel Kolo ordered all of them to search for CNRT (Conselho Nacional de Resistencia Timorese) members who were believed to be hiding in the neighborhood and to take them to the office of village chief in Imbate in West Timor. The militia members including “X”, pursuant to orders, searched for CNRT members; but, during the course of their operation, they didn’t find any CNRT member, and afterwards, they went to report.

28 At Imbate, many people including villagers from Nbin, Tumin and Kiobiselo and members of Sukanar militia had gathered. The villagers were forced to register at the sub district office by the militia members. About seventy-five young men including Marcus Baquin, Josefino Ulan,

Pedro Cono, Cipriano Bobo, Sebastiao Sunef (Ulan Sufa) Augustino Ase (Afon Ase), Mateus Kusi, Sebastiao Sufa, Elias Colo and Domingos Kelo Kaet wer separated from the other people. The young men were all from the villages of Tunin and Kiobiselo. The young men were put into pairs and tied together using bindings by the Sakunar militia members including “X”

- 29 At or around midnight, the young men were forced to leave Imbate on foot. A large group of militia, including “X”, escorted them. The young men were taken back from Imbate in West Timor towards Passabe in East Timor. At or around 3 am on 10th September 1999, the group reached the border between East Timor and West Timor at Tionlasi. Here the group crossed the Noel Passabe River into East Timor.
- 30 Once the group had crossed the river, at a place called Nifu Panef, the militia members including “X” commenced the killing of the young men who were still tied together bindings. The victims were either shot or hacked with machetes or swords. In total, more than forty-seven people were killed. Some young including Sebastiao Sufa, Elias Colo and Domingos Kelo Kaet managed to escape while some others including Marcus Baquin, Joseino Ulan, Pedro Cono, Sebastiao Sunef (Ulans Ase) Augustino Ase (Afon Ase) and Mateus Kusi survived but were badly injured.
- 31 “X” took part in the killing of the young men. “X” was armed with a machete, which ‘X’ used to strike to death three young men. “X” made the first two victims to face the river while X stayed on the right side and then hit the first on the left che k and the second on the side of his neck causing both victims to fall dead on the ground. Then after “X” made the third the third victim to face the river while X positioned ‘X’ self on his left side and then hit him on the left side of his neck.

G. LEGAL FINDINGS

- 32 According to the article 338 of Indonesian Penal Code a person who with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum of imprisonment of fifteen years. Manslaughter is defined in Indonesian Penal Code as homicide committed with the intention to cause death
- 33 The legal elements of the offence are:

- The victim is dead,
- As a result of an act of the accused,
- Committed with the intention to cause death.

34 The facts established by the Court clearly confirm that the accused by 'X' act, and with intention to caused death, voluntarily took the life of three unidentified young men. The accused killed them with 'X' machete in the manner described above in the factual finding.

35 Taking into account the factual finding made by this court, and the manner that the accused took the life of the victims, It could be discussed whether the conduct of the accused should be characterized as manslaughter or as murder as described in article 340 of Indonesian Penal Code. The indictment contains no allegation that the accused had acted with premeditation. As a matter of the fact the conduct of the accused is characterized in the indictment as murder without premeditation (manslaughter), a crime established on article 338 of Indonesian Penal Code. It is clearly for this crime the accused had been charged. And it is for the same crime 'X' entered 'X' guilty plea. Consequently, This Court cannot convict 'X' for more severe crime than the one 'X' is indicted for. Section 32.4 of UNTAET Regulation 2000/30 prevent the Court to convict the accused of a crime that was not included in the indictment, as it may have been amended, or of which the accused was not informed by the judge.

36 For the above reason, this Court find that the crime committed by the accused is the one punished in section 338 which provides that *“the person with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum of imprisonment of fifteen years”*.

37 The accused killed the three young men almost at the same time and under the same resolution.

H. CONVICTION.

52. For the aforementioned reasons, in light of the confession of guilty and admissions of all the evidence made by the accused in addition of 'X' plea of guilty, the Special Panel, on 28 October 2002, accepted 'X' plea and convicted 'X' of the murder of 3 unidentified young men contrary to

Sections 338 of the Indonesian penal code and Section 8 of UNTAET Regulation 2000/15.

- 53. Pursuant to these findings of guilty, the Court will proceed to sentence "X" in order to determine an appropriate penalty.

I. SENTENCING

1) Facts related to the sentence.

54 The Defence claimed that the accused, being a minor at the time of the crimes was forced to follow what X was ordered by the chief of Militias. According to the Defense, the accused, as a child used in an armed conflict, is a victim rather than the perpetrator. The guilty plea, the remorse from the accused, X youth constitute mitigating circumstances. In conclusion, the Defence is of the opinion that the accused should not be sentenced with imprisonment. The Defence strongly requested the Court, not to sentencing the Accused, to take into account that he was 14 years old when the crime was committed. He concluded that the accused was still a juvenile and X wants to go back to school.

55 The Prosecution agrees that the accused is very young and that X cooperated with justice, and those circumstances should be taken into account in sentencing. However, the Prosecution is of the opinion that in order to bring justice to the victims of the accused conduct, the later shall be sentenced with prison of at least eleven months.

56 The Special Panel has taken into account the following:

Mitigating circumstances:

57 The age of the accused. confidential information—, the accused is now — years old. Pursuant to Section 45.1 UNTAET Regulation 2000/30, a minor is a person under 18 years of age. The Special Panel agrees with the Defence saying that at the date of the commission of the offence on 9/09/1999, the accused was still a minor, since X was — years old. X was like a tool on the hand of the true responsible for campaign of violence orchestrated against civilian population who was not following the autonomy within Indonesian. As it is well known that campaign took place in very tense situation. However, it must be recall that not all minor of the age of the accused were involved in that campaign.

- 58 It is important to recall that the accused pleaded guilty to the charge against 'X'. The plea of guilty will be taken into account as a considerably mitigating factor.
- 59 The accused acted on the orders of a superior, which is a mitigating circumstance provided in section 21 on UNTAET Regulation 2000/15. All 'X' actions were taken under the authority of Simao Lopes, Laurentinho Soares alias Moko and Gabriel Kolo. The defendant was ordered to kill young men from the villagers and 'X' carried out that order and killed 3 young men. 'X' said, "*Because at that time the situation was very scared and we were ordered by Gabriel Kolo as our chefe of the village as acting also as a commander of the militia Sakunar and I am young and afraid I didn't have a plan to kill him*". Therefore the Special Panel deems that this specific circumstance is provided for in Section 21 U.R. 2000/15 and can be applied in this case.
- 60 The Special Panel has also taken into consideration the fact that the accused has no previous conviction.

Aggravating circumstances:

- 61 The victims of the acts perpetrated by the accused were defenseless young men.
- 62 The horrible manner the crimes were committed, the accused slashing the victims one by one with strange cold blood.

Having reviewed all the circumstances of the case, the Special Panel is of the opinion that exceptional circumstances in mitigation surrounding the crime committed by the accused afford 'X' some clemency.

2) Sentencing policy

- 63 According to the applicable law, in particular Art. 338 of PCI, the penalties that the Special Panel could impose on a person convicted of manslaughter is a maximum imprisonment of fifteen years.
- 64 And section 10.1 of UNTAET Regulation 2000/15, in determining the terms of imprisonment for the crimes referred to in sections 4 to 7 of the present regulation, the panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international; for the crimes referred to in Sections 8 and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor, shall apply.

53. According to Sect. 10 U.R. 2000/15, for the crimes referred to in Sect. 8 of the aforementioned regulation the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor (i.e. the PCI) shall apply. *“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”*.
54. The penalties imposed on accused persons found guilty by the Special Panel must be directed, on one hand, as retribution of the said accused, who must see their crimes punished (*punitur quia peccatur*). Over and above that, on other hand, as deterrence, namely to dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of law and human rights (*punitur ne peccetur*).
55. Finally, the objective to prosecute and punish 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.
56. Taking into account the aggravating and mitigating circumstances, the gravity of the crime and the abovementioned considerations, the Special Panel, deems appropriate the punishment of 12 (twelve) months imprisonment.

J. DISPOSITION

For the foregoing reasons, having considered the plea of guilty of the accused and the arguments of the parties, the transitional rules of Criminal Procedure, the Special Panel finds and imposes sentence as follows:

Accused “X”, is guilty for the charge of murder of three person in violation of article 338 of Indonesian Penal Code.

In punishment of that crime sentences “X” to an imprisonment of twelve (12) months.

Credit for time served

According to section 42.5 of UNTAET Regulation 2000/30, and article 33 of Indonesian Penal Code the Special Panel deducts the time spent in

detention by "X", due to an order of and East Timorese Court. The Defendant was arrested and detained from 19 October 2001 until 10 September 2002. Therefore 'X' was in detention for 11 months and 21 days. Accordingly, previous detention shall be deducted from the sentence today imposed.

Enforcement of sentence

Pursuant to article 14.a) of Indonesian Penal Code the remaining time of prison will not be served, unless the accused, within the period of one year, commit another offence.

This Decision is provided in one copy to the Defendant and 'X' legal representative, Public Prosecutor and to the Prison Manager.

The Defense is entitled to the right to file a Notice of Appeal within the coming 10 days and a written appeal statement within the following 30 days (Section 40.3 of UNTAET regulation 2000/30).

Pursuant to section 45.5 of UNTAET Regulation 2000/30, this Court reaffirms its previous decision prohibiting the publication or disclosure of any information that may lead to the identification of the Accused.

This Judgment was delivered on the 2nd of December 2002 in District Court of Dili by

Judge MARIA NATERCIA Gusmao Pereira (Presiding)



Judge Sylver NTUKAMAZINA



Judge Benfeito MOSSO RAMOS

