



JUSTICE UPDATE

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Recent Decisions from the Special Panels For Serious Crimes

This week the Special Panels for Serious Crimes (SPSC) were due to deliver written reasons for judgment the panels' final case, *Sisto Barros & Cesar Mendonca*. The release of the written reasons for the conviction of the two defendants on all charges has now been set down for Thursday 12 May.

This Justice Update provides summaries of the three other recently delivered decisions not covered last week.

1. Julio Fernandes Convicted of Destruction of Property

On 19 April 2005, the Special Panels for Serious Crimes ("SPSC"), comprised in this case of Judge Carmo and Judge Rapoza, with Judge Gomes presiding, released its written decision in *Prosecutor vs Júlio Fernandes (25/2003)*. The SPSC acquitted Fernandes of all three charges of the Crimes Against Humanity of Persecution, Deportation or Forcible Transfer of Population, and Inhumane Acts. The defendant was, however, found guilty under Article 170(1) of the *Indonesian Penal Code* for destruction of property committed by a group of people acting with a common purpose. He received a one year suspended prison sentence pursuant to Article 14A of the *Indonesian Penal Code*. Judge Rapoza dissented on the question of the sentence. In his view there were sufficient aggravating factors to counter-balance the mitigating factors which the majority had taken into account and the defendant ought to have been sentenced to 4 years imprisonment on that basis.

Once the defendant confessed to having participated in the destruction of property, the SPSC had the task of determining the type of crime constituted by his conduct. The SPSC disagreed with the Public Prosecutor's submissions and held that destruction of property did not amount to the Crime Against Humanity of Persecution. According to s 5.1(h) of *UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences ("Reg. 2000/15")*, the persecution must be in connection with any act referred to in that provision or any crime within the jurisdiction of the SPSC. The SPSC had little difficulty in finding that the defendant had not committed any of the acts referred to in that provision and also rejected the expansive definition which the prosecution sought to attribute to "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health" (s 5.1(k)).

The *Júlio Fernandes* case therefore raises the interesting question of whether or not the SPSC are competent to convict a defendant of an offence not *expressly* within the jurisdiction prescribed by *Reg. 2000/15* (in this case, the lesser charge of destruction of property in breach of Article 170.1 of the *Indonesian Penal Code*).

Pursuant to sections 1 and 2 of *Reg. 2000/15*, the SPSC have exclusive jurisdiction with respect to the following serious criminal offences:

- (a) Genocide,
- (b) War Crimes,
- (c) Crimes Against Humanity,
- (d) Murder*,
- (e) Sexual Offences*, and
- (f) Torture*.

In short, these provisions stipulate that *only the SPSC* have jurisdiction to hear charges for the listed offences but *not* that these are the *only charges* within the SPSC's jurisdiction. This is an important distinction to bear in mind.

This issue was previously addressed by the SPSC in the *Victor Alves (1/2002)* decision delivered on 8 July 2004¹. In that case the SPSC found the defendant not guilty of the offence of murder, however, it held that there were sufficient grounds to convict him of the lesser offence of negligence causing death pursuant to Article 359 of the *Indonesian Penal Code*. According to the Panel:

“[W]here an indictment charges an offence within the original jurisdiction of the Special Panels, the Court is competent to render a verdict on lesser included offences of that crime, even though initially such offences could not have been brought before the Special Panels”.

This was a reference to s 32.4 of *Reg. 2000/30*, which authorises conviction of a lesser charge not contained in the indictment. That section prohibits conviction of an offence not included in the indictment unless deemed to be a “lesser included offence of an offence which is stated in the indictment”. The Panel also stressed in its decision the sensible “requirement for overall economy and efficiency of the judicial process” and acknowledged the waste of time and resources which would have otherwise arisen if the case had to be reheard in its entirety by an ordinary panel of the District Court, in accordance with section 30.1 of *Reg. 2000/30*².

In JSMP's view this is also fitting in light of the SPSC's status as a ‘hybrid tribunal’ incorporated into the national court system and subject to subsidiary laws in addition to *Reg. 2000/15*, its empowering statute. In short, as panels of a domestic tribunal, the SPSC have responsibility to convict persons tried before them of crimes of which they

¹ See also *Gaspar Leite (5/2001)*, delivered on 14 September 2002

² Section 30.1 of *UNTAET Regulation 2000/30 on the Transitional Rules of Criminal Procedure as Amended by UNTAET Regulation 2001/25 (“Reg. 2000/30”)* provides that: “All judges who are required to participate in the final decision of the case must be present at all sessions of the trial”. The remit of such a case from the SPSC to ordinary panels of the District Court would therefore require a complete re-trial of the case. This is particularly onerous in light of current shortages of judicial actors in the courts and the heavy caseloads with which judges are burdened.

* Only if committed in the period between 1 January 1999 and 25 October 1999.

are, according to the evidence, guilty even if those crimes are not within their original serious crimes jurisdiction. This rationale falls away with respect to the criminal tribunals for Yugoslavia and Rwanda (“ICT’s”), for example, which are purely international institutions with no supplemental domestic laws other than the statutes on which they are based.

2. Convictions for Crimes Against Humanity committed in Passabe

Former members of the Sakunar militia, Januario Da Costa and Mateus Punef, have been convicted by the Special Panels for Serious Crimes (SPSC) of the Crimes Against Humanity of murder and inhumane acts committed in Oecussi district in September 1999. The charges related to brutal reprisal attacks carried out by the Sakunar militia upon villages that had supported independence in the 1999 popular consultation, and the killing of 47 men near Passabe, in what has become known as the Passabe massacre.

On 8 September 1999 members of the Sakunar militia raided the villages of Nibin, Tumin and Kiubiselo, killing 18 people and injuring many others. On 10 September the surviving young males of the villages were led to Teolassi, near Passabe, where they were systematically shot or hacked to death with machetes. Forty-seven men were killed and others were severely injured. Eleven men, including members of the TNI, were indicted in 2001 for their involvement, but only one of those, Florenco Tacaqui, has been brought to trial. Da Costa and Punef were charged on a separate indictment in 2003.

The prosecution charged Da Costa, a militia leader, with the Crimes Against Humanity of the murders of 18 people in the 8 September raids (Count 1), of the inhumane acts of seriously injuring three people in the same raids (Count 2), of deportation or forcible transfer of population on 9 September 1999 (Count 3), of extermination by murder of 47 men at Passabe on 10 September (Count 4), of inhumane acts committed against seven men on the same occasion (Count 5), and of persecution (Count 6). The prosecution did not charge Punef with offences relating to the raids on villages on 8 September, but charged him with Da Costa on counts four to six in relation to the massacre on 10 September.

Punef’s Plea

Before the trial Mateus Punef confessed to the killing of a prisoner at Teolassi, and confirmed this by his evidence at trial. His evidence was that he was forced to kill the prisoner and that he would have been killed by militia leaders himself if he had refused. The SPSC heard testimony from several other witnesses to the killings and did not accept Punef’s claim that he acted under duress, holding rather that he was an active and enthusiastic participant, “keen to share the aims of the leaders”.

However the SPSC did not find that Mateus was responsible for extermination as charged in Count 4 on the indictment, “keeping in mind that the accused can only be blamed in part in relation to criminal activity, the Court [thought] that it [was] more appropriate to maintain it ...within more modest and traditional boundaries”. He was instead convicted of the crime against humanity of the murder of 47 people. He was also convicted of Count 5, the crime against humanity of inhumane acts committed

upon people on the same occasion, although the SPSC did not state on what basis he was found criminally responsible for this crime.

Januario da Costa

The SPSC found that Da Costa's role was as an "interface between the leadership and the subordinates". While there was no direct evidence of "him setting ablaze huts or killing people in Kiubiselo, Nibin and Tumin", there was evidence of him giving orders, encouraging and threatening others and being present at the various crime scenes.³ He was therefore convicted of Counts 1 and 2 on the basis of his participation as a commander.

This was a concerning development, as the indictment was amended with leave of the Court at the beginning of the trial to charge only criminal responsibility for the direct commission of acts,⁴ while removing any reference to command responsibility.⁵ The Court was "conscious that [the finding of guilt on the basis of command responsibility] may raise perplexities and complaints by the Defence Counsel", but held that the indictment must provide a description of the facts and an identification of the legal provision alleged to have been breached, *not* the basis on which criminal responsibility is alleged to lie on the accused.

According to the SPSC, the account of the facts and the specific charges as set out in the indictment was what Da Costa "was entitled to and needed in order to be put in the condition to develop a complete defence". It may respectfully be suggested that this is not in fact the case, as defending a case brought on the basis of command responsibility is very different to defending a case alleged on the basis of direct execution of crimes, involving different defence witnesses, different strategy and different plea considerations. Where a specific amendment was made to change the case against the accused so that command responsibility was not referred to in the alternative the accused must have been prejudiced in his defence by a subsequent finding of guilt on that basis.

The SPSC found that there was evidence Da Costa participated directly in the crimes alleged at Teolassi and convicted him of Count 4 (qualified as the crime against humanity of murder, not extermination) and Count 5. They found there was insufficient evidence to convict him of Count 3 and on the basis of their decision in *Tacaqui* the SPSC held that the crimes committed by the two defendants did not amount to persecution, as alleged in Count 6, because they were based on revenge, not discrimination.

Sentencing

The SPSC sentenced Da Costa to a total of 12 years imprisonment, and Punef to a total of 10 years imprisonment. For both, this included a sentence of nine years imprisonment for the murders committed at Passabe. The SPSC reduced this from what it saw as an otherwise appropriate head sentence of 14 years because the murders took place in a mass frenzy where the individual "hides himself behind the shield of impunity and anonymity, renouncing to hold to his own inhibitors and sense

³ The SPSC was willing to accept that the murders described in Count 1 occurred, despite not hearing direct evidence of these killings in this trial, on the basis of hearsay evidence in the trial and judicial notice of the notoriety of the crimes.

⁴ By referring to UNTAET Regulation 2000/15, s 14.3 (a), (c) and (d).

⁵ By removing reference to UNTAET Regulation 2000/15, s 14.3 (b) and

of responsibility”, leading to “a vicious circle of self-referentiality and unaccountability” where the “single participant [loses] the sense of measure and of the limits”.

3. Former TNI Soldier Convicted of Attempted Murder after New Evidence Presented

Former TNI soldier Ruldolfo Alves Correia (aka “Adolfo”) has been convicted by the SPSC of the Crime Against Humanity of attempted murder committed in Hera village, east of Dili, in September 1999. The conviction came despite a motion from the Prosecutor to withdraw the indictment after the results of an autopsy of the presumed deceased were received late in the trial.

Correia was indicted on 25 September 2003 for the murder as a crime against humanity of Domingos Nu Nu Alves on 6 September 1999. The SPSC found that, after rounding up and beating Alves and two other people, Pinto and Jesus, Correia ordered another TNI soldier to shoot the deceased in the head. Alves fell to the ground and in the ensuing confusion Pinto and Jesus were able to escape. Two days later the deceased’s wife returned to Hera to find his body lying on the road – it appeared burned in part and the tongue had been cut out of his mouth. There was further forensic evidence of several other injuries that are likely to have occurred around the time of the victim’s death.

On the last day of trial autopsy results were received which showed that the deceased had not received a gunshot wound to the skull as alleged by the Prosecution, and the Prosecution sought to withdraw the indictment. The SPSC reserved its decision on that motion and the trial continued to closing arguments. On 19 April the SPSC delivered its decision in the matter, denying the Prosecutor’s motion to withdraw the indictment on the basis that there was sufficient evidence to convict Correia of the crime against humanity of attempted murder.⁶

The SPSC found it had been proved beyond a reasonable doubt that Correia did “order, solicit or induce” another TNI soldier to shoot Alves in the head, that he “had every reason to believe his order would be obeyed”, and that he would have known that such an action would be fatal to the victim. While the autopsy evidence now shows that Alves’ death did not result from a shot to the head, and while it cannot now be established how the victim’s death was caused, the crime was attempted⁷ and Correia bears criminal responsibility.

The Panel, constituted by Judge Rapoza (presiding), Judge Schmid and Judge Da Costa Ximenes, sentenced Correia to five years imprisonment.

⁶ Qualified from the crime charged in the indictment pursuant to TRCP s 39.1.

⁷ Pursuant to UNTAET Regulation 2000/15, s 14.3(b) a person bears criminal responsibility if the crime “in fact occurs or is attempted”.