

UNITED NATIONS



NATIONS UNIES

ETTA
East Timorese Transitional Administration
DILI DISTRICT COURT

SPECIAL PANEL for SERIOUS CRIMES

Case No. 05/2000
Date: /2001
Original: English and Bahasa
Indonesia

IN THE TRIAL CHAMBER

Before:

Judge Sylver Ntukamazina, Presiding
Judge Marcelo Dolzany da Costa, Rapporteur
Judge Maria Natercia Gusmao Pereira

Registrar: João Nauro

Judgment of: June 11 , 2001

THE PROSECUTOR
v.
JOSEPH LEKI

JUDGEMENT

The Office of the Public Prosecutor:

Mrs. Donna Daleo assisted by Mr. John Cina

Counsel of the accused:

Mrs. Lisete Quintao and Mr. Siphosami Malunga

INTRODUCTION

The trial of Joseph Leki (aged 33, farmer, born in Lalawa Village in Tilomar Subdistrict, Cova Lima District, East Timor, married and father of four children) before the Panel for Serious Crimes in the District Court of Dili, responsible for the handling of serious criminal offences (hereafter: the “Special Panel”), commenced on 18th May 2001 and concluded today, the 11 June 2001 with the rendering of the decision.

After considering all the evidence presented during the trial, and the written and oral statements from the office of the Prosecutor General (hereafter: the “Public Prosecutor”) and also the Defendant and the defense for the defendant, the Special Panel

HEREBY RENDERS ITS JUDGEMENT.

A. THE SPECIAL PANEL

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, 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

On 24 November 2000, the Public Prosecutor presented before the Dili District Court a written indictment (in English) with a charge of murder against the defendant Joseph Leki. Attached to the indictment were also typed and handwritten copies of the following documents, in English and Tetum versions:

- the statements of the accused (21.2.2000); and the
- statements of the witnesses A (21.2.2000), B (21.2.2000) and C (22.2.2000)

On 14 May 2001, about one week before the trial hearing, the Office of the Public Prosecutor served to the Court the originals and many other documents collected after the indictment, including new statements of the same witnesses, the accused and a letter written by an officer of New Zealand’s Army who had interviewed the accused right after his arrest (p. 93 - 173).

On 16 January 2001, the Public Prosecutor submitted an application for leave to amend the indictment in order to present alternative counts to the charges (p. 34-36). However, the Court dismissed the proposed amendment, deeming that it was “less accurate than the very first one initially submitted” on 18 January 2001 (p. 59).

The Court clerk provided notification of the receipt of the indictment to the accused (21.12.2000) and to his legal representative (12.12.2000), pursuant to Sect. 26.1 and 26.2 U.R. 2000/30 (p. 32). The Defense raised a preliminary objection by alleging defects in the indictment. For him, the indictment should sever the counts relating to each victim (p. 61).

Joseph Leki was arrested and detained on 17 February 2000 when he was returning from West Timor. The Court issued an warrant of arrest on 12 January 2001, after the case came from the investigating judge. However, the same Court released him, under substitute restrictive measures, by a decision issued on 21 February 2001 (p. 37-39).

The preliminary hearing commenced on the 18 January 2001 and finished on 21 February 2001, after two adjournments (p. 60-88). The Court checked if the defendant had read the indictment or if the indictment had been read to him, and asked if he understood the nature of the charges, his right to be represented by a legal advisor, his right to remain silent, to plead guilty or not guilty to the charge, as provided for in Sect. 30.4 U.R. no. 30/2000. The defendant made a statement that he had read the indictment and that he understood the charge against him. During the preliminary hearing, the defense did not submit a list of evidence. The Public Defender said that the defense would try to contact some witness in West Timor. The Court deemed that such a submission could not be "considered as a request of evidence", therefore dismissed it (p. 60). The defense did not file any other motion. The Court admitted the evidence requested by the Public Prosecutor after the submission of the indictment. The request for evidence submitted by the defense came ill-timed and therefore was dismissed during the trial hearing (p. 174).

The defendant did not plead guilty. He stated that at the time he was forced to kill only one of the alleged victims, and consequently was not guilty. He denied responsibility about the murder of Damiao Ximenes, Titus Malis and Januario Maia.

The ordinary trial was scheduled for 18 May 2001 (p. 88).

The ordinary trial was held over two sessions (18.5.2001 and 22.5.2001). The Court also notified both parties that the record of the hearing would be provided by the rapporteur judge, considering that there is no audio or video recording apparatus, no stenographers and no shorthand writer available to the judicial administration in East Timor. The rapporteur judge made a record after summarizing as accurately as possible on a portable computer the statements made by the parties and the questions, orders and decisions of judges during the hearing. The Special Panel decided that this record was authoritative with regard to the one made by the Court clerk.

The Public Prosecutor submitted the statements of the accused and four witnesses, and made a request to the Court to consider as evidence a letter written by the New Zealand's military officer. The Defense did not present any witnesses or evidence and was opposed to consider the statement of the accused made before Captain D as evidence. The Court dismissed the letter as evidence because it did not fulfill the requirements of Sect. 6.2 UR-2000/30. The Public Prosecutor read out the indictment in an open hearing; the accused maintained his stands by refusing to make an admission of guilt. The Court and both parties questioned him. The following witnesses were questioned and gave testimony under oath: A, B, E and C.

The Court closed the presentation and hearing of evidence and then postponed the trial hearing to 22 May 2001 to allow the parties to make their closing statements. On 22 May 2001, the Public Prosecutor submitted a written statement (in English version only) and read it out. The Defense made an oral closing statement. Finally the Court then gave an opportunity to the Defendant to make any additional statement. He preferred to remain silent.

On 29 May 2001, the Court read to the public the verdict and the sentence and adjourned to the 11 June 2001 to release the written judgment.

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

C. APPLICABLE LAW

As specified in UNTAET Regulations No.1/1999, No.11/2000 and No. 15/2000, the Special Panel for Serious Crimes shall apply:

- UNTAET Regulations and directives;
- Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
- Pursuant to Sect. 3 UNTAET Regulation No. 1/1999, the law applied in East Timor prior 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.

Therefore, the Court will apply U.R. No. 2000/15, No. 2000/11, the Penal Code of Indonesia (hereafter PCI) and U.R. No.2000/30 on Transitional Rules of Criminal Procedure.

D. THE FACTS

Factual allegations of the case

The Prosecutor's factual allegations may briefly be set out as follows.

In June 1999, the accused joined a Laksaur militia group in his home village. This militia was very active in the Cova Lima District committing a great number of criminal acts and causing many people to leave their villages and hide in the mountains. In mid September 1999, member of Laksaur militia carried out an attack on Salele village in the Cova Lima District. After this attack, a group of 18 residents left Salele village for West Timor. While resting on 25 September 1999 in the Wea forest between Salele and Tilomar, they were suddenly surrounded and attacked by members of Laksaur militia intending to kill as many of the villagers as possible. One of the attackers was the accused Joseph Leki. During the attack, Titus Mali, Damiao Ximenes and Januario Maia were killed by gunshots fired by the militiamen, including Joseph Leki. Some of the refugees managed to escape to the forests. Eight of them were arrested, tied up and taken to West Timor. On 26 September 1999, the accused and other Laksaur militia members attacked a camp of refugees from Salele village locate in Muta Sikun. They met the group sleeping. As the day before, the militiamen,

including Joseph Leki, opened fire. The refugee Paulino Cardoso was hit and killed by a gunshot. The other refugees managed to escape from the camp.

In final statement, the Prosecutor considered that there was sufficient evidence in relation to the offence which took place on 25 September 1999. Both witnesses, upon the prosecution's viewpoint, reported the action of the militia group that opened fire and killed the victims Mali, Ximenes and Maya. Even if those witnesses could not confirm whether or not Leki had actually fired his gun during the shooting, they did prove that Leki was carrying a gun and was present at the time of the shooting. Thereby, his individual criminal responsibility, even not proved if he really fired his gun during the attack, was joint with his militia group at the time. About the murder of Paulino Cardoso, on 26 September 2001, the Prosecutor also was convinced that the acknowledgment of the accused and the statement of two other witnesses clarified that Leki indeed shot the victim. The duress the defendant and his legal representative alleged to be under could not avoid his criminal responsibility because he himself admitted that he "waited for the militia to pick him up on the morning of 26 September 1999 knowing that the militia would be continuing its operation of finding and shooting persons who had fled to the forest". Accordingly, he had previous opportunity to avoid the threat that he relies on to form the basis of his defense.

The Defense, on the other hand, firstly stressed that the evidence presented by the Prosecution were contradictory. In relation to the fact held on 25 September 1999, it should not be presumed that the accused agreed to participate in the operation; he was threatened to join the mission; he didn't share the intention of the militia leaders. About the second count related to the murder of Paulino Cardoso on the day after, the defense stated that Leki had no intention to kill the victim. Otherwise, it should have been unnecessary for the militiaman Norberto to point his gun at the accused head to force him to kill Cardoso. Eyewitnesses presented by the Prosecution have confirmed this fact and expressed their opinion: "if the accused refused to kill Paulino Cardoso, he would be killed". As a result, the accused had no choice. Section 19.8(b) UR-2000/15 provides, in such circumstance of imminent death, the individual criminal responsibility shall be excluded. The defendant, acting under duress, should not be deemed guilty.

Factual findings

The Court deems that the following facts have been proved in relation to what was charged and what the defendant acknowledged and the defense affirmed during the trial:

- The conduct of the accused
- The victims' cause of death and the link between the conduct and the outcome proved

The conduct of the accused

The accused declared before the Court he was a member of Laksaur militia. He joined the group in June 1999 because he was forced to. His first duty was to keep guard at the militia post. "I [had] to report periodically in the morning and afternoon. Nighttime I was guarding. I sat down all night and then slept", he clarified his duty when asked by the Prosecutor (p. 179, lines 18, 19 and 37). He declared that militia leaders Olivio Moruk and

Egidio Manek ordered him to provide security. Those leaders required him as guard because “they carried and kept the guns (...) to be distributed to people” (p. 179, line 33). Once questioned if he himself carried guns to provide the security, the accused gave the following answers during his deposition:

(...) We [*the security guards*] *didn't* have guns” (p. 179, line 31);

(...) Yes, I got a gun [*before September, when I went to West Timor*] (p. 180, lines 5/8)

(...) Yes, [*on September 1999 I was given a gun*] (...) to participate in an operation (p. 180, lines 19/23)

(...) Yes [*the truth is that I had a gun before September*] (p. 181, line 37)

(...) I had my gun on 25 September (p. 182, line 37)

(...) After one week [*I started to provide security in West Timor*], (...) yes, they gave one gun [*a rifle*] (p. 183, lines 17/20)

(...) On 24 September I didn't have gun, I only got gun when I was at the security [*in West Timor*], (...) before we went to the forest (...) because I was the security. (p. 183, lines 35/46).

(...) Yes, [*I was in the forest on 25 September, but I had no gun on September 25 and 26*] (p. 184, lines 8/14)

The witness A, one of the refugees during the three killings on 25 September 1999, was also shot and survived to the attack because he pretended he was dead (p. 188, line 35/36 and 40). “Joseph Leki had gun [*during the attack*], but I didn't know if he shot”, declared A (p. 188, line 43). He details:

(...) I saw Leki was carrying guns. At the time there were 10 guns in the forest. When the shooting started I don't know exactly where the gunshots were coming from. We were sitting at the time in the forest, suddenly the militia surrounded us. Yes, [*Joseph Leki was there when Titus Malis, Damiao Ximenes and Januario Maia were shot*]. (...) The militia beat me and picked me up in the car. They brought us to the [*village*] of Salele [*after my three friends were killed in the forest*]. Joseph Leki was with us and went together in the same car. (...) When we approached the [*village*] he came and talked to me, but I didn't reply to him because he was militia member and was armed, I was afraid (...) (p. 189/190, excerpts)

B, eyewitness whose husband Damiao Ximenes was one of the three victims of the attack, told the Court what happened on 25 September 1999:

(...) We were at the forest under the trees, suddenly the militia came. My husband raised his hands and said we were not running away. They fired the guns. Olivio Moruk Kasa and Egidio shot my husband. First time they shot his arm. I also was shot in my chest and my leg. I fell. I know one of them is Joseph Leki [*pointing the finger to the accused in the courtroom*] (...) At the time I fell to the ground. I didn't know whether Joseph Leki was shooting or not. He also carried guns. (...) [*After the attack*] they brought us to Indonesia. (...) Joseph Leki was in the group to Indonesia (...) they gave noodles to my children, another meal as well. I didn't speak to him because I was hunger, I was sad. (...) I didn't see who shot my husband (...), I didn't see Joseph Leki, I saw other two people pointing the gun to my husband. No, I didn't see [*Joseph Leki killing anyone*] (p. 193/194 – excerpts).

From the comparison between those statements the Court deems that the accused really carried a gun during the attack. Not any of the eyewitnesses imputes to him as the main

perpetrator of the murder of Damiao Ximenes, Titus Malis and Januario Maya. He refused, at the beginning of the trial, to admit he used guns before the incident on 25 September 1999, but the contradictions came soon as long as he was invited to give further informations about the performance of his duties as security guard to the militia. His phrases reveal, as a whole, that he was given a gun much time before the operation in September 1999. Right after his joining in prior June, he symptomatically was entitled to have a gun, since his duty was to protect the militia post in West Timor. It is far beyond the common sense that someone in charge of security activities in a paramilitary group could not be allowed to hold and to use guns. Also it sounds pathetic his statements that, in performing his duties as security guard, he just “sat down all night and then slept” (p. 179, line 37). After being allegedly constrained to join the militia, he should not complain by spending many nights along sitting down and sleeping.

The first conclusion is that the accused was indeed carrying guns all the time since he joined the militia, otherwise he should not be in charge of security service for those who “carried and kept guns” (p. 179, line 25). The accused cannot explain why his duty was to provide security and keep guns and even though he was not given a gun. His confused deposition almost immediately revealed that, some months before the three-day operation in September, he was already carrying guns.

Along the first day of that operation, he continued to use the guns, as stated by both witnesses. However, there is no evidence that he could have fired a single shot on September 25. The eyewitnesses only testified that, in any case, they saw him carrying guns that first day when at least Egidio and Olivio were included among the militia members as principal perpetrators of the three deaths.

On the second day of the operation, the accused admitted he was carrying a gun and fired a shot, a fatal gunshot at the victim Paulino Cardoso. His shot, nevertheless, was not the single one; it was fired after that Egidio and Norberto had also shot at the victim. Joseph Leki stands his act by imputing to the militiaman Norberto a unavoidable pressure to shoot at the victim. The accused reports this pressure:

(...) Because I was ordered, [*I shot Paulino Cardoso*]. (...) I was forced by Norberto. Norberto put the gun to me. (...) If I didn't, I would die. (p. 187, excerpts).

The witnesses C and E also detail this fact. They report that Joseph Leki actually received a strict order to fire his gun at the victim Paulino Cardoso.

“Norberto Ximenes jumped and aimed his rifle at Joseph Leki and said: ‘*Shoot him or I’ll shoot you!*’, testified Amaral, one of the villagers who were forced to hide in the forest and in the company of the victim and E. This witness C also confirmed that, hiding in the bush and at 20 meters far from the crime scene, he could see and hear what was going on (p. 195, lines 20/43). After an apparent misunderstanding on cross-examination by the defense, he agreed: “I saw Norberto pointing the gun to Joseph Leki and saying: ‘*Shoot him or I’ll shoot you!*’” (p. 196, lines 9/10).

The testimony about the same scene came through the statement of the witness C , also one of the escapees of the militia’s actions that day:

(...) On 26 September 1999, the militia took us at the place where we were hiding. At the time we were sleeping, suddenly the militia called us and said: *Don't run away!* They were using TNI uniforms. *Don't run away, if you run away, we will shoot you!*. They started shooting, we ran away. Everyone tried to escape. Norberto shot Paulino. He shot Paulino and he faced Leki. He was still alive and raised the arms: *Bapak (father), it is me!*. Norberto said: *No father here, father is at home*. Joseph Leki was the last to arrive. Then Norberto pointed the gun to Joseph Leki and spoke to him: *If you don't shoot, I will kill you!* (p. 196, lines 41/46; p. 197, lines 1/3).

The second conclusion is that the accused, under pressure from a gun pointed to his own head, fired the last and lethal shot at the victim Paulino Cardoso, who previously was wounded by other gunshots fired by his fellowmen. Both accused and witnesses have unchallenged versions for this fact and its circumstances. The Court will assess them in appropriate framework.

The victims' cause of death and the link between the conduct and the outcome proved

It is undisputed that the four victims' cause of the death was the gunshots fired the length of the operation carried out by the militia group on 25 and 26 September 1999. On the first day, there is no evidence that the accused fired one of the bullets that resulted in the death of Damiao Ximenes, Titus Malis and Januario Maya; but, it is acknowledged that Joseph Leki was taking part of the operation, providing and carrying guns, supporting, frightening and forcing the hidden villagers to flee. The operation has its successful results with his help. He was not a security guard any more; he had already joined an operation, which objectives and reasons he was fully aware. The main purpose of this widespread and organized strategy was in fact to kill the villagers and to burn their houses in retaliation to the results from the popular consultation in the preceding month. In addition, the plan outlined and executed by Indonesian military forces and its supported local militia groups was the forced deportation of hundreds of thousands of East Timorese. Those facts do not call for any formal evidence in the light of what even the humblest and the most candid man in the world can assess.

On the second day, the final bullet fired at Paulino Cardoso really came from the rifle pointed by Joseph Leki. Regardless any consideration about which bullet caused the fatal wound that killed the victim, there are no doubts Leki fired at and also killed Cardoso.

Two controversial points at this moment raise and demand a meticulous assessment: the individual criminal responsibility and its exemption by the duress. The Court shall point out its belief according to what it has been proved by both parties and pursuant the legal provisions on the matter.

About the incidents related to both counts, the defense relies on the following evidence: (a) the fact that the shots that caused the death of Damiao Ximenes, Titus Malis and Januario Maya were not fired by the accused, regardless he were carrying or not a gun; and (b) the circumstance that, in the following day, the accused was allegedly under duress so that he could not avoid shooting at Paulino Cardoso.

This Court, however, has a different sight from the same facts and circumstances relied on by the defense.

About the three victims on September 25, the accused did participate in their killings, pursuant to what is considered as individual criminal responsibility according to UNTAET regulations.

By supporting morally and in logistic, carrying guns and with immediate involvement in both attacks held on 25 and 26 September 1999, the accused had deliberate intent to provide sufficient means to accomplish the purposes of the militia group. The killings of Damiao Ximenes, Titus Malis and Januario Maya was not a casual fact; they were carried out as a part of a longer planning to terminate any opponent to the *establishment*.

Section 14.3(d) of UR-2000/15 provides that “a person shall be individually responsible and liable for punishment for a crime within the jurisdiction of the panels if that person, in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or be made in the knowledge of the intention of the group to commit the crime” (...). Since he joined the militia, the accused obviously knew about the purposes of the group. To participate in those operations, regardless he was carrying a gun or not, was his contribution to the killings of the first three victims. The evidence he was carrying a gun, as the Court could assess above, enhances his performance to the results. Just holding a gun during a siege maneuver against unarmed civilians, he played an undoubting role to the commission of the three deaths.

The alleged duress can be assessed not only the day the accused shot Paulino Cardoso, as stressed by the Defense, but also along his whole activity in the militia group.

The accused joined the militia in June 1999; he did it supposedly to avoid threats to himself and his family, as his statements underline. However, such constraint is not plenty to put aside his criminal responsibility for the acts he was latter involved. He alleged that the militia could kill him or his family if he refused to join (p. 179, line 46). Asked why he didn't take his family and fled to hide in the places the population was forced to, he just answered that “there was a big number of familiars” (p. 180, line 38). No one should be supposed to stand a heroic behavior by challenging the alleged constraint to join. However, the Court is persuaded that the accused had several choices to do as long as he was with his family and worked as house security guard as he informed when the militia leaders came before him (p. 185, line 16). Leki admitted that many other persons resisted joining the militia (p. 178, line 15) and recognized that they were forced to hide in the forests (p. 180, lines 30/32). The accused chose to be in line with the guns.

From the time when he joined until the operation came after the ballot in August 1999, he had many chances to refuse to share the purposes of the militia group. The retaliation would come as soon as the results pro-independence were confirmed. More than two months after he joined, would Leki still be afraid to be killed? The Court is convinced that his personal condition was not worse nor better than what forced the rest of the population who fled to the forests.

The Defense emphasizes that the accused could not avoid killing Paulino Cardoso on the second day of the operation. “He had no voluntarily shot, he had a gun pointed at his head

to shoot Cardoso”, justifies the Defense in final statement. The Court agrees that this specific circumstance was really sufficient to exclude his criminal responsibility for the murder as principal perpetrator. However, even so remains his individual responsibility as one of those who provided the opportunity and the means for the result, considering that he had prior joined the militia plans to make possible the attack. The killings, burnings and forced deportation came as a corollary of the militia campaigns he joined to. Even before having a gun pointed at his head – specific circumstance that by itself should be duress – the accused had already agreed with and accepted that the rifle he was entitled to hold and his performance in the attacks were necessary to the acts committed by the main perpetrators. Both the rules above are appropriate to consider his responsibility in the two counts.

Therefore, the alleged – and proved – duress on the accused at the very last time he fired his gun at Paulino Cardoso would exclude his responsibility, since he could not necessarily and reasonably avoid that threat, as says Sect. 19.1(d) of UR-2000/15. However, the undisputed fact that he, prior to the very last moment of duress, could avoid that circumstance endows the Court sufficient grounds to believe that Joseph Leki was able to avoid such threat simply by refusing to contribute to the attacks.

E. THE LAW

The Special Panel deems that the evidence on record proves beyond any reasonable doubt that all the essential elements of murder – as alleged in the charge made by the Public Prosecutor – are met.

Pursuant to Sect. 8 U.R. 15/2000 and Article 340 PCI, “the person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished...”.

- ◆ The evidence clearly show that Joseph Leki did participate in the operations that resulted in the deaths of the four victims on 25 and 26 September 1999.
- ◆ Even if Joseph Leki was not the main murder perpetrator on the first day, his individual responsibility is met both in Sect. 14.3(d) of UR-2000/15.
- ◆ On the second day, he was indeed forced to shoot at the victim Paulino Cardoso, but this specific moment of duress in directly committing a crime, as principal perpetrator, should be avoided much long before. The duress, as circumstance to exclude the punishment, is not allowable when the perpetrator deliberately before joined the purpose of the group in the knowledge of the intention to commit the crime.
- ◆ Premeditation means that there is a time between when the intent to murder arises and when the intent is actually realized. Leki knew and could calmly think about how the murder is to be committed. For him, it was sufficient to be aware he was contributing to all the results he had undertaken by joining the group. The time between when the decision arose to join and participate in the militia campaigns and operations to kill can be assessed as the element of *premeditation*.

The Defense submitted that the actions of the defendant were at the order of and with coercion from the militia leaders.

Sect. 19.1(d) of U.R 2000/15 provides that “the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that persons or another person, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be made by other person or constituted by other circumstances beyond that person’s control”.

As stated before, the Special Panel deems that the aforementioned circumstance of exclusion of criminal responsibility would be applicable to the murder committed by Joseph Leki only if he had not before joined the purposes of the group. By joining the operation launched on 25 September, he previously and intentionally shared the aim of furthering the criminal activity of the group (Sect. 14.3(d)[I] UR-2000/15). Even though he did not share these criminal purposes, the Special Panel has no doubts that the accused gave his contribution “in the knowledge of the intention of the group to commit the crime” (Sect. 14.3(d)[ii] UR-2000/15).

“The fact that an accused acted pursuant to an order of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment...” (Sect. 21 of U.R. 2000/15). The accused incessantly alleged that he was forced to join and to work together with the militia’s criminal purposes. As says the law, such circumstance shall not result in impunity, but in an easing punishment.

Pursuant to the consideration of the aforementioned elements, it is found legitimately and in accordance with the law that the Defendant has committed the crimes as specified in Sect. 8 U.R. 2000/15 and article 340 of PCI.

F. VERDICT

For the aforementioned reasons, the Special Panel is satisfied that the Public Prosecutor has proved the case against the accused beyond reasonable doubt and therefore finds Joseph Leki guilty of murder, as a violation of Sect. 8 U.R. 2000/15 and article 340 of PCI.

G. SENTENCING

Pursuant to these findings of guilt, the Special Panel will proceed to sentence Joseph Leki, in order to determine the appropriate penalty.

According to the applicable law, in particular Art. 340 of PCI, the penalties that the Special Panel could impose on a person convicted of murder are capital punishment, life imprisonment or a maximum of 20 years of detention. U.R. # 1999/1, Sect. 3.3, excludes capital punishment. Finally, U.R. # 15/2000, Sect. 10, excludes life imprisonment by providing that it has to be for a specified numbers of years, which may not exceed a maximum of 25 years.

The Prosecution had no suggestion for the penalty.

The accused did not plead guilty and a trial had to be conducted.

The defense underlined that Joseph Leki acted under the pressure of militia and T.N.I. and that he has a family with children.

The Special Panel has taken into account the following:

Aggravating circumstances:

The Special Panel deems that there are no aggravating circumstances in this case.

Mitigating circumstances

The accused had order to kill the people who refused to run away and were hiding in the villages and to burn houses as an intimidation to those who were pro-independence supporters. He acted to carry out an order from a government who was supporting militia groups in East Timor as reprisal to the popular consultation who decided by the independence of this territory. Thereby, the Special Panel deems that the attenuating circumstance provided by Sect. 21 U.R. 2000/15 is applicable to this case.

The Special Panel bears in mind that the accused is married with children. However this may be said of many accused persons and cannot be given any significant weight in a case of this gravity. The accused has no previous convictions.

Sentencing policy

According to Sect. 10 U.R. 2000/15, for the crimes referred to in Sect. 8 of the aforementioned regulation “the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor (i.e. the PCI) shall apply”. “In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person”.

The penalties imposed on accused persons found guilty by the Special Panel must be directed, on one hand, as retribution of the said accused, who must see their crimes punished (*punitur quia peccatur*). Over and above that, on other hand, as deterrence, namely to dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of law and human rights (*punitur ne peccetur*).

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

In this case there are four killings that result in two counts. The death of Damiao Ximenes, Titus Malis and Januario Maya on 25 September 1999 took place in paramilitary

operation whose achievement came by continued acts. Those acts carried on the day after with the killing of Paulino Cardoso. The multiple deaths came in sequential stages that also included house burnings and forced deportation. Such factual framework indeed reveals a conjunction of acts whose rule for punishment lies on Art. 64.1 of Indonesian Penal Code:

“If among more acts, even though each in itself forms a crime or misdemeanour, 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.”

Taking into account the mitigating circumstances, the gravity of the crime and the abovementioned consideration, the Special Panel deems appropriate the punishment of 13 (thirteen) years of imprisonment.

H. DISPOSITION

For the aforementioned reasons, having considered all the evidences (statements from the witnesses and the defendant before the Court) and the arguments of the parties, the transitional rules of Criminal Procedure, the Special Panel finds and imposes sentence as follows:

With respect to the defendant JOSEPH LEKI:

- (1) GUILTY for both of the charges of murder, in violation of Section 8 of UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia;
- (2) In punishment of the continued crimes, sentences JOSEPH LEKI to an imprisonment of 13 (thirteen) years.
- (3) Orders the defendant to pay the costs of the criminal procedure

Credit for time served

According to Section 10.3 U.R. 15/2000, section 42.5 UR-30/2000 and Article 33 of Indonesian Penal Code, the Special Panel deducts the time spent in detention by JOSEPH LEKI, due to an order of an East Timorese Court. The defendant JOSEPH LEKI was arrested on 15 February 2000 and released on 21 February 2001, therefore he was under detention for 1 (one) year and 6 (six) days. Accordingly, 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 UR-2000/30, the convicted 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.

This decision is provided in one copy to the Defendant and his legal representative, Public Prosecutor and to the prison manager.

The Defense has the right to file a Notice of Appeal within the coming 10 days and a written appeal statement within the following 30 days (Sect. 40.2 and 40.3 UR-2000/30).

This Judgment was rendered and delivered on the 11th of June 2001 in the District Court of Dili by

Judge Sylver NTUKAMAZINA (presiding)
Judge Marcelo Dolzany DA COSTA (reporting)
Judge MARIA NATERCIA Gusmão Pereira.

(Done in English and Bahasa Indonesia, the English text being authoritative)

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