JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAM PEMANTAUAN SISTEM YUDISIAL

JUSTICE UPDATE

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Dili District

SEVEN CONVICTED OF CRIMES AGAINST HUMANITY

On 27 October 2004 the Special Panels for Serious Crimes ("the Court"), composed of Judge Schmidt, Judge Blunk and Judge Maria, convicted Agustinho Cloe, Agustinho Cab, Lazarus Fuli, Lino Beno, Antonio Simao and Domingos Metan of crimes against humanity. The first-named defendant, Anton Lelan Sufa, was subsequently convicted of crimes against humanity on 8 November 2004. These convictions were all based on guilty pleas and illustrate the need to comprehensively examine all guilty pleas before acceptance. The indictment was issued on 15 February 2003 in relation to events which took place in Oecussi District on 16 September 1999. In total there were seven accused (following the withdrawal of the charges against Lazarus Tael).

At the initial trial hearing held on 25 October 2004 all but one of the defendants, Lelan Sufa, entered a plea of guilty. Five of these defendants were sentenced to 5 years imprisonment whilst one was sentenced to 4 years imprisonment. Lelan Sufa's case was accordingly severed from the main proceedings and his trial proceeded separately following the conviction of the other seven defendants. On 8 November 2004 he entered a guilty plea and was sentenced to 7 years imprisonment. The Court ordered, in accordance with section 42.6 of UNTAET Regulation 2001/25, that the sentences of all defendants be stayed for a short period to enable them to visit their families in Oecussi prior to imprisonment.

Conviction of the Six Accused

The question of whether a confession of guilt should be accepted by the court is premised on the principle, well established in international criminal jurisprudence, that a guilty plea is not, of itself, a sufficient basis for the conviction of the accused – there are other considerations which must be taken into account.

Section 29A.1 of UNTAET Regulation 2001/25 therefore prescribes criteria by which a guilty plea must be assessed, in order to determine whether it can properly be accepted by the court. This is buttressed by section 29A.5, according to which plea agreements are not binding on the court so that there is an overriding duty on the court to investigate the circumstances of, and if necessary reject, the guilty plea irrespective of any agreement reached between the prosecution and defence. Following the entry of their guilty pleas, the Court questioned each defendant

JUDICIAL SYSTEM MONITORING PROGRAMME
Rua Setubal, Kolmera, Dili – East Timor
Mailing address: P.O. Box 275 Dili, East Timor
Phone: (Mobile) +670 7233711 (Landline) +670 (390) 323 883
E mail: info@jsmp.minihub.org Internet: www.jsmp.minihub.org

separately and systematically in order to ensure that their pleas were made in circumstances which satisfied the requirements of section 29A.1.

According to section 29A.1 the court must be satisfied of the following before accepting a guilty plea:

- The accused understands the nature and consequences of the admission of guilt;
- The admission is voluntarily made by the accused after sufficient consultation with defense counsel; and
- The admission of guilt is supported by the facts of the case.

The Court methodically referred to each of the criteria imposed by s 29A.1 in the course of accepting the defendants' guilty pleas. Nevertheless, on the basis of jurisprudence of the International Criminal Tribunals for Yugoslavia and Rwanda and the Court of Appeal of East Timor, it is at least arguable that the questioning was inadequate and that the circumstances of the case warranted greater caution from the Court in accepting the defendants' guilty pleas. Although the precise scope of the court's duty to examine guilty pleas is not clear, it is well-established that the duty of the court will not be discharged simply by applying each of the criterion as a checklist, in other words, it is "not to be mechanically discharged"[1].

The Court of Appeal has also confirmed that the duty imposed by section 29A.1 requires proactive questioning – it is not enough for the court to simply repeat the words of the regulation to the accused[2]. Consequently, merely asking whether the defendant understands the consequences of his guilty plea where he appears to be uneducated or experiencing difficulty in answering the courts' questions is inadequate. For example, Agustinho Cab was asked whether he knew the consequences of his admission. He said that he did and this was accepted without further questioning. When asked whether the admission was voluntary he simply answered that his "lawyer knew". He was then asked whether he had consulted with his lawyer and he confirmed that he had. The judge was apparently satisfied that these answers fulfilled the first two requirements of section 29A.1(b).

Furthermore, according to the ICTY, the burden on the court in examining a guilty plea is particularly onerous where the defendant is charged with a serious crime and where they are apparently experiencing difficulties in understanding the judge's questions[3]. The defendants were all farmers who had received only a minimal education. It was clear to JSMP that some of the defendants had difficulties (or at least *appeared* to) in comprehending the meaning and implication of questions asked of them. Lazarus Fuli, for example, did not answer when asked for the second time whether he pleaded guilty. His lawyer was then forced to answer on his behalf after which Fuli proceeded to answer the judge's questions. Cab similarly said very little and sometimes answered in a way which indicated that he did not fully understand the question. This situation was exacerbated by the fact that some of the defendants had to share a lawyer – i.e. two defendants represented by the same lawyer. In these circumstances it is questionable whether, especially given the fact that they were

[1] *Prosecutor* v. *Jean Kambanda*, Case No. 97-23-A
[2] Ibid, 31.
[3] *Prosecutor* v. *Drazen Erdemovic*, case No. IT-96-22-T

charged with crimes against humanity, the Court examined each of the defendants' guilty pleas to the extent required by section 29A.1.

Nevertheless, the Court was scrupulous in ensuring that each of the guilty pleas was "supported by the facts of the case", particularly in relation to the pleas of Lino Beno and Domingos Metan. The charges of these two defendants were severed from the main indictment on the ground that their pleas were only partial - that is, their admissions did not support the offences with which they were charged. The Court ordered that the trial would have to proceed in respect of these two cases, unless the prosecution presented additional evidence. The prosecution chose to withdraw the unsupported charge in the case of Metan and presented additional evidence, by way of further witnesses, which the Court accepted as proving all charges against Beno. The requirement for the admission to be supported by the facts was then satisfied and the two defendants were convicted on that basis.

Conviction of Anton Lelan Sufa

Following the severance of his case Lelan Sufa's trial continued and a number of witnesses were heard. However, on 8 November 2004 he chose to make a statement to the Court. In this statement he confessed to having ordered some of the other defendants to kill the victims. The judges questioned Sufa at length as to the nature of his involvement, the orders he had received and given and whether or not he had actually participated in the killing and beating. In short, the Court appeared to be satisfying itself that Sufa's admissions were supported by the facts of the case as required by section 29A.1(c). However, there were no questions directed towards the criteria set out in paragraphs (a) and (b) of that provision, namely, whether or not Sufa understood the nature and consequences of his admission and whether it was made voluntarily only after adequate consultation with his lawyer. Not only did the Court in this case fail to investigate in more depth and exercise the additional caution which cases of this nature demand but it did not even directly question the defendant as to the fundamental criteria set out in paragraphs (a) and (b), section 29A.1.In JSMP's view this was a critical omission.

The role of the section 29A.1 criteria is to ensure that guilty pleas are voluntary, informed, unequivocal and in accordance with the facts of the case, in short, that they are genuine. There is a particular need to adhere to these criteria in the circumstances in which the Court finds itself at present. Security Council Resolution 1543 requires all cases to be finished by 20 May 2005. The time limit imposed by this Resolution was actually referred to by the Court during the trial. Consequently there is pressure on the prosecution to negotiate for, and enter into, plea agreements with the defence and for the Court to accept the resulting guilty pleas. The onerous burden to which courts are subject in accepting guilty pleas is even more pronounced in these circumstances. Where the criteria have been referred to, the court's obligation to accept a genuine guilty plea will not necessarily be discharged by simply repeating the criteria to the defendant. The court must be broad and proactive in its questioning, especially where the defendants are charged with serious crimes and are likely to have a limited comprehension of proceedings. It is therefore questionable whether the Court's application of the criteria in respect of the six defendants was adequate.

APARICIO GUTERRES

The preliminary hearing for the case of Aparicio Guterres was held on 5 November with Judge Schmid presiding. Guterres is facing charges of murder as crime against humanity.

The Defence filed a motion claiming that it had never been officially served with a copy of the indictment as required by section 26.2 of Regulation 2000/30 (Transitional Rules of Criminal Procedure – TRCP). The Court rejected the Defence's motion on the grounds that the Prosecution had sent the indictment to the Defence.

The Prosecution also filed a motion requesting the Court to withdraw the indictment. The Prosecution argued the TRCP do not include any reference as to withdrawal of indictments. Furthermore according to section 54.2 that gives precedence to the application of Indonesian law, the Indonesian Code of Criminal Procedure (ICCP) is applicable to the present case. According to Article 144.1 ICCP, the Prosecution is allowed to change the law suit before the day of the court session whether to improve or not to continue the law suit. The possibility of improvement refers to the amendment of indictments, a question regulated by the TRCP. The possibility of not continuing the law suit is regulated by Article 144.1 ICCP that requires the change in the law suit to occur at least seven days before the court session. The Prosecution pointed out that in the present case the court session has not yet been scheduled and it is not expected to be scheduled before January therefore the motion requesting the withdrawal of the indictment is in compliance with the law. In addiction, the Prosecution argued that this matter is regulated by international provisions such as Rule 51 of the Rules of Evidence of the International Criminal Tribunal for Rwanda which give the Prosecution the power to withdraw an indictment without prior leave at any time before its confirmation. In sum, both the ICCP and international rules admit the possibility of withdrawal of indictments at a pre-trial stage.

The Defence agreed with the Prosecution's arguments and submissions and requested to make some arguments of its own. For the Defence, the TRCP clearly give power to the Prosecution to withdraw an indictment. However, even if that was not the case, according to the TRCP in cases of ambiguity of interpretation, the Court must adopt the interpretation most favorable to the accused. On the other hand, in the Defence's understanding, section 19.A.7 TRCP gives the Prosecution absolute authority to dismiss a case without any time requirements. Whenever the Prosecution dismisses a case, and in accordance with section 22.1, the investigating judge must release the suspect. The Defence agreed with the Prosecution's view that in areas not covered by the UNTAET Regulations, Indonesian law applies. The Defence further argued that this interpretation of the law would also be consistent with the practice of the court in the present case and referred to the decision delivered on 2 November in which the court stated that 'in areas that UNTAET law does not cover, Indonesian law applies'. Indonesian law is clear at to the power of the Prosecution to withdraw an indictment at any time.

The Court considered this issue to be too complex to decide immediately and decided to deliver its decision at another day. At the time of writing of this Justice Update the decision on the Prosecution's motion had not yet been released.