



JUSTICE UPDATE

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Final Decisions of Special Panels for Serious Crimes Handed Down

The Special Panels for Serious Crimes (“SPSC”) this week handed down its decision in the final case before it, *Xisto Barros and Cesar Mendonca*, four weeks before the end of its mandate on 20 May 2005. Final written judgment in that matter is still to be delivered, but all other cases have been finalised. It has delivered a number of other written judgments in the past weeks in preparation for its closure, and this update provides a summary of some of those recently delivered judgments. JSMP will publish a further Justice Update next week which summarises the final three decisions of the SPSC.

Domingos Amati and Francisco Matos

On 5 April 2005 Domingos Amati and Francisco Matos were sentenced to seven years imprisonment for the murder of Antonio Pinto Soares (aka Charles) on 5 September 1999. Both Amati and Matos have previously been convicted of Torture as a Crime against Humanity and Persecution as a Crime against Humanity by the SPSC, and are currently serving their sentences for those offences.¹

The SPSC found that, following a heated argument between a drunken Amati and the victim Soares, Soares was chased down to a beach and hacked with a machete by Amati and Matos. He then made his way to the Aitarak Militia Post where he was again attacked with machetes by Amati and Matos. He died later that day of his injuries.

According to the SPSC, Amati and Matos killed Soares, but acted without premeditation to commit murder as contemplated by Art 340 of the Indonesian Penal Code. They were both therefore found guilty of murder (manslaughter) under Art 338 of the Indonesian Penal Code, for which premeditation is not an element.

In reaching the conclusion that there was no premeditation the SPSC relied on the concept of provocation. JSMP is concerned with the SPSC’s treatment of this concept as it is confusing and at times contradictory.

Firstly, the SPSC did not refer in its substantive reasons for judgment to the lapse of time between the first attack at the beach and the second attack at the militia post. However, in reasons for sentencing it stated that this “would have afforded time for the accused to ‘think with a free mind’ [and] narrows down the margin between the offence of murder under s 340 of the Indonesian Penal Code and s 338 of the Indonesian Penal Code”. This was treated as

¹ Case no 28/2003.

an aggravating factor by the SPSC in sentencing but logically should also have been dealt with by the SPSC in determining whether the murder was premeditated.

A second matter for concern is the grounds on which, according to the SPSC, the victim provoked the perpetrators. These were (i) the first argument between Soares and Amati and (ii) the belief that the victim was a supporter of pro-independence groups. While the first of these may raise a basis for provocation it is not made clear by the SPSC how “a suspicion” that a person is a pro-independence supporter amounts to provocation for murder. There is nothing in the evidence referred to by the SPSC in its reasons to suggest that this was a newly-acquired suspicion at the time of the argument or attack, and it seems incongruous that a SPSC set up to try serious crimes committed in the context of largely state-sponsored violence committed upon pro-independence supporters should find this a factor giving rise to a defence.

Furthermore, in its reasons for sentence the SPSC held, first, that the “suspicion harbored by the members of the militia that the deceased was a double agent for both the militia and the clandestine movement” was a mitigating factor, because it “provided a background for the incident”. In the next sentence the SPSC stated, conversely, that “[t]o some extent, the court observes this as an aggravating circumstance as it may push the case against the accused more towards the borders of premeditation”. This not only contradicts the reasons on sentencing, but also the SPSC’s finding that it was a factor of provocation.

While this suspicion may have heightened the anger directed towards the victim following the argument, and while this was a charge of murder under the Indonesian Penal Code rather than a Crime against Humanity, it seems unhelpful to refer to this factor as a matter of provocation, at the very least without further clarification.

Domingos de Deus

On 12 April 2005 the SPSC released its written judgment in the case of Domingos de Deus, convicted on 16 March 2005 of the Crimes Against Humanity murders of UN electoral monitors Joao Lopes and Orlando Gomes and the attempted murder of Alvaro de Deus Lopes. For these crimes he was sentenced to two years imprisonment, although Judge Schmid dissented on the length of sentence.

Joao Lopes, Orlando Gomes and Alvaro de Deus Lopes were employed by the UN to oversee the operation of voting for the Popular Consultation at Baboe Letten village primary school on 30 August 1999. They, along with other civilians, were attacked in the primary school by militia on the afternoon of the Popular Consultation. Domingos de Deus was a TNI soldier, chief of Malabe village and TIM PANCASILA militia chief who was present at the scene. Joao Lopes and Orlando Gomes were killed, while Alvaro de Deus escaped seriously injured.

The Panel found that de Deus was part of an organized force that threatened people by shooting, beating and stabbing with intent to kill. The majority found that de Deus did not inflict any of the wounds on the victims but that he “contributed to their criminal intent by his threatening posture of carrying a gun, at least at his arrival, and uttering scolds and verbal threats, thereby intimidating the unarmed people in and around the polling station, and strengthening the criminal resolve of the other members of the group”. There was, the Panel held, “no doubt that the accused had the required intent as stipulated in s 18.1 UNTAET

Regulation 2000/15". He was therefore held to be responsible for the crimes as part of a joint criminal enterprise pursuant to s 14.3(d)(ii) UNTAET Regulation 2000/15.

In imposing sentence the majority (Judge de Silva and Judge Pereira) took into account that the accused saved several people (who included his relatives) from the attack, that he was unarmed at least during the commission of the crimes, he made only a minor contribution to the crimes and that he is now re-integrated into society. Judge Schmid dissented, holding that de Deus took leading part in the commission of the crime, and that he punched, kicked, beat and tried to stab Orlando. She held that he did not attempt to save any of the victims, despite having authority to do so. Holding that a deterrent sentence was vital for violations of international law, particularly "because just across a highly porous border there are thousands of recalcitrant ex-militia men with the capability of once again destabilizing this country by means of murder", she would have sentenced the accused to six years imprisonment.

Francisco Pedro

On 31 March 2005 Francisco Pedro (aka Chico) was convicted on his own confession of one count of the Crime against Humanity of Murder, one count of the Crime against Humanity of Attempted Murder and the Crime against Humanity of Other Inhumane Acts. He was sentenced on the same day to a total of eight years imprisonment for these crimes. The panel comprised Judge Blunk (Presiding), Judge de Silva and Judge dos Santos.

This brought to an end a case with a long and complicated procedural history, begun by original indictment dated 13 January 2001. Following the dismissal of that indictment by the SPSC on 4 May 2001, the Prosecutor attempted to file a further, defective indictment which was then dismissed on 22 May 2001. After filing two additional indictments in 2002, which did not proceed to trial, the prosecution filed its final indictment on 14 December 2004 together with a motion to withdraw the two indictments filed in 2002². The defence motion to dismiss the latest indictment, on the grounds that two of the counts had been disposed of by the Court's dismissal of the second indictment, was rejected both at first instance by the SPSC³ and on appeal.⁴

Count 1: Crime Against Humanity of Other Inhumane Acts

By Pedro's guilty plea, the SPSC found that the accused was a member of the FIRMI militia which, on 2 September 1999, detained Francisco Maia and other East Timorese civilians at the house of militia commander Joao Oliveira (aka ANO) in Balibo until 6 September 1999. Francisco Maia and seven other civilians were repeatedly punched, kicked and beaten by militia members while Pedro guarded the door of the house. The SPSC found that Pedro bore individual responsibility for the crime, pursuant to s 14.3 of UNTAET Regulation 2000/15, because he aided in its commission by guarding the door.

Counts 4 and 5: Crime against Humanity of Murder and Attempted Murder

The SPSC found that on 15 September 1999 Pedro and other members of the militia drove Elias Pires (Pedro's cousin), Jorge Mau Loe and Carlito Mau Loe to a clearing near Batugade intending to kill them. Pedro stabbed Jorge Mau Loe with a knife in the chest and he died

² 31 January 2002 and 6 May 2002.

³ Decision of 11 February 2005.

⁴ Decision of 10 March 2005.

instantly. Pedro then stabbed Elias Pires, who fell down and was stabbed by another militia member with a sword, and died of the wounds. Carlito Mau Loe escaped. Pedro was held to be individually responsible for the murder of Elias Pires, and jointly responsible for the murder of Jorge Mau Loe. The taking of Carlito Mau Loe to the clearing in the dark with the intention of killing him, and making him get out of the car was held to amount to the commission of a “substantial step” towards the completion of the crime of his murder, and on that basis Pedro was convicted of attempted murder.

The SPSC held that the killings of Elias Pires and Jorge Mau Loe were not separate acts under Art 64.1 of the Indonesian Penal Code because of their close proximity in time and space and the fact that they were based on the same design. The attempted murder of Carlito Mau Loe was however considered to be a separate act because although based on the same design the “substantial step” towards the commission of the crime took place before the killings. Count 1 was similarly held to constitute a separate act. The accused was sentenced on this basis.

The SPSC noted in sentencing Pedro that the fact that the victim Elias Pires was his cousin was “particularly deplorable”, but noted too that the accused cooperated with the investigators at an early stage and that he pleaded guilty on the second day of trial, that he showed remorse and apologised to the families of the murdered victims. The SPSC also acknowledged that Pedro “...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)...”.

He was sentenced to seven years imprisonment for the murders, four years for the attempted murder and two years for the other inhumane acts. This was constituted in a single punishment of eight years imprisonment pursuant to Art 65.2 of the Indonesian Penal Code.

Francisco Perreira

The SPSC handed down its written reasons on 27 April 2005 for the conviction of Francisco Perreira (aka Siku Gagu) of the Crimes Against Humanity of attempted murder and persecution in relation to a campaign of intimidation, beatings, torture and illegal detention executed against supporters of independence in the Zumalai subdistrict in April and May 1999. For these crimes he was sentenced to three years imprisonment.

Jurisdictional Issue

An interesting preliminary issue addressed by the SPSC was whether s 163.1 of the *Constitution* precludes it trying a person indicted after the entry into force of that section. Section 163.1 states that:

“The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases⁵ under investigation”

As Perreira was not indicted until two years after the entry into force of the *Constitution*, it was argued that his case was not “under investigation” at the relevant time and that the SPSC therefore did not have jurisdiction. The SPSC rejected this contention, holding that the SPSC continues to have “jurisdiction over all investigated cases until the eventual replacement of

⁵ The majority stated that the correct translation from the Portuguese is “trials under investigation” not “cases under investigation”, but Judge Rapoza, in his separate reasons for judgment, did not agree that it was a mistranslation.

the Panel within the context of the new judicial structure”. The majority (Judge Florit and Judge Helder Viana do Carmo) looked to the intention of the Legislature to reach this conclusion, while Judge Rapoza, in a separate statement, held that a plain reading of the section was enough to resolve the issue.

Murder or Attempted Murder?

Perreira was charged with the Crime Against Humanity of the murder of Alvaro Tilman, whom he hacked with a sword before the victim was shot in the head by another member of the Mahidi militia. He was convicted only of attempted murder,⁶ although Judge Rapoza dissented on this point.

There were two questions here – did the sword wounds cause the victim’s death and was there a common purpose between the militia to kill the victim? The majority answered no to each of these questions. They found that the gunshot wound was the fatal injury, that Perreira’s and the shooter’s intentions were independent, and that Perreira could therefore not be held criminally responsible under s 14.3(d) of UNTAET Regulation 2000/15 for the actions of the person who shot Tilman. Judge Rapoza disagreed, holding that circumstantial evidence established that there was an implicit agreement between Tilman’s pursuers that “his escape was to be prevented, using deadly force if necessary”, and that Perreira therefore bore criminal responsibility for the murder.

The Persecution Charges

Perreira was convicted of the persecution of Raimundo Magno (illegally arrested on 13 April 1999, beaten with a sword and detained for three weeks), Jose Manek (illegally arrested on 3 April 1999, beaten, temporarily blinded through the use of a white powder and detained for 16 days), Matheus Barreto (illegally arrested some time in April, beaten and detained for one week) and Luis Sarmiento (arrested on 20 May 1999, kicked and detained for two months). He was sentenced to one year imprisonment for these crimes, to be served concurrently with his sentence for attempted murder.

⁶ Section 5 of UNTAET Regulation 2000/15 does not include attempted murder as a head of jurisdiction of the SPSC. Attempted murder was, however, held to be within the SPSC’s jurisdiction in *The Prosecutor v Mateus Tilman* (8/2000).