



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL
TRIBUNAL DISTRIAL de DILI
SECÇÃO CRIMES GRAVES

Case No. 5/2002
Date: 23/03/2004
Original: English

Before:
Judge Sylver Ntukamazina, Presiding
Judge Maria Naterçia Gusmão Pereira
Judge Siegfried Blunk

Registrar: Joao Naro
Judgement of: 23 March 2004

THE PUBLIC PROSECUTOR
V.
UMBERTUS ENA and CARLOS ENA

JUDGEMENT

The Office of the Public Prosecutor:
Mr. Charles Nsabimana

Counsel of the accused:
Ms. Ana Beatriz Sanchez Lara (for Umberto Ena)
Mr. Alan Michael Gutman (for Carlos Ena)

INTRODUCTION

- 1 The trial of Umbertus Ena aka Mala Cloe (39 years old, born in Naetuna, Sub District of Passabe, Oecussi District, East Timor, farmer, married and father of 3 children) and Carlos Ena aka Tolo Cloe (44 years old, born in Naetuna, Sub District of Passabe, Oecussi District, East Timor, farmer, married and father of 4 children.), brothers, 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 15 September 2003, and concluded today, 23 March 2004 with the rendering of the decision.
- 2 After considering all the evidence presented during the trial, all the written and oral statements from the office of the Prosecutor General (hereafter: the "Public Prosecutor") and from the defense counsels for the defendant, considering the arguments of the parties including their final statements of 22 March 2004 the Special Panel,

HEREBY RENDERS ITS JUDGEMENT

A. THE SPECIAL PANELS

- 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.

B. PROCEDURAL BACKGROUND

- 4 On 5 June 2002 the Prosecutor filed an indictment (in English) against Umbertus Ena and his brother Carlos Ena where they are charged with crimes against humanity (count 1: murder; count 2: attempted murder and, alternatively, count 3: inhumane acts). Both accused were charged with the same counts. Together with the indictment the Prosecutor filed a list of evidence supporting the indictment including the written statements of ten witnesses, the written statements of the two accused and other documentary evidence. The victims of the crimes were identified as Ernesto Lafu, Vicente Quelo and Serafim Tolo. The Prosecutor requested the extension of detention of the accused for the duration of the trial.
- 5 Attached to the indictment were copies of the following documents: Executive Summary Report of the Indonesian Commission on Human Rights Violations in East Timor, dated January 2000; identical letters dated 31 January 2000 from the Secretary General addressed to the President of the General Assembly of the United Nations, the President of the Security Council and the Chairperson of the Commission on Human Rights (A/54/726, S/2000/59); Note by the Secretary General on the Situation of Human Rights in East Timor (A/59/660); Commission on Human Rights Fifty Sixth Session Agenda Items 9 and 14 (c).
- 6 The Prosecution submitted also with the indictment written statements of the accused Umbertus Ena (3 statements, 2 in English and Bahasa and one in English) and Carlos Ena (one statement in English and Bahasa) and from the witnesses Terezinha Punef (English and Bahasa), Laurinda Oki (English and Bahasa), Maria Lafu Ulan (English and Bahasa), Olinda Cono (English and Bahasa), Arnaldo Ulan (English and Bahasa), Maria Sufa (English and Bahasa), Sabina Kope (English and Bahasa), Terezinha Tolo (English and Bahasa), Maria Colo (English) and Serafim Tolo (English and Bahasa)
- 7 The Court clerk provided notification of the receipt of the indictment to the accused Umbertus and Carlos Ena and to their legal representatives on 11 June 2002, pursuant to Sect. 26.1 & 2 U.R. 2000/30.

- 8 The indictment was amended on 16 September 2003 in order to charge the accused persons with crimes against humanity: murder and inhuman acts.
- 9 On 19 September the Prosecutor submitted the following materials: scene of crime site report; forensic anthropology report of Ernesto Lafu; autopsy report of victim Ernesto Lafu; forensic anthropology report of Vincente Quelo; autopsy report of victim Vincente Quelo; medical examination report of Serafim Tolo.
- 10 Umbertus Ena was detained in Becora prison since 9 January 2002 pursuant to an initial detention order issued by the investigating Judge. His detention was regularly extended until 8 June 2002.
- 11 Carlos Ena was arrested on 6 May 2002 and pursuant to an order of the investigating Judge his detention was extended until 10 November 2002.
- 12 On 28 June 2002 the Court decided the extension of the detention of the accused for the duration of the trial.
- 13 The defense counsels of both accused filed, on 13 December 2002, an urgent application for their release. On 31 January 2003 was held a Review of Detention Hearing. The application for release was dismissed by the Court on 15 February 2003.
- 14 The Preliminary Hearing was held on 14 February 2003. During the Preliminary hearing, the Court checked if the defendants had read the indictment or if the indictment had been read to them, and asked them if they understood the nature of the charges, their right to be represented by a legal advisor, the right to remain silent, to plead guilty or not guilty to the charges, as provided for in Sect. 30.4 U.R. 30/2000.
- 15 On 23 May 2003 the defense counsel of Carlos Ena produced a new application for release. The Court rejected the application on 12 June 2003. The decision of the Court was appealed by the defense counsel of Carlos Ena before the Court of Appeal on 23 June 2003. On 18 July 2003 the counsel of Carlos Ena filed again a new application for

- release before the Special Panel that was also rejected by the Court on 12 August 2003. On 24 September 2003 the Court of Appeal decided on the issue raised by the defense counsel of Carlos Ena and granted the appeal. The Court of Appeal ordered the release of Carlos Ena from detention and the application of substitute restrictive measures.
- 16 On 29 September 2003 the defense counsel of Umbertus Ena filed an application for release from pre-trial detention. The Special Panel granted the application and decided to substitute the detention by alternative measures.
- 17 The trial hearing of Umbertus and Carlos Ena commenced on 15 September 2003. On that date Umbertus and Carlos Ena were heard on trial.
- 18 On 16 September the court heard the testimony of the witness Teresinha Punef.
- 19 On 17 September the Court heard the testimony of the witness Laurinda Oki. The hearings were postponed until the 8 of October.
- 20 On 8 and 10 October 2003 the Court heard the testimony of the witness Teresinha Tolo.
- 21 On 27 October 2003 the Court heard the witness Sabina Kope.
- 22 On 28 October 2003 the Court heard the testimonies of the witnesses Maria Sufa and Arnado Wulan.
- 23 On 20 November the Court heard the testimony of the witness Aleixo Ulan.
- 24 On 4 December 2003 were heard the testimonies of the witnesses Dr. David Macolik, Domingos Obe and Jose Obe.
- 25 The trial continued on 9 February 2004 with the testimonies of the witnesses Diosdado Gallardo, J. E. Bell and Caroline Barker.
- 26 On 13 February 2004 the Court heard the testimony of the witness Dr. Muhamad Nuruf.

27 On 22 March 2004 the Court heard the final statements of the parties.

28 After hearing the witnesses and the allegations of the parties the hearing concluded today 23 March 2004 with the decision of the Court.

29 Interpreters into English, Bahasa Indonesian and Tetum languages assisted every act before the Court.

C. APPLICABLE LAW

30 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:

- i. UNTAET Regulations and directives;
- ii. Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
- iii. 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 fulfillment of the mandate given to UNTAET under the United Nations Security Council Resolution 1272 (1999), or UNTAET regulations or directives.

31 Section 1 of Law No.10/2003 provides that the applicable legislation in East Timor on 19 May 2002 means all Indonesian laws applied and that were in force de facto in East Timor prior to 25 October 1999. Section 2 of the same law held that the source of law in Democratic Republic of East Timor are:

- a. The Constitution of the Republic
- b. Law emanated from the National Parliament and from the Government of the Republic

D. FACTS OF THE CASE

- 32 The facts of the case, as presented in the indictment by the Public Prosecutor, can be summarized as follows:
- 33 The district of Oecussi is an enclave of East Timor and is about 43 km away from the rest of East timor. It is landlocked on three sides by Indonesian territory of West Timor. The Selat Ombai Sea is to the north.
- 34 The district of Oecussi is divided int four (4) Sub districts: Pantemakassar A and B, Nitibe, Oessili and Passabe.
- 35 The Sakunar militia operated within the District of Oecussi from approximately April to October 1999.
- 36 Simao Lopes was the supreme commander of the Sakunar militia.
- 37 In Passabe Village, Gabriel Kolo, a police officer and also chief of the village, was the commander of the Sakunar militia.
- 38 Umbertus Ena aka Mala Cloe, Carlos Ena aka Tolo Cloe, Aleixo Sipa and Libertus Mauno aka Latus were members of the Sakunar militia in Naetuna village, Sub-District of Passabe.
- 39 On or around 9 September 1999, a large number of militia members including Umbertus Ena aka Mala Cloe, Carlos Ena aka Tolo Cloe, Aleixo Sipa and Libertus Mauno aka Latus came down from Passabe to Nakome village. The militia members burnt down almost all the houses of the village with all their belongings. Only one or two houses were not burnt during the attack.
- 40 One or two days later, the same group of militia members came back down from Passabe to Nakome village. They were carrying machetes, swords, spears, clubs and sticks.

- 41 Upon arrival of the militia members, the villagers of Nakome were gathered in front of one of the houses that had not been burnt in the first attack.
- 42 The militia members secured the area, surrounded the villagers to make sure nobody could escape from the attack and started stoning them.
- 43 While the stoning was still going on, Umbertus Ena aka Mala Cloe, Carlos Ena aka Tolo Cloe, Aleixo Sipa and Libertus Mauno aka Latus targeted three villagers namely Ernesto Lafu, Serafim Tolo and Vicente Quelo aka Mala Quelo perceived as being CNRT members or/and supporters of independence of East Timor.
- 44 Umbertus Ena aka Mala Cloe, Carlos Ena aka Tolo Cloe, Aleixo Sipa and Libertus Mauno aka Latus struck repeatedly Ernesto Lafu, Serafim Tolo and Vicente Quelo aka Mala Quelo using their machetes.
- 45 Ernesto Lafu and Vicente Quelo aka Mala Quelo died directly from their injuries while the militia members thought Serafim Tolo was also dead. The three victims were left on the spot.
- 46 After the attack, a large number of cattle belonging to the villagers was stolen and taken to Passabe.

E. FINDINGS OF THE COURT

a. Factual findings on the charges against the accused

- 47 A number of facts were not in dispute in the present case. The Court considers the following general facts as proven.
- 48 The Sakunar militia operated within the District of Oecussi from approximately April to October 1999.

- 49 In Passabe village, Gabriel Kolu was the commander of the Sakunar militia. Liberatus Mauno (a.k.a. Latus) held a position of authority within this militia.
- 50 In 1999 Umbertus Ena (a.k.a. Mala Cloe) and Carlos Ena (a.k.a. Tolo Cloe) were members of the Sakunar militia in Naetuna village, sub-district of Passabe.
- 51 On a Wednesday following the referendum in 1999, a large number of militia members came from Passabe to Nakome village. The militia members burnt many of the houses in the village, along with many of the villager's belongings. A few houses were left standing.
- 52 Two days later (a Friday), the same group of militia members returned to Nakome. Among the militia members were Umbertus Ena and Liberatus Mauno. A number of witnesses testified in the trial that Carlos Ena and Mateus Ena (a.k.a. Seni Cloe) were also present. The militia members were carrying machetes and spears.
- 53 The militia members gathered a number of villagers in front of one of the houses. The militia members surrounded the villagers so that they could not escape. Liberatus Mauno gave the order to advance and the militia members began to throw stones at the male villagers.
- 54 Three of the men of the village were attacked with stones and machetes. Two men, Ernesto Lafu and Vicente Quelo (a.k.a. Mala Quelo), were killed while a third, Serafim Tolo, was severely injured.
- 55 These are the general facts of the violence at Nakome. However, the Court must make a more detailed consideration of the evidence relating to the direct involvement of Umbertus Ena and Carlos Ena in the events at Nakome, specifically in relation to the attacks against Ernesto Lafu, Vicente Quelo and Serafim Tolo.
- 56 Ernesto Lafu was struck by machetes on his arms and the back of the neck until he died. Terezinha Punef testified that Umbertus Ena struck the victim first. Terezinha Tolo testified that Liberatus Mauno, Umbertus Ena and Carlos Ena cut the victim with machetes. Laurinda Oki testified that Umbertus Ena cut the victim on the neck and forearm. They then threw stones at his legs.

- 57 Serafim Tolo testified that he recognised Umbertus Ena, Carlos Ena, Mateus Ena and Liberatus Mauno as those who attacked him. He saw Liberatus Mauno cut Ernesto Lafu with a machete and saw Vicente Quelo speared. Serafim Tolo testified that Umbertus Ena, Carlos Ena, Mateus Ena and Liberatus Mauno threw stones at him. He lost consciousness after a stone hit his head. He testified that he was unable to recall what happened afterwards. Sabina Kope and Maria Sufa testified that they saw the victim struck by a stone and then fall. Serafim Tolo was struck on the neck with a machete by Umbertus Ena. Terezinha Punef and Laurinda Oki testified that then Mateus Ena, Carlos Ena and Liberatus Mauno also struck him. Terezinha Tolo testified that Liberatus Mauno, Umbertus Ena and Carlos Ena cut the victim, and that Mateus Ena was also present. The victim was left for dead by his attackers. He later regained consciousness.
- 58 Vicente Quelo was speared, struck by machetes and then stoned until he died. Terezinha Tolo, Laurinda Oki and Sabina Kope testified that the victim was speared from behind by Umbertus Ena. Terezinha Punef and Laurinda Oki both testified that Umbertus Ena, Liberatus Mauno, Seni Cloe and Carlos Ena struck him with machetes. Laurinda Oki testified that Liberatus Mauno cut his neck. Terezinha Tolo testified that Umbertus Ena then threw a large stone at the back of the neck of the victim. Maria Sufa and Sabina Kope testified that Mateus Ena threw a rock at the head of the victim.
- 59 Ernesto Lafu and Vicente Quelo died directly from their injuries. Serafim Tolo was severely injured.
- 60 This Court holds no doubts as to the participation of Umbertus Ena in the attack in Nakome village and his involvement in the deaths of Ernesto Lafu and Vicente Quelo and the injuring of Serafim Tolo. The direct involvement of Umbertus Ena was confirmed by the in- Court testimonies of the witnesses Terezinha Punef, Laurinda Oki, Terezinha Tolo, Serafim Tolo, Sabina Kope, Maria Sufa, and Arnaldo Ulan.
- 61 Umbertus Ena himself stated he was present and participated in the acts of violence. He confirmed he was present in the militia attack and stabbed Vicente Quelo with a spear- so killing him- in three



statements to police investigators taken on 30 December 2001, 2 January 2002 and 19 February 2002. Further, as he declared to the Court, *"I speak to this court. I am a member of CNRT. After the referendum I ran away to the mountains. After I returned from the mountains, militia called me; they forced me; I went to Meokona; they told me we were going to look for vegetables; but when we got there they started killing people; before that they were throwing stones. Liberatus Mauno and others members were throwing stones first. After that there were three people dead; two I did not see, the other I saw. One of them Alexio Sepa and Liberatus Mauno they cut him until death. I was standing at the back near a tree. Liberatus Mauno called me and took his machete to my neck and said if you don't kill that person you have to die; he gave me a spear and I speared him on the hand; Liberatus Mauno had already killed him. After that we left we went to the main road; there was a person called Carlos Vas and he had a machete; and he said "I also cut them". After that we headed to Passabe; after that we ran away to Indonesia."*

62 This Court holds some doubts as to the presence of Carlos Ena in the attack on Nakome village.

63 The Court acknowledges that at trial, Prosecution witnesses testified that Carlos Ena was present and directly involved in the events. Terezinha Punef testified that *"Mala Cloe and Tolo Cloe are the ones who were cutting; they are here [in court]."* Laurinda Oki testified in Court that *"Three people killed them [Ernesto Lafu and Vicente Quelo]: Mala Cloe, Tolo Cloe and Seni Cloe."* Terezinha Tolo testified that *"Latus, Mala Cloe, Tolo Cloe used machete to cut Ernesto Lafu"* and that *"after Ernesto Lafu, they also cut Serafin Tolo three times... he fell down on the ground... Latus, Mala Cloe, Tolo Cloe are the ones who cut three times."* Serafin Tolo testified that *"On Friday, many people came and attacked the village on Friday, but I recognized only Mala Cloe, Tolo Cloe, Latus and Seni Cloe."* Sabina Kope testified that *"on Friday they were many... I recognized Latus, Mala Cloe, Tolo Cloe and Seni Cloe."* Maria Sufa testified that *"among the people that came Friday I was able to recognize Mala Cloe, Tolo Cloe and Seni Cloe."*

64 Despite this evidence, a number of considerations have led this Court to hold serious doubts regarding whether Carlos Ena was present in the attack on Nakome village.

65 Firstly, there are a number of irregularities and inconsistencies in the earlier statements made by some Prosecution witnesses and their later statements to police investigators and their testimony before Court.

66 On 1 January 2002, Serafim Tolo provided a statement to investigators in which he identified the two perpetrators of the attack as Liberatus Mauno and Mala Cloe. The statement makes no mention of Carlos Ena. On 1 January 2002, Maria Sufa provided a statement to investigators in which she identified the two perpetrators as Latus and Mala Cloe. The statement makes no mention of Carlos Ena. On 1 January 2002, Sabina Kope provided a statement to investigators in which she identified the perpetrator as Mala Cloe. In the statement she claims to have seen Carlos Ena and Seni Cloe in a group of people, but did not see them commit any act against the victims. On 19 February 2002, the suspect Umbertus Ena provided a statement to the police stating that Tolo Vas was a co-perpetrator. None of the three pre-trial statements of Umbertus Ena refer to Carlos Ena. Despite these statements, the participation of Tolo Vas in the events in Nakome was not investigated.

67 Statements taken in March 2002 from four key Prosecution witnesses do mention the involvement of Carlos Ena. However, the Court expresses its concern that two of the statements (the statement of Laurinda Oki and Maria Lafu Ulan, both dated 20 March 2002) are identical. Other than the name, age and time of interview, the text of the statements are identical- even the spacing and punctuation marks are replicated. The first five paragraphs of the statement of Terezinha Punef (also taken on 20 March 2002) are identical to these two statements, while the remaining paragraphs of the statement display striking similarities in terms of words, phrasing and contents. In addition, the statement of Olinda Cono (taken on 22 March 2002) shows striking similarities in terms of words, phrasing and contents to these statements. Given the irregular nature of these statements, the Court is highly reluctant to accord this evidence much weight.

68 The second issue of concern to the Court is that a number of witnesses testified before the Court that Carlos Ena did not participate in the attack on Nakome village.

69 At trial, witness for the Defence Tolo Vas testified that he participated in the militia attack on Nakome, and that Carlos Ena was not present. He stated *“I did not recognize any other person in the group apart from Liberatus Mauno because when they arrived they forced us to follow... Nobody else apart from Liberatus Mauno cut Vicente Quelo... I have not seen Carlos Ena on the day Vicente Quelo was killed... I have not seen Umbertus Ena on the day Vicente Quelo was killed... apart from Liberatus Mauno I was not able to recognize anybody else, I didn't know.”*

70 When asked why he had come to give his testimony for Carlos Ena, the witness Tolo Vas replied *“Because he is not wrong because at the time that they went Meokona I was the one who went.”* Tolo Vas testified that he was involved in the death of Vicente Kelo. He stated before the Court:

“In Meokona there was a small house where there were some men and women and some of the belongings they had taken there. Liberatus came out and got me like from there. He said to me: Why don't you go and chase those people? And he said to me: If you don't want to chase them then you follow me. So because of that I was afraid, I felt like he wanted to kill me. Because he knew we were CNRT members. And then I came and Vicente Kelo was standing like here and I came directly to stand next to him. At that time I wanted to run away but he said: If you run away I will kill you now. And then like this... Liberatus Mauno cut Vicente Kelo till he died. And at that time I wanted to run away too and for that reason, he cut me here on the left had side of my ribs.”

71 Tolo Vas also testified that in his village there existed a long-standing confusion between himself and Carlos Ena. Carlos Vas testified that there could have been a confusion of him with Carlos Ena with regard to the presence of Carlos Ena in Nakome when the incidents occurred. He stated *“it could be mistaking, my name and his name are the same when we were young; I said about the names, when they were calling*

the name, I would respond or he would respond; our names are close; the confusion of names was sometimes only in our village Abani”.

- 72 Manuel Da Cunha testified that he was part of the militia that went to Nakome. He testified that that Tolu Vas and Umbertus Ena were present but that Carlos Ena was not there. Manuel Da Cunha declared before Court, *“Alexio Sepa is the one who forced me, he hit me; I went with them in Nakome and we were split into two groups, one with Alexio Sepa, the other one with Liberatus Mauno; in these two groups I have not seen Tolo Cloe, I only saw Tolo Vas with Mala Cloe; apart from Alexio Sepa, Liberatus Mauno, Tolo Vas and Mala Cloe I didn’t recognize anybody else; when we were attacking the houses, we were running I did not see Tolo Vas doing anything; I didn’t see who killed Vicente Quelo; I didn’t see who killed Ernesto Lafu; Carlos Ena was not there when Ernest Lafu and Vicente Quelo were killed.”*
- 73 Domingos Obe (the nephew of Umberus and Carlos Ena) testified that Umbertus Ena participated in the attack but that Carlos Ena was not a member of the militia and did not participate in the attack. He testified before the Court *“On 30 July 1999, the house of Carlos Ena was used as a meeting place for CNRT activists; in the afternoon we went back to Oecussi; the next morning Umbertus Ena was caught and forced to join the militia if not his house would be burnt and himself killed.”* He also testified that *“The second thing is that Carlos Ena came back from Indonesia in December 1999 because he knew he did not wrong he is not militia; only Umbertus Ena is involved because he was forced to join by Latus, the commandante.”*
- 74 Andre Efi, the CNRT leader for Passable, testified regarding Carlos Ena’s involvement in the CNRT movement. He testified that Carlos Ena had never been in the militia. When questioned by the Court if he knew the whereabouts of Carlos Ena when Ernesto Lafu and Vicente Quelo were killed, Andre Efi responded *“Carlos Ena said he had run away to Indonesia and returned but did not do anything wrong; he told me he did not go to the place, but the one who went there was Carlos Vas; after that I asked Carlos Vas, he said I went but I was forced to go there”.*
- 75 The possibility of mistaken identity between Carlos Ena and Carlos Vas cannot be discounted. Umbertus Ena mentioned in his statement

to the Court “there was a person called Carlos Vas and he had a machete; and he said “I also cut them”. This is consistent with his statement to police investigators on 19 February 2002, when Umbertus Ena provided a statement to the police stating that Tolo Vas was a co- perpetrator. The possibility of such confusion is compounded by the fact that Tolo Vas was never investigated for his involvement in the events in Nakome.

76 Thirdly- and finally- in his statement to the Court, Carlos Ena claimed he did not participate in the militia attack and that he was hiding in a stream at the time.

PPC – Your Honour. Carlos Ena where were you in the date 9 September 1999 when the village was attacked by the militias?

AC – When they attacked I was not there.

PPC – Where were you?

AC – I was hiding.

PPC – Where were you hiding?

AC – I hide in the field.

PPC – Which field?

AC – I hide in the stream.

77 Defence witnesses support this assertion by Carlos Ena that he was not in fact in fact in Nakome. Two witnesses (Carlos Vas and Manual Da Cunha) testified on the basis that they were in Nakome and participated in the events. Other witnesses- such as Domingos Obe and Andre Efi- testified based on their knowledge of Carlos Ena’s character and his affiliation with CNRT.

78 For the reasons highlighted above, this Court expresses its doubts that Carlos Ena was present and participated in the attack on Nakome. Carlos Ena enjoys the presumption of innocence as established in Section 34 (1) of the Constitution of the Democratic Republic of East Timor. This presumption places the burden of establishing his guilt upon the Prosecution. The Prosecution must establish this guilt beyond a reasonable doubt. In the present case, the Court is not able to conclude beyond a reasonable doubt that Carlos Ena was present and participated in the alleged crimes.

b. Legal findings of the case

Murder and Inhumane Acts as Crimes Against Humanity

79 Section 5.1 of U.R. No. 2000/15 establishes the underlying criminal offences that can be qualified as crimes against humanity if they were “committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack.” The provision thus enumerates the necessary elements that all crimes against humanity have in common, sometimes referred to as the *chapeau* elements.

80 To qualify as a crime against humanity, an offence contained in Sec. 5.1 of U.R. No. 2000/15 must be committed in the following context:

1. There must be an “attack.”
2. The attack must be “widespread or systematic.”
3. The attack must be “directed against any civilian population.”
4. The perpetrator of a designated crime must have “knowledge of the attack.”
5. The designated crime must be committed “as part of” such an attack.

81 The Sakunar militia operated within the District of Oecussi from approximately April to October 1999. The Sakunar militia was a pro-autonomy militia group that operated in close cooperation with the TNI and carried out a widespread and systematic attack against the civilian population. The events that occurred in Nakome village on a Wednesday and Friday following the referendum in 1999, including the murder of Ernesto Lafu and Vicente Quelo and the attack of Serafim Tolo, were part of such an attack. In 1999 Umbertus Ena and Carlos Ena were members of the Sakunar militia in Naetuna village. As members of the Sakunar militia both accused had knowledge of the widespread and systematic nature of the attack by the militia. Accordingly, the *chapeau* requirements of Sec. 5.1 of U.R. No. 2000/15 are satisfied.

82 Section 5.1 (a) of U.R. No. 2000/15 provides that murder can be qualified as a crime against humanity. The crime of murder is itself not defined in Sec 5.1. The Special Panel addressed the definition of

murder as a crime against humanity in the case of *The Public Prosecutor v. Joni Marques*, Case No. 09/2000, often referred to as the Los Palos case. In that case the Special Panel set out the following definition of the offence:

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

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

645. The victim is dead.

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

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

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

649. In summary, in a murder, as a crime against humanity, there is no requirement of premeditation as the mental element for murder as a crime pursuant to Sect. 340 of Penal Code Indonesia (KUHP). The mens rea is restricted to the deliberate intent to cause the death of the victim or that such result would occur in the ordinary course of events.



83 It has been established in the jurisprudence of the Special Panels that the requirements for murder as a crime against humanity are as follows:

- a. The victim is dead;
- b. The perpetrator's act was a substantial cause of the victim's death;
- c. The perpetrator intended to cause the death of the victim or reasonably knew that his act was likely to result in the victim's death.

84 The attack against Ernesto Lafu and Vicente Quelo left both men dead. The actions of Umbertus Ena were a substantial cause of the death of Ernesto Lafu, as he struck him repeatedly with his machete and then threw stones at him. His actions were also a substantial cause of the death of Vicente Quelo, as he first speared him, struck him with his machete and then threw stones at him. From such an attack, the Court infers that Umbertus Ena intended to cause the death of both victims or reasonably knew that his act was likely to result in the victim's death.

85 Regarding the attack on Serafin Tolo, Section 5.1 (k) of U.R. No. 2000/15 provides that "*other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*" can be qualified as a crime against humanity.

86 The phrase "*other inhumane acts*" covers a broad range of criminal activity. The breadth of this underlying offence is intentional. The ICTY Trial Chamber in *Kupreskic* considered the phrase "*other inhumane acts*" as an underlying offence that "was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition."¹

¹ *Prosecutor v. Kupreskic*, Case No. IT-95-16, Judgement (Jan 14, 2000), para. 563.

87 The crime of “other inhumane acts” must have the seriousness and gravity of other underlying offences of crimes against humanity.

88 The ICTY Trial Chamber in *Kupreskic* stated that the acts in this category must be as serious as other underlying offences underlined in Article 5 (of the ICTY Statute).² Expressing a similar line of reasoning, the ICTR Trial Chamber in *Kayishema* reasoned “Other inhumane acts include those crimes against humanity that are not otherwise specified in Article 3... but are of “comparable seriousness” and “comparable gravity” to the other enumerated acts... These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim...”³

89 It has been stated that whether a particular act rises to the level of inhumane acts “should be determined on a case-by-case basis.”⁴ The ICTY has established considerable case law on types of acts that are sufficiently grave so to qualify as inhumane acts. As was held by the ICTY Trial Chamber in *Blaskic*, “serious physical and mental injury – excluding murder – is without doubt an ‘inhumane act’ within the meaning of Article 5 of the Statute.”⁵ According to the Trial Chamber in *Kvočka*, “[M]utilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance are listed in the jurisprudence of the Tribunal as falling under this category [other inhumane acts].”⁶ In addition, the ICTY Trial Chamber in *Krstic* held that “[F]orcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity.”⁷

² *Prosecutor v. Kupreskic*, Case No. IT-95-16, Judgement (Jan 14, 2000) para. 566.

³ *Prosecutor v. Kayishema*, ICTR-95-1, Judgement (May 21, 1999) paras. 148-151.

⁴ *Prosecutor v. Kayishema*, ICTR-95-1, Judgement (May 21, 1999) para 151.

⁵ *Prosecutor v. Blaskic*, ICTY-95-14, Judgement (March 3, 2000) para. 239.

⁶ *Prosecutor v. Kvočka et al.*, ICTY-98-30/1, Judgement (November 2, 2001) para. 208.

⁷ *Prosecutor v. Krstic*, IT-98-33, Judgement. (August 2, 2001) para. 523.

90 In the jurisprudence of the Special Panel for Serious Crimes, forcing a man to eat his own flesh has been held to be an inhumane act.⁸ The Special Panel also indicated that extremely restrictive and degrading conditions of detention could potentially constitute inhumane acts.⁹ Most recently, the Special Panel has held that the severe beating of a CNRT leader was an inhumane act.¹⁰

91 The elements of the crime have been most clearly enumerated by the ICTY Trial Chamber in *Vasiljevic*. “The elements to be proved [for other inhumane acts] are: (i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.”¹¹ These constituent elements of the crime have been previously adopted by the Special Panel in the cases of *Jose Cardoso*¹² and *Abilio Mendes Correia*.¹³

92 The attack of Serafim Tolo by a group of militia members, including Umbertus Ena, was an “inhumane act”. He was struck by machetes and had stones thrown at him. The gravity and seriousness of the attack are clear from the evidence that the militia left the victim thinking he was dead.

Individual criminal responsibility

93 Section 14.3 of UNTAET Regulation 2000/15 sets out the basis for an individual’s criminal responsibility. It reads as follows:

14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

⁸ *Prosecutor v. Jose Cardoso*, Case 4/2001, Judgement (5 April 2003) para. 417.

⁹ *Prosecutor v. Jose Cardoso*, Case 4/2001, Judgement (5 April 2003) para. 416.

¹⁰ *Prosecutor v. Abilio Mendes Correia*, Case 19/2001 (29 March 2004) para. 50.

¹¹ *Prosecutor v. Vasiljevic* IT-98-32, Judgement (November 29, 2002) para. 234.

¹² *Prosecutor v. Jose Cardoso*, Case 4/2001, Judgement (5 April 2003) para. 407.

¹³ *Prosecutor v. Abilio Mendes Correia*, Case 19/2001 (29 March 2004) para. 50.

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (...)

94 Section 14.3 of UNTAET Regulation 2000/15 considers individual criminal responsibility through a variety of modes of participation. Sub-sections (a) of Section 14.3 refer to the direct commission of a crime by a perpetrator.

95 Pursuant to Sec. 14.3(a) of U.R. No. 2000/15, a person can be individually responsible for a crime whether he committed the crime as an individual or jointly with another. In the present case, the accused Umbertus Ena was one of a number of militia members to strike the victims with machetes, spears and stones. The Court does not consider that Umbertus Enas' actions alone were the cause of the death of Ernesto Lafu and Vicente Quelo. Nonetheless, the defendant was one of several people who joined together to stab and stone the victims. His actions were a substantial cause of those deaths. He is thus individually responsible for the death of Ernesto Lafu and Vicente Quelo (even though the fatal wound or wounds cannot be identified with precision) and the commission of inhumane acts against Serafim Tolo under Sec. 14.3(a) of U.R. No. 2000/15.

F. VERDICT

96 For the aforementioned reasons, the Special Panel is satisfied that the Public Prosecutor has proved the case of murder beyond reasonable doubt, and therefore finds Umbertus Ena guilty of the murder of Ernesto Lafu and Vicente Quelo, as a Crime against Humanity, according to Sec. 5.1 (a) U.R. 2000/15, and guilty of other inhumane acts intentionally causing great suffering or serious injury to body or mental or physical health against Serafim Tolo, as a crime against humanity, in violation of Section 5(k) of UNTAET Regulation 2000/15.

97 With respect to the accused Carlos Ena, the Court is not satisfied that the Public Prosecutor has proved the case of murder and the case of

other inhumane act beyond reasonable doubt, and therefore finds Carlos Ena not guilty of the murder of Ernesto Lafu and Vicente Quelo aka Mala Quelo, as crimes against humanity, in violation of Section 5.1(a) of UNTAET Regulation 2000/15. The court finds also Carlos Ena not guilty of other inhumane acts intentionally causing great suffering or serious injury to body or mental or physical health against Serafim Tolo, as a crime against humanity, in violation of Section 5(k) of UNTAET Regulation 2000/15.

G. SENTENCING

98 The Special Panel has taken into account the following:

Mitigating circumstances:

99 The accused person Umbertus Ena, prior to the commission of the crime was living in a very coercive environment, and had been forced by threats to join the militia.

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

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

102 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 affords him some clemency.

Aggravating circumstances:

103 The accused, acting together with a group, murdered victims that were defenseless, unable to respond to the attack of a superior force.

104 In addition to the fact that the victims were defenseless, they were killed in a most horrible manner: they were stabbed several times by the accused and other people, before throwing stones on them until they died.

Sentencing policy

105 According to Sec 10.1 (a) UR 2000/15, for the crimes referred to in Sec 5, in determining the terms of imprisonment for those crimes, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals. "In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (Sec 10.2).

106 The penalties imposed by the Panel are intended, on the one hand, as retribution against the accused, whose crimes must be seen to be punished (*punitur quia peccatur*). They are also intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future, to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights (*punitur ne peccetur*).

107 Finally, the objective of prosecuting and punishing the perpetrators of the serious crimes committed in East Timor in 1999 is to avoid impunity and thereby to promote national reconciliation and the restoration of peace.

108 The Panel considered all the aggravating and mitigating circumstances upheld both by the practices of East Timorese courts in applying the Indonesian Penal Code (IPC) and the standards derived from the International Tribunal for Yugoslavia and the International Tribunal for Rwanda, apart from those provided for under UR-2000/15 as well as under general principles of law.

Conjunction of punishable acts.

109 The Crimes against Humanity of Murder and Inhumane Acts for which the accused Umbertus Ena was convicted form a conjunction of punishable acts. A group of militia members, including Umbertus Ena, attacked Serafim Tolo and struck him with machetes and threw stones at him, leaving him for dead. At almost the same time, the same group speared Vicente Quelo, struck repeatedly with machetes both Vicente Quelo and Ernesto Lafu, and threw stones at them until they died. Because of the close proximity of time and space and the fact that the acts of the accused persons were part of the action of group acting with a common criminal purpose, these acts have to be considered as one continued act in the sense of Art. 64 (1) Indonesian Penal Code (IPC).

110 Sect. 10.1 of UR-2000/15 recommends the Panel to apply Indonesian law in determining the terms of imprisonment for the crimes against humanity committed in East Timor¹⁴. Accordingly, Art. 64(1) IPC provides that only the most severe penal provisions shall be imposed¹⁵. In this case, the crime of murder is the most severe.

111 Taking into account the aggravating and mitigating circumstances, the conjunction of acts, the gravity of the crime and the abovementioned considerations, the Special Panel deems appropriate the punishment of 11 (eleven) years imprisonment for the conviction on the crimes of murder and inhumane acts.

H. DISPOSITION

¹⁴ Sect. 10.1 of UR-2000/15: "A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present Regulation: (a) imprisonment for a specified number of years, which may not exceed a maximum of 25 years. 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 tribunals (...)".

¹⁵ Art. 64(1) of KUHP: "If among several acts, even though each in itself forms a crime or misdemeanor, there is such a relationship that they must be considered as one continued act, only one penal provision shall apply whereby, in case of difference, the most severe penal provision shall be imposed."

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

With respect to the defendant Umbertus Ena (aka Mala Cloe)

- a) Guilty of the murder of Ernesto Lafu and Vicente Quelo aka Mala Quelo, as crimes against humanity, in violation of Section 5.1(a) of UNTAET Regulation 2000/15.
- b) Guilty of other inhumane acts intentionally causing great suffering or serious injury to body or mental or physical health against Serafim Tolo, as a crime against humanity, in violation of Section 5(k) of UNTAET Regulation 2000/15.
- c) In punishment of those crimes of murder and other inhumane acts, which are considered as one continued act for the purposes of sentencing, in accordance with Section 64.1 of the Indonesian Criminal Code, sentences Umbertus Ena of eleven (11) years of imprisonment.

With respect to the defendant Carlos Ena (aka Tolo Cloe)

- d) Not guilty of the murder of Ernesto Lafu and Vicente Quelo aka Mala Quelo, as crimes against humanity, in violation of Section 5.1(a) of UNTAET Regulation 2000/15; and therefore acquits him on that charge.
- e) Not guilty of other inhumane acts intentionally causing great suffering or serious injury to body or mental or physical health against Serafim Tolo, as a crime against humanity, in violation of Section 5(k) of UNTAET Regulation 2000/15; and therefore acquits him on that charge.



Cost of Proceedings

The Court orders Umbertus Ena to pay half of the costs of the criminal procedure.

Credit for time served

According to Section 10.3 of UNTAET Regulation 15/2000, Section 42.5 of UNTAET Regulation 30/2000 and Article 33 of Indonesian Penal Code, the Special Panel deducts the time spent in detention by Umbertus Ena, due to an order of this Court. The defendant Umbertus Ena was arrested and detained since 9 January 2002 and released on 8 October 2003. Therefore he was under detention for 1 year and 9 months. Accordingly, his period of previous detention shall be deducted from the sentence today imposed, together with such additional time he may serve pending the determination of any final appeal.

Enforcement of sentence

Pursuant to Sections 42.1 and 42.5 of UNTAET Regulation 2000/30 (as amended by UNTAET Regulation 2001/25), the convicted person shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.

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

One copy of this decision is to be provided to the Defendants and their legal representatives, to the Public Prosecutor and to the prison manager.

This Judgment was rendered on 23 March 2004 in the District Court of Dili by

Judge Sylver NTUKAMAZINA, presiding

Judge Maria NATERCIA GUSMAO PERREIRA

Judge Siegfried BLUNK.

