



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE
RDTL
TRIBUNAL DISTRITAL de DILI
SECÇÃO CRIMES GRAVES

DISTRICT COURT of DILI
SPECIAL PANELS for SERIOUS CRIMES

Case No. **1 / 2001**
Date: 14 April 2005
Original: English

Before: Judge Siegfried Blunk, Presiding
Judge Samith de Silva
Judge Deodolindo Dos Santos

The Deputy Prosecutor-General for Serious Crimes
v.

Francisco Pedro

JUDGEMENT

For the Prosecution:
Mr. Marek Michon

Defense Counsel:
Mr. Holger Hembach

A. THE SPECIAL PANELS

1. The Special Panels for Serious Crimes in East Timor (hereinafter: Special Panel) were established within the District Court of Dili pursuant to Sec. 10 UNTAET Regulation (hereafter "Reg.") 2000/11 as amended by Reg. 2001/25, in order to exercise jurisdiction (inter alia) over Crimes against Humanity as specified by Sec. 1.3 (c) Reg. 2000/15, among them the criminal offences of the Crime against Humanity of Murder (Sec. 5.1 (a) Reg. 2000/15), the Crime against Humanity of Torture (Sec. 5.1 (f) Reg. 2000/15), and the Crime against Humanity of other Inhumane Acts (Sec. 5.1 (k) Reg. 2000/15).

All Regulations referred to in this judgement have been upheld by Section 165 of the Constitution of the Democratic Republic of East Timor, which came into force on 20 May 2002.

2. According to Sec. 3 Reg. 2000/15 the Special Panel shall apply foremost

- the law of East Timor as promulgated by Sec. 3 Reg. 1999/1, which are "the laws applied in East Timor prior to 25 October 1999"
- subsequent UNTAET Regulations.
- subsequent laws of democratically established institutions of East Timor.

3. The Special Panel has held that "the laws applied in East Timor prior to 25 October 1999" were Indonesian laws (Prosecutor v. Joao Sarmento and Domingos Mendonca, Decision, 24 July 2003). This opinion was confirmed by Sec. 2.3 (c) Law of the Democratic Republic of East Timor No.10/2003, published on 10 December 2003.

B. PROCEDURAL BACKGROUND

4. The indictment dated 13 January 2001 alleged that Francisco Pedro repeatedly stabbed 2 victims, but brought charges that he did "commit, aid, abet or otherwise assist" in the murders. When the Court in a decision dated 4 May 2001 pointed out that it does not make sense to charge the same conduct (stabbing) as committing a crime and at the same time as aiding it, the Prosecution filed an "amended" indictment dated 10 May 2001 containing again the formulation the Court had objected to, but now also naming Apolinario Dos Santos as an additional defendant.

The Court on 22 May 2001 rendered a decision.

The decision discussed the defects in the wording of the indictment, which the Court had pointed out before, and which were not remedied in the “amended” indictment dated 10 May 2001; it went on to examine the power of the Judge to dismiss the indictment, but in the end dismissed the “case”.

The Prosecution appealed the decision, but later withdrew the appeal, at the same time submitting a new indictment dated 31 January 2002.

5. On 31 January 2002 the third indictment against the accused, and on 6 May 2002 the fourth indictment against the accused and Apolinario Dos Santos was submitted.

6. The case file was handed over to the present Presiding Judge on 3 December 2004, who on the same day requested the head of the Defense Lawyer’s Unit to assign Defense Counsels for the defendants, which was done on 15 December 2004.

On 14 December 2004 the Prosecution filed a motion to be allowed to withdraw the third and fourth indictment.

The Defense on 8 February 2005 filed a motion that did not oppose the requested withdrawal, but requested the dismissal

- of counts 4 and 5 of the indictment, arguing that the Court in its decision dated 22 May 2001 had dismissed them already

- of counts 3 – 5, arguing the indictment did not allege the necessary *mens rea*.

The Court in a decision rendered on 11 February 2005 rejected the motion by the Defense, and gave leave to withdraw the third and fourth indictment. An appeal against this interlocutory decision was rejected by the Court of Appeal on 10 March 2005.

7. The Preliminary Hearing according to Sec. 29 Reg. 2000/15 was held on 22 February 2005, a Pre-trial Conference on 8 March 2005.

The trial hearing began on 30 March 2005 with the testimony of 2 witnesses. On 31 March 2005 the accused pleaded guilty to counts 1, 4 and 5 of the indictment, and the Court gave leave to the Prosecution to withdraw the remaining counts. The accused was convicted and sentenced on the same day.

Interpreters for English and Tetum assisted before the Court.

C. ACCOUNT OF THE PROVEN FACTS

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

8. According to the guilty plea of the accused, which was credible, as it was corroborated by witness testimony, the Court is convinced of the following facts:

In September 1999 the accused, an East Timorese farmer, then aged 29, was a member of the "FIRMI" militia that was organized and controlled by the Armed Forces of the Republic of Indonesia which was illegally occupying East Timor despite its declaration of independence on 28 November 1975. The main purpose of this militia was to terrorize civilians who were suspected as independence supporters. The accused had been motivated by threats after an arrest in April 1999 to join the militia.

a) After Francisco Maia and other East Timorese civilians and independence supporters had been arrested by the militia on 2 September 1999, they were detained at the house of the FIRMI militia commander Joao Oliveira aka ANO in the town of Balibo, Bobonaro district, East Timor. There, until 6 September 1999 Francisco Maia and 7 others were repeatedly punched, kicked and beaten with sticks and rifle butts by militia members, while the accused guarded the door of the house, preventing the detainees from escaping.

b) On 15 September 1999 near Batugade, Bobonaro district, East Timor, members of the FIRMI militia including the accused placed the East Timorese civilians and suspected independence supporters Elias Pires, Jorge Mau Loe and Carlito Mau Loe, who had been abducted from their homes, into a taxi and drove them in the dark to a clearing where the militia members intended to kill them. The accused with a knife stabbed Jorge Mau Loe in the chest who died instantly. Later, he stabbed his cousin Elias Pires with his knife, who fell down, and was then stabbed by another militia member with a sword, whereupon he died of the combined wounds. Carlito Mau Loe managed to escape.

9. These acts were part of a country-wide campaign of violence organized and controlled by the Indonesian Armed Forces to intimidate and punish independence supporters, particularly after the population of East Timor in the Popular Consultation held on 30 August 1999 had overwhelmingly voted against remaining an (autonomous) province of Indonesia. The accused was aware of this context.

10. The accused was arrested by INTERFET on 11 November 1999 and released on 23 May 2001.

D. LEGAL FINDINGS

1. Crime against Humanity of Other Inhumane Acts

11. The accused, by guarding the door of the house where the beating and kicking of Francisco Maia and other helpless prisoners during several days took place, knowing this was part of a systematic attack on the civilian population, committed the Crime against Humanity of Other Inhumane Acts as recognized by Art.6 (c) Nuremberg Charter, Art.5 (c) Tokyo Charter, Art. 5 (i) ICTY Statute, Art. 3 (i) ICTR Statute, and Art. 7.1 (k) ICC Statute, and pursuant to Sec. 5.1(k) Reg. 2000/15.

For this criminal offense it is sufficient to deliberately cause serious physical suffering of comparable gravity to the other crimes against humanity (ICTR, Kayishema and Ruzindana, Sentencing Judgement, 21 May 1999, para. 585) thus committing acts that are similar in gravity to the enumerated acts (ICTY, Tadic, Judgement, 7 May 1997, para. 729). The Court, in the case of the accused, because of the abovementioned special circumstances of the beating considers this threshold of gravity to be surpassed. The accused bears individual responsibility in the form of aiding the commission of the crime (Sec. 14.3 (c) Reg. 2000 /15).

12. The fact that Reg. 2000/15 did not yet exist when the criminal acts were committed, is irrelevant, because the Crime against Humanity of Murder is not based on written, but on **customary** law, and has been accepted as such by the International Community for more than half a century. Therefore, in International Criminal Law it is unnecessary to have provisions similar to ones contained in national penal codes specifying offences; what is necessary are statutes defining the jurisdiction of the International Tribunals. This was expressed with clarity in ICTY, Delalic Decision, 15 Oct. 1999 para 26: "... the Tribunal's Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which are already part of customary law."

For this reason the conviction of the accused of a crime under customary International Law cannot violate the principle *nullum crimen sine lege*: unwritten customary law is law just as written law. This is recognized by Sec. 9.1 Timorese Constitution, according to which customary principles of international law are part of the legal system of East Timor. Since this Section is part of the “Fundamental Principles” of the constitution, it obviously takes precedence over the personal right in Sec. 31.5 Timorese Constitution, that criminal law shall not be enforced retroactively.

13. The Special Panels have exclusive jurisdiction over the Crime against Humanity of Other Inhumane Acts according to Sec. 1.1, 1.3 (c) Reg. 2000/15. Since both the accused and the victims are East Timorese, and the offense was committed in East Timor, the issue of the universal jurisdiction of the Special Panels (Sec. 2.2. Reg. 2000/15) does not arise.

2. Crime against Humanity of Murder

14. The accused, by deliberately killing Jorge Mau Loe and Elias Pires, knowing this was part of a systematic attack on the civilian population, committed the Crime against Humanity of Murder under customary International Criminal Law as recognized by Art. 6 (c) Nuremberg Charter, Art.5 (c) Tokyo Charter, Art. 5 (a) ICTY Statute, Art. 3 (a) ICTR Statute, Art. 7.1 (a) ICC Statute, and pursuant to Sec. 5.1(a) Reg. 2000/15.

Unlike the crime of Murder under the national law of many countries, the Crime against Humanity of Murder under international law does not require premeditation (ICTR, Akayesu, Judgement 2 Sept. 1998, para. 589-590; ICTY, Blaskic, Judgement, 3 March 2000 para. 217; Special Panels, Marques, Judgement, 11 Dec. 2001 para. 649).

Since the accused killed Jorge Mau Loe without assistance by another person, he committed the crime “as an individual” in the sense of Reg. 14.3 (a) Reg. 2000/ 15 (solitary perpetration).

As he and another militia member each stabbed Elias Pires according to a pre-conceived common design to kill him, he committed the crime “jointly with another” in the sense of Sec. 14.3 (a) Reg. 2000/15 (co-perpetration).

3. Crime against Humanity of Attempted Murder

15. Because the accused had the intent to kill Carlito Mau Loe as part of a systematic attack on the civilian population, and was prevented from doing so only by the escape of the victim, but had already taken him to the intended place of killing under cover of darkness, and had made him leave the car there, he had performed acts that commenced the execution of the crime by a “substantial step” in the sense of Sec. 14.3 (f) Reg. 2000/15, wherefore he is responsible for the Crime against Humanity of Attempted Murder.

Sec. 14.3 (f) Reg. 2000 /15 is in so far consistent with customary international criminal law, which requires a significant step towards the completion of the crime (Ambos, in Triffterer (ed.), Commentary on the Rome Statute of the ICC, “Art. 25”, margin No. 32).

4. Conjunction of punishable acts

16. Since the accused committed several acts, the Court according to Sec. 3.1 Reg. 1999/1 has to apply Articles 63 - 65 of the Indonesian Penal Code (IPC), which leads to the following result:

- a) As the killings of Elias Pires and Jorge Mau Loe took place in close proximity of time and space and were based on the same design, the Court did not consider them as separate acts in the sense of Art. 65.1 IPC, but as one continued act according to 64.1 IPC so that only one punishment had to be imposed for them.
- b) However the attempted murder (although based on the same design) must be considered as a separate act in the sense of Art. 65.1 IPC because the “substantial step” (*supra* 10) took place before the killings.
- c) The participation in the inhumane treatment of the prisoners was based on a different design, and was committed at a different time and in a different place than the accomplished and attempted murders, wherefore it constitutes a separate act.

For the several acts a) – c) the Court applied Art. 65.1 of the Indonesian Penal Code (IPC), so that a total punishment has to be constituted out of the single punishments.

E. SENTENCING

1) Aggravating and mitigating circumstances

17. Aggravating is that the accused in April 1999 had joined the militia after his arrest, although no specific threat against his life or that of his relatives had been made. Also, he was no insignificant militia member as he was entrusted to guard a village chief.

Having once joined the militia, he naturally was under a certain pressure to participate in the beating and killing of suspected independence supporters, but he was by no means forced to do so, and did not even claim for his defense that he had been ordered to. His claim that otherwise "they would have killed me" was unsubstantiated and incredible.

He committed these crimes against his fellow-countrymen in the interest of a foreign power that was illegally occupying his home country.

As regards the killing of Elias Pires, the fact that the victim was his cousin makes the crime particularly deplorable.

18. Mitigating is that the accused cooperated with the investigators at an early stage, and that before the Court he pleaded guilty on the second day of the trial, so that the Court whose lifespan ends on 20 May 2005, can turn its resources to the remaining trials, which according to OP 8 Security Council Resolution 1543 should be concluded "as soon as possible".

The accused apologized to the families of the murdered victims, and showed remorse.

He must be considered a victim of circumstance, as he would not have committed the crimes without the despicable system of the Indonesian Armed Forces (TNI) of pitting one part of the local population against another, and without the campaign of militia violence unleashed by TNI after the popular consultation turned out to be unfavourable to Indonesia.

However, the Court was not convinced of the assertion by the Defense that he would not commit similar deeds in future, rather the Court fears that in a similar situation of civil war he would be tempted to commit acts of violence again, wherefore a personal deterrence is required.

The Court also took into account that he has to provide for a child, its mother, and two relatives, so that a prison term is particularly harsh for him. On the other hand, for such grave crimes justice must be seen to be done, so that he could not be spared a prison sentence.

2. Sentencing policy

19. In its sentencing policy the Court according to Sec.10.1 (a) and 10.2 Reg. 2000/15 had recourse to the general practice in the courts of East Timor and in the International Tribunals, and took into account the individual circumstances of the accused and the gravity of his offenses.

The sentencing aims for the Court were deterrence, retribution, reconciliation and reprobation. Most prominent in accordance with the Security Council's general aim of restoring and maintaining peace were deterrence and retribution (see ICTY, Erdomevic, Sentencing Judgement, 19 November 1996, para. 58).

For violations of international law the most important aim is deterrence (ICTY, Delalic, Judgement, 16 November 1998, para. 1234).

In East Timor there is an additional requirement for deterrence because just across a hard-to-guard-border live hundreds of recalcitrant ex-militia men with the capability of once again destabilizing this country by means of murder. The aim of reconciliation is particularly important in East Timor after a quarter century of strife and turmoil that in many areas effectively amounted to civil war. However, reconciliation can only be achieved after justice is done.

20. Under the circumstances the following single punishments seemed necessary but also sufficient to achieve the above sentencing aims:

- a) for the accomplished murders seven years,
- b) for the attempted murder four years,
- c) for the inhumane acts two years of imprisonment.

Out of these single punishments the Court constituted in accordance with Sec. 65.2 IPC (*supra* para.16) a total punishment., which was not allowed to exceed one third of the highest single punishment (*supra* a) in accordance with Art. 65.2 IPC, of eight years of imprisonment.

21. From this prison term the time already spent in detention (*supra* 10) had to be deducted according to Sec. 42.5 Reg. 2000/30.

22. For the foregoing reasons the Court on 31 March 2005 rendered the following

Disposition of the Decision

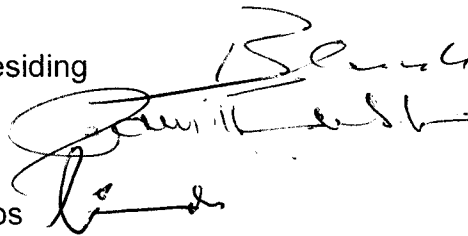
The Court convicts and sentences the accused Francisco Pedro as follows:

1. The accused is
 - a) Guilty of the Crime against Humanity of Murder according to Sec. 5.1 (a) Reg. 2000/15 committed against Elias Pires and Jorge Mau Loe and for this is sentenced to 7 (seven) years of imprisonment
 - b) Guilty of the Crime against Humanity of Attempted Murder according to Sec. 5.1 (a) Reg. 2000/15 committed against Carlito Mau Loe, and for this is sentenced to 4 (four) years of imprisonment
 - c) Guilty of the Crime against Humanity of Other Inhumane Acts according to Sec. 5.1 (k) Reg. 2000/15 committed against Francisco Maia and others, and for this is sentenced to 2 (two) years of imprisonment.
2. Out of these single punishments the Court constitutes a **total** punishment of 8 (**eight**) years of imprisonment.
3. The accused has to bear the costs of the proceedings against him as regulated by law.
4. From this prison term shall be deducted 1 year 6 months and 8 days the accused has already spent in detention.
5. The accused is to be imprisoned immediately.
6. The accused is informed that he can appeal this decision by filing a Notice of Appeal no later than 10 (ten) days after the release of this decision.

Judge Siegfried Blunk, Presiding

Judge Samith de Silva

Judge Deolindo Dos Santos



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