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NATIONS UNIES

ETTA

East Timorese Transitional Administration

DILI DISTRICT COURT

SPECIAL PANEL for SERIOUS CRIMES

Case No.02 C.G.2000
Date: 1/03/2000
Original: English

IN THE TRIAL CHAMBER

Before:

Judge Sylver Ntukamazina, Presiding
Judge Luca L. Ferrero, Rapporteur
Judge Maria Natercia Gusmao Pereira

Registrar: José Manuel Simoes.

Judgment of: February 27, 2001

THE PROSECUTOR

v.

Julio FERNANDEZ

JUDGEMENT

The Office of the Public Prosecutor:

Ms. Brenda Sue Thornton and Mr. Antonino Goncalves.

Counsel of the accused:

Canxio Xavier, Olga Barreto Nunes, Joao Riberio and Siphosami Malunga.

INTRODUCTION

The trial of Julio Fernandez before the Special Panel of Dili District Court, for the Prosecution of Persons Responsible for Serious Criminal Offences (hereafter "Special Panel"), commenced on 10/01/2001 and came to a close on 1/03/2001.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Deputy General Prosecutor for Serious Crimes (hereafter "Public Prosecutor") and the Defence for the accused, the Trial Chamber,

HEREBY RENDERS ITS JUDGEMENT.

A. THE SPECIAL PANEL

The Special Panel was 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

- 1) Julio Fernandez, born in Hatolia, district of Ermera, on 27.06.1970, was arrested on 5.05.00 by CIVPOL pursuant to the Indonesian Code of Criminal Procedure, The Court did not find on file any document about the detention and the extension of detention pursuant to Sections 19 and 20 of regulation 2000/30 on transitional rule of Criminal Procedure.
- 2) On 16 November 2000, the Public Prosecutor presented a written indictment (both in English and in Bahasa Indonesia), with a charge of murder against Julio Fernandez, at Dili District Court. The case file was registered by the Registry of the Court and forwarded to this Special Panel. The Registrar also provided notification of the receipt of the indictment to the accused and to his legal representative, pursuant to Sect. 26 U.R. 2000/30.

- 3) The preliminary hearing was held on 10 January 2001. The accused made a statement about the charge. The Public Prosecutor presented the evidence for the trial and asked for the extension of the detention of Julio Fernandez. The Special Panel deemed that the statement of the accused could not be considered as an admission of guilt "because Julio FERNADES did not agree totally with the charge and it was clear that there had not been sufficient consultation with the defence". As the order of detention of Julio FERNANDES had expired on 19.11.2000, the Special Panel ordered his release and set the date of trial as 6.02.2001.
- 4) On 11.01.2001 the Public Prosecutor filed a request for continuation of detention of Julio Fernandez (and other 19 accused). On 12.01.2001 the Special Panel issued a warrant of arrest.
- 5) On 16.01.2001 Julio Fernandez was arrested in Gleno.
- 6) On 17.01.2001 the Public Prosecutor filed a request for a review hearing. The hearing was held in Becora Prison on 19.01.2001 and, after both the Parties made the respective requests (Public Prosecutor for detention and defence for release), the Special Panel, "considering that there were reasonable grounds to believe that witnesses and victims could be pressured or manipulated", confirmed the arrest and ordered the detention of Julio Fernandez until the first day of the trial.
- 7) On 23.01.2001 the Public Prosecutor filed a confidential submission containing a list of witnesses to be called at the trial and a list of the evidence to be submitted at the trial. On 6.02.2001, before the trial, another similar list was filed by the Public Prosecutor.
- 8) The trial was held on 6.02.2001. The Public Prosecutor read the indictment to the public. The defence submitted a written statement signed by the accused; Judge Maria Natercia read out the statement given (in Bahasa Indonesia) by the accused during the preliminary hearing on 10.01.2001, then Julio Fernandez made an oral statement and was questioned by the Court and by the parties. The witnesses Rita Pinto de Araujo, Mario Soares and Flaviano Lemos were questioned. The Public Prosecutor, with the consent of the defence to use them as evidence, submitted the statements of witnesses Antonio Salsinha *alias* Durai, Edwin Tan, Daniel Soares, Jose Andrade,

Cipriano dos Santos, Jorge Tim Lau, Gabriel Ximenes. The Public Prosecutor also submitted photographs of the grave and of the exhumation of the victim Americo de Jesus Martins, the report of post mortem examination with photographs and the report of the forensic anthropologist. The Court closed the presentation and hearing of evidence and then asked the Public Prosecutor to make her closing statement. The defence and the accused made their closing statements.

- 9) The Special Panel set then the date of 27 February 2001 to release the written decision and decided to extend the detention of Julio Fernandez until that day.
- 10) On 14 February 2001, the Court of Appeal annulled the warrant of arrest issued on 12.01.2001 and ordered the release of the accused.
- 11) On 27.02.01 the Court postponed the hearing to the 1.03.01

C. APPLICABLE LAW

- 1) As specified in UNTAET Regulations No. 1/1999, No.11/2000 and No. 15/2000, the Special Panel shall apply:
- 2) UNTAET Regulations and directives;
- 3) Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict;
- 4) 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 NATION SECURITY COUNCIL RESOLUTION 1272 (1999), or UNTAET Regulations or directives.
- 5) Therefore, the Court will apply U.R. No. 2000/15, the Penal Code of Indonesia (hereafter C.P.I.) and U.R. No.2000/30 on Transitional Rules of Criminal Procedure.

D. THE FACTS

Factual allegations of the case.

- 1) The Prosecutor's factual allegations may briefly be set out as follows. The Public Prosecutor alleged that Julio Fernandez was a FALINTIL member. After the ballot on 30 August 1999 he fled to the mountains. When Darah Merah Militia withdrew from the Ermera District and moved to West Timor, the accused, together with the population, returned to their homes. On 26 September unidentified villagers captured Americo de Jesus Martins and brought him to a house close to the military compound in Gleno village. He was placed on a chair with his hands tied behind his back and seriously maltreated by the crowd: both of his ears were cut off and he was struck with a machete on one arm. Julio Fernandez arrived on the scene. He questioned Americo on whether he was a member of the militia, who his commander was and why he hadn't left to West Timor. After Americo answered the questions Julio Fernandez stabbed him twice with a knife. He died immediately. The Public Prosecutor submits that the accused took the life of Americo with deliberate intent and premeditation and that the alleged acts constitute the crime of murder, as recognized in Sect. 8 of U. R. N.2000/15 and article 340 of the Penal Code of Indonesia.

- 2) The Defence admitted that Julio Fernandez stabbed twice Americo, that the victim was tied, beaten and suffering and that the crowd was shouting "kill him, kill him". The defence contended that the accused is not guilty of the alleged crime. The Defence submitted that Americo might have been killed after Julio Fernandez stabbed him, because there is no evidence that the wounds inflicted by the accused caused his death. The Defence challenged the criminal responsibility of the accused asserting that the conduct had been caused by duress resulting from the threat of imminent death coming from the crowd.

Factual findings.

- 3) Most of the factual allegations made by the Public Prosecutor are undisputed because the accused himself acknowledged these facts:

Julio Fernandez was a FALINTIL member since 1991. He was the commander of a platoon and was a well known and respected member of the community in Gleno. On the 26 September he returned to Ermera, coming back from the mountains to which he had fled with other members of the community to escape from militia attacks and to avoid displacement to West Timor. When Julio Fernandez arrived in Gleno village, somebody (unknown) took revenge on a member of the Militia who did not escape to West Timor because he could not secure a place for himself and his family on the last truck that was leaving from Gleno. When Julio Fernandez saw him it was the first time, the man was sitting on a chair, his hands tied behind his back, he had been already seriously beaten and maltreated. Both his ears had been cut off and his face was bleeding. Someone had struck him on the arm with a machete.

Julio Fernandez didn't know him before.

The man was surrounded by a crowd screaming that he was a militia member and ought to be killed. Julio Fernandez approached the man and asked him if he was a militia member, who his commander was and why he didn't go to Atambua. The man said he was a member of the Darah Merah militia group, that his leaders were Zeca Lucas, Hilario and Evaristo and that he couldn't go to West Timor because there was no transportation. The crowd continued shouting: kill him, kill him! Finally Julio Fernandez stabbed the man twice with a knife, once on the right side of the chest and once on the back, near his ~~neck~~ neck-bone. The man fell off the chair dead and Julio Fernandez ordered those present to bury him.

- 4) There is considerable other evidence to corroborate the statement of the accused.

Witnesses Antonio Salsinha, *alias* Durai and Jose Andrade saw a lot of people gathered in Gleno village, near the market. They said that the crowd was surrounding the victim. Flaviano Lemos testified that the crowd was very angry, armed with machetes and knives, shouting "kill him, kill him!". The situation was very tense and out of control.

Witness Flaviano Lemos confirmed that Americo had his hands tied behind his back, that he was sitting on a chair and that he had been maltreated.

The witnesses testified also that, at one point, the crowd was saying that the militia man had been killed.

Rita Pinto de Araujo (wife of Americo) stated that her husband was taken from his house on the morning of 26 September 1999, but she couldn't recognize anybody of them because she was in another room. She also stated that her family couldn't go to West Timor because Americo was pushed out of the truck.

5) There is no doubt that the dead body, examined by the experts, was that of Americo de Jesus Martins. Three of the witnesses (José Andrade, Mario Soares and Cipriano dos Santos) knew him as a friend, recognized his dead body and helped others to bury him. The witness Mario Soares showed the place where he was buried to the investigators (witness Edwin Tan). Mario Soares gave a description of the zinc sheet that he was wrapped in (see photos of the exhumation). The clothes and the personal belongings described by the aforementioned witness and by Rita Pinto de Araujo correspond to those reported by the experts (see photos and report of the exhumation).

6) There is evidence to prove, beyond reasonable doubt, that the two stab wounds inflicted by Julio Fernandez were the cause of Americo's death.

Firstly the accused himself acknowledged that, after the second stabbing motion, Americo felt down from the chair dead. He was so sure that the wounds were fatal that he ordered others to bury the body.

The results of the two expert reports confirmed this statement. The post-mortem examination revealed a fracture near the vertebral border that appears consistent with a cut directed right to left and a fracture in the right antero-lateral seventh rib. According to the expert, both injuries correlate with the cuts found on the shirt (see photographs) and can be referred to stab wounds.

A third fracture, to the distal third of the right humerus, wedge shaped, with a partially detached bone fragment, can be related to the machete strike acknowledged by the accused and by the witness Flaviano Lemos.

Even though the forensic pathologist wrote that "the cause of death is sharp force injuries of the trunk and the right upper extremity", the Special Panel (as *peritus peritorum*) believes that a wound to the humerus could not be fatal in the short term and that, therefore, the

cause of death was the two wounds to the trunk inflicted by Julio Fernandez.

This opinion is confirmed by the evidence that, after being struck on the upper arm with the machete, Americo was alive and was able to talk to Julio Fernandez and to the witness Flaviano Lemos.

E. THE LAW

- 1) On the evidence on record, the Special Panel finds that proves, beyond any reasonable doubt, that the essential elements of murder are met: the perpetrator, the deliberate intent, the premeditation and take somebody's life.
- 2) The accused desired and intended to kill the victim because he was a militia member, The people from Ermera district had escaped to the mountains to avoid attacks, killings and displacements to West Timor. On 26 September 1999 these people returned and found most of their properties burnt and destroyed. These people were asking him to execute the member of the Militia and the accused desired to kill that man, if a militia member (deliberate intent). Julio Fernandez questioned the victim as to whether he was a militia member and, after hearing the response, he decided to kill him (premeditation). Then stabbed twice the victim in the upper body with a knife (takes life).
- 3) The Special Panel deems it inappropriate to qualify the crime with the lesser offence of manslaughter. According to the C.P.I. (applicable as mentioned above), which derives from the Dutch Penal Code, the difference between murder (art. 340) and manslaughter (art.338) is premeditation.
Premeditation, according to Indonesian jurisprudence and the interpretation of murder in different countries, does not necessarily imply a long-term planning of the conduct. It's enough to have thought about acting and to have decided whether to take the life of the victim or to withdraw from that intention. The time for the decision can be very short (i.e. minutes or seconds), but what is important is that nothing exceptional interferes with the decision.
Julio Fernandez approached Americo, questioned him, listened to his answers, decided to kill him and then stabbed him twice. He was sure the victim was dead, ordered he be buried and walked away.

It was not an instinctive reaction to a very peculiar situation, but a decision reached by reasoning, after which followed the conduct.

- 4) The defence alleged that, if the conduct of the accused was the cause of Americo's death, Julio Fernandez should not be criminally responsible because of duress.

According to article 49 of C.P.I. "not punishable shall be the person who commits an act necessitated by the defence of his own or another one's body, chastity or property against direct or immediate threatening unlawful assault".

U.R 2000/15 lessens the applicability of duress. Sect.19.1.d) 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".

The Special Panel believes that there is no evidence of a serious threat of imminent death or bodily harm against the accused.

The behavior of Julio Fernandez was not likely to be caused or conditioned by threat. While the crowd was shouting "he is a Militia member, kill him, kill him!", the accused approached Americo, questioned him about his belonging to the Militia, the names of his commander and the reason he didn't go to West Timor. The accused even stated that, if he realized that the man, who had his hands tied behind his back and was sitting on a chair, beaten and bleeding, was not a militia member he would have walked away.

The witnesses stated (and the accused agreed) that Julio Fernandez was a member of FALINTIL, highly considered and respected in the community.

The Special Panel believes that the crowd did not threaten Julio Fernandez, but called him in order to take revenge on the militia man and to punish him in an "official" way, through a FALINTIL member.

The same happened to the witness Flaviano Lemos, who was a member of the C.N.R.T. and highly considered and respected in the community like Julio Fernandez. The crowd asked him to kill Americo, but he was able to refuse and to walk away.

The Special Panel believes that if the accused had decided to walk away, the crowd would have surely blamed and insulted him but not threatened his life.

Finally there were more than two options for Julio Fernandez. It was also open to the accused, as a FALINTIL member, to have decided to take Americo into his custody and to hand him to the authorities. Had he made this choice it is unlikely that the accused would have been threatened by the crowd, since his decision would more likely have been supported by the majority.

It is also relevant to underline that, before the hearing on 6.02.2001, Julio Fernandez had never mentioned that he had felt threatened by the crowd and that had caused his conduct. On 10.01.2001 he simply acknowledged that he killed Americo because he was a FALINTIL member with a duty to keep law and order in community.

Duress is clearly the defense of the very last moment.

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 Julio Fernandez guilty of murder, as a violation of Sect. 8 U.R. 2000/15 and article 340 C.P.I.

G. SENTENCING

- 1) Pursuant to these findings of guilt, the Special Panel will proceed to sentence Julio Fernandez, in order to determine the appropriate penalty.
- 2) According to the applicable law, in particular Article 340 of the C.P.I., 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. No. 1999/1, Sect. 3.3, excludes the capital punishment and U.R. No. 15/2000, Sect. 10, excludes life imprisonment by providing that it has to be for a specified number of years, which may not exceed a maximum of 25 years.
- 3) Both the parties did not submit any aggravating or mitigating circumstances.

- 4) The Public Prosecutor did not give any specific recommendation for the length of sentence.

Aggravating circumstances.

- 5) Julio Fernandez was a FALINTIL since 1991 and was a platoon commander. He acknowledged that, as a FALINTIL member, he knew that there was an order not to kill militia members. Therefore the murder of Americo de Jesus Martins, besides violating the law, is also a breach in FALINTIL rules.
- 6) When killed, Americo, had his hands tied behind his back, was sitting on a chair, defenseless, bleeding and suffering from serious maltreatment and injuries. He should have inspired pity not violence.

Mitigating circumstances.

- 7) The historical situation in East Timor, in September 1999, was very peculiar: the people voted for independence from Indonesia through a democratic ballot. However, before and after the result, suffered from killings, maltreatment, threat, systematic displacements, burning and destruction of premises. After the majority of militia and the Tentara Nasional Indonesia (T.N.I.) left, the East Timorese went back to a place where almost all property was destroyed. The feeling of the people toward militia members was hate and revenge.
- 8) On the very day of the crime a large crowd gathered around the victim, who had been beaten and seriously maltreated. When Julio Fernandez arrived, the atmosphere was very tense and, even if the accused had not been threatened and was not under duress (as above said), he was certainly under pressure.
- 9) 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), has no previous conviction and is highly regarded and respected in the community.

Sentencing policy

- 10) 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 C.P.I.) 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”.
- 11) In this case, more than others, the punishment is also a contribution to reconciliation and to deter such crimes even in the hard times during which they occurred. Julio Fernandez could not be acquitted from the charge of murder because he killed a militia member immediately after the rampages suffered by East Timor civilian population. That situation can only be deemed relevant in determining the penalty.
In fact the persons found guilty to a crime is sentenced to a punishment not only because he broke the law (*punitur quia peccatur*) but also to deter himself and others to break the law (*punitur ne peccetur*).

H. DISPOSITION

For the foregoing reasons, having considered all the evidence 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 accused Julio Fernandez:

GUILTY for the charge of murder, in violation of Sect. 8 of UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia;
In punishment of the above mentioned crime, sentences Julio Fernandez to an imprisonment of seven years

Orders Julio Fernandez to pay the costs of the criminal procedure.

Credit for time served

According to Sect. 10.3 U.R. 15/2000, Sect. 42.5 U.R. 30/2000 and article 33 Of C.P.I. the Special Panel deducts the time spent in detention by Julio Fernandez, due an order of an East Timorese Court. Julio Fernandez was arrested on 5.05.00 released on 11.01.01, arrested on 16.01.01 and released on 15.02.01.

Accordingly, 9 months and 8 days 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 sentences

Pursuant to sect. 42.5 U.R. 30/2000, the convicted shall be imprisoned and shall spend the duration of the penalty in East Timor.


The Special Panel informs Julio Fernandez that he is entitled to file a Notice of Appeal to this decision within 10 days and to file the written appeal statement within the following 30 days.

The sentence shall be executed immediately. The Special Panel informs that is the responsibility of the Public Prosecutor to notify the decision to the competent authorities.

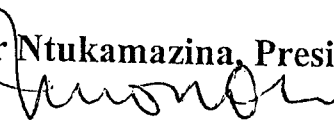
The Special Panel orders the Registrar to give a copy of the written decision to each party and to the prison manager.

Done in English and Bahasa Indonesia, the English text being authoritative.

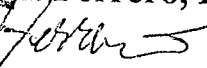
Dili, March 1, 2001



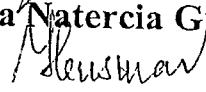
 Judge Sylvester Ntukamazina, Presiding



 Judge Lucas L. Ferrero, Rapporteur



 Judge Maria Natercia Gusmao Pereira



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PENGADILAN DISTRICT DILI
PANEL HAKIM UNTUK KEJAHATAN BERAT
KASUS NO. 02 /C.G /2000

Majelis Hakim :

Hakim Luca Ferrero
Hakim Silver Ntukamazina, Presiding
Hakim Maria Natercia Gusmao Pereira

JAKSA UNTUK KEJAHATAN BERAT
V
JULIO FERNANDES Alias LIAN TIMOR

Asli : Bhs Indonesia.

KEPUTUSAN TERPISAH DAN TIDAK SEPENDAPAT
OLEH HAKIM MARIA NATERCIA GUSMAO PEREIRA
MENGENAI ANALISA FAKTA-FAKTA DAN HUKUM
YANG DITERAPKAN

JAKSA UNTUK KEJAHATAN BERAT :
BRENDA SUE THORNTON
ANTONINHO GONCALVES

TIM PENGACARA DARI PUBLIC DEFENDER OFFICE :
CANCIO XAVIER
SIPO MALUNGA

PENDAHULUAN

Keputusan yang diumumkan hari ini bukan merupakan keputusan yang diambil secara bulat. Pertama, saya setuju dengan sebagian yang diambil dalam putusan ini. Kedua, saya adalah merupakan bagian yang minoritas dan saya merasa saya dapat mengambil sedikit perbedaan jalan pendapat yang mempunyai suatu tujuan akhir yang sama.

Pada Kesempatan ini saya ingin memberikan pendapat saya masalah fakta-fakta pembunuhan dari Julio Fernandes dengan masalah penerapan hukum yang sesuai.

FAKTA- FAKTA DARI KASUS

Setelah membaca fakta- fakta yang diajukan dalam dakwaan oleh Jaksa terhadap Julio Fernandes yang mana dituduh dengan pembunuhan berencana sesuai dengan Regulasi Untaet 15/2000 section 8 dan pasal 340 KUHP Indonesia,

Setelah mendengar keterangan dari Terdakwa Julio Fernandes (yang disebut terdakwa) yang pada pokoknya menerangkan bahwa terdakwa ketika itu pada tanggal 25 September 1999 atau waktu lain pada bulan September 1999 terdakwa datang dari pegunungan (tempat persembunyian) dengan tujuannya mengantar (pengungsi) atau rakyat pro kemerdekaan kembali ke kota Ermera setelah mereka mendengar bahwa Tentara Nasional Indonesia (TNI) sudah menarik diri/meninggalkan Timor Loro Sae dan pulang ke Indonesia.

Pada saat terdakwa datang di dekat Mercado Gleno terdakwa melihat segerumunan orang/rakyat berkumpul dan terdakwa mendekati kerumunan itu untuk mengetahui apa yang sedang terjadi, terdakwa melihat seseorang sedang duduk diatas sebuah kursi dengan kedua tangan terikat ke belakang, telinga telah terpotong dan muka berlumuran darah dan banyak terdapat luka ditangan akibat diparang oleh seseorang yang terdakwa tidak mengenalnya. Terdakwa mendengar kerumunan orang itu berteriak bunuh dia, bunuh dia, lalu terdakwa bertanya kepada korban Americo de Jesus Martins bahwa “apakah anda seorang milisi? Korban menjawab betul” dan terdakwa terus bertanya “mengapa anda ingin pergi ke Atambua - Timor Barat?” dan oleh karena korban menjawab bahwa dirinya adalah anggota Milisi Darah Merah terdakwa bertanya lagi bahwa “mengapa korban tidak pergi? dan Korban menjawab bahwa karena tidak ada transportasi”. Pada saat terdakwa mendengar jawaban tersebut terdakwa emosi dan saat bersamaan terdakwa terus mendengar kerumunan itu tetap berteriak “bunuh dia, bunuh dia,” dan seketika itu juga terdakwa mengeluarkan sebuah pisau berukuran lebar dua jari dan panjang kira kira 20 cm, dan menusuk sebanyak 2 kali, pertama disebelah kanan, kedua dibagian tulang leher.

Akibat tusukan pisau terdakwa, maka korban jatuh ke tanah dan mati seketika, setelah itu terdakwa memerintahkan orang-orang/ kerumunan itu untuk menguburkannya dan terdakwa pergi dari tempat itu.

Setelah mendengar saksi-saksi dalam persidangan, saksi Rita Pinto de Araujo, saksi Mario Soares, saksi Gabriel Ximenes, yang pada pokoknya saksi- saksi dibawah sumpah menerangkan :

Bahwa saksi tahu, (sebagaimana dalam berita acara persidangan)

Setelah membaca Visum Et Repertum atau surat keterangan Otopsi dari dokter Forensik (sebagaimana terlampir dalam surat Dakwaan)

UNSUR –UNSUR DARI BAGIAN 8 REG. UNTAET 15/2000 dan PASAL 340 KUHP Indonesia

Sesuai dengan fakta- fakta tersebut diatas maka harus dibuktikan terlebih dahulu semua unsur-unsur sebagaimana terdapat dalam pasal 340 KUHP.

Unsur- unurnya sebagai berikut :

(a). Barang siapa, (b). dengan sengaja, (c). dan direncanakan lebih dahulu, (d). menghilangkan jiwa orang lain.

Unsur barang siapa;

Menimbang bahwa unsur barang siapa dalam pasal ini ditujukan terhadap manusia sebagai subyek hukum yang dapat dipertanggung jawabkan atas semua perbuatan- perbuatannya. Dan dalam perkara ini Jaksa Penuntut Umum telah mendakwa terdakwa Julio Fernandes dan kemudian dalam persidangan identitasnya jelas bahwa dialah Julio Fernandes yang telah didakwa oleh Jaksa Penuntut Umum dalam perkara ini selanjutnya terdakwa dewasa dan dapat menjawab dengan baik semua pertanyaan yang diajukan kepadanya oleh karenanya disimpulkan bahwa terdakwa dapat mempertanggungjawabkan semua perbuatannya sehingga unsur barang siapa dalam pasal ini cukup terbukti.

Unsur dengan sengaja;

Menimbang bahwa sengaja dalam pasal ini diartikan dikehendaki atau dimaksud ataupun diinsyafi, sudah termasuk dalam niat pelaku yang dalam hal ini matinya korban;

Menimbang bahwa sesuai dengan fakta- fakta yang diperoleh hakim dalam perkara ini bahwa pada tanggal 25 September 1999 kira-kira jam 10.00 pagi bertempat di Ermera/Gleno atau waktu lain pada bulan September 1999 atau

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waktu lain pada bulan September 1999 terdakwa datang dari pegunungan (tempat persembunyian) dengan tujuannya mengantar (pengungsi) atau rakyat pro kemerdekaan kembali ke kota Ermera setelah mereka mendengar bahwa Tentara Nasional Indonesia (TNI) sudah menarik diri dan pulang ke Indonesia.

Terdakwa datang, terdakwa melihat sekerumunan orang/rakyat berkumpul dan terdakwa mendekati kerumunan itu untuk mengetahui apa yang sedang terjadi, terdakwa melihat seseorang sedang duduk diatas sebuah kursi dengan kedua tangan terikat ke belakang, telinga telah terpotong dan muka berlumuran darah dan banyak terdapat luka ditangan akibat diparang oleh seseorang yang terdakwa tidak mengenalnya.

Terdakwa mendengar kerumunan orang itu berteriak bunuh dia, bunuh dia, lalu terdakwa bertanya kepada korban Americo de Jesus Martins bahwa apakah anda seorang milisi, dijawab betul dan terdakwa terus bertanya mengapa anda tidak pergi ke Atambua - Timor Barat? Dijawab korban bahwa tidak ada transportasi pada saat terdakwa mendengar jawaban tersebut terdakwa emosi dan saat bersamaan terdakwa terus mendengar kerumunan itu tetap berteriak bunuh dia, bunuh dia, dengan demikian terdakwa mengeluarkan sebuah pisau berukuran lebar dua jari dan panjang kira kira 20 cm, dan menusuk sebanyak 2 kali, pertama disebelah kanan, kedua dibagian tulang leher. Akibat tusukan pisau terdakwa, maka korban jatuh ke tanah dan mati setelah itu terdakwa memerintahkan orang-orang/kerumunan itu untuk menguburkannya dan terdakwa pergi dari tempat itu;

Menimbang bahwa berdasarkan pertimbangan diatas maka unsur dengan sengaja dalam pasal ini disimpulkan hakim cukup terbukti.

Unsur dengan direncanakan lebih dahulu;

Menimbang bahwa dengan direncanakan terlebih dahulu yaitu antara timbulnya maksud untuk membunuh dengan pelaksanaannya itu masih ada waktu/tempo kepada si pelaku/terdakwa untuk dengan tenang memikirkannya misalnya dengan cara bagaimanakah pembunuhan itu akan dilakukan. Waktu/tempo disini tidak perlu terlalu sempit akan tetapi sebaiknya juga tidak perlu terlalu lama, yang penting adalah apakah dalam tempo itu si pelaku/terdakwa dengan tenang masih dapat berpikir-pikir mengatur pembunuhan itu;

Menimbang bahwa dalam pembelaan yang disampaikan oleh penasehat hukum dalam persidangan terdakwa pada itu dikuasai oleh emosi dan teriakan masa yang sangat banyak jumlahnya, terdakwa tidak ada cukup waktu untuk berpikir-pikir, terdakwa sangat emosi dengan jawaban dari korban yang mengatakan akan pergi ke Atambua-Timor Barat karena anggota Darah Merah Milisi, sehingga pembunuhan atas diri korban terjadi secara tiba-tiba, terdakwa tidak dapat menghindarkan diri dari kejadian itu;

Menimbang bahwa perbuatan terdakwa membunuh korban Americo de Jesus Martins itu dengan demikian terjadi secara spontan atau tanpa direncanakan lebih dahulu, hal mana sesuai dengan fakta yang ditemukan hakim dalam persidangan;

Menimbang bahwa unsur dengan direncanakan lebih dahulu dalam pasal ini dengan demikian tidak terbukti.

Unsur menghilangkan Jiwa orang lain;

Menimbang bahwa perbuatan terdakwa sesuai dengan fakta yang ditemukan hakim dalam persidangan, matinya korban yang bernama Americo de Jesus Martins dilakukan secara spontanitas, sesuai dengan Visum Et Repertum Atau Keterangan dari dokter ahli Forensik Sebagaimana dalam surat dakwaan, korban meninggal dunia akibat menderita luka- luka dibagian tangan, tusukan pisau disebelah kanan dan tusukan pisau dekat tulang leher belakang;

Menimbang bahwa berdasarkan pertimbangan tersebut maka unsur menghilangkan jiwa orang lain dipandang telah terbukti;

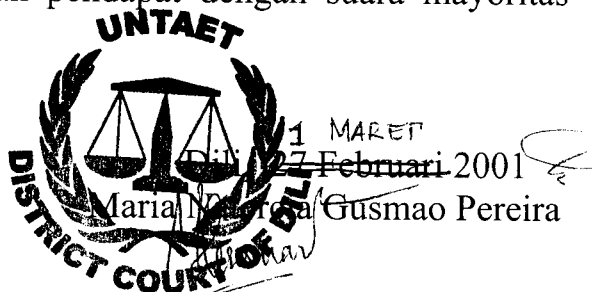
Menimbang bahwa berdasarkan seluruh pertimbangan unsur- unsur sebagaimana tersebut dalam pasal 340 KUHP maka salah satu unsur yaitu dengan direncanakan terlebih dahulu tidak terbukti. Sehingga terdakwa harus dilepaskan demi hukum dari pasal ini;

Menimbang bahwa berdasarkan seluruh pertimbangan unsur-unsur tersebut diatas maka terdakwa haruslah dinyatakan secara sah dan menurut hukum melakukan kejahatan seperti tersebut dalam bagian 8 Reg. Untaet No. 15/2000 dan/atau pasal 338 KUHP Indonesia;

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Menimbang bahwa selama pemeriksaan persidangan tidak ternyata bagi hakim terdapat adanya alasan pembenar ataupun alasan pemaaf yang menyertai perbuatan terdakwa maka kami berkeyakinan bahwa terdakwa bersalah dan dijatuhi hukuman;

Menimbang bahwa mengenai hal-hal lainnya yang berkaitan dengan putusan dalam perkara ini tidak ada perbedaan pendapat dengan suara mayoritas majelis hakim pengadilan ini.



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DISTRICT COURT OF DILI
PANEL OF JUDGES – SERIOUS CRIMES
Case No. /Pid. Berat/2000

Panel Of Judges:

Judge Luca Ferrero, ~~Presiding Judge~~
Judge Silver Ntukamazina, – PRESIDING JUDGE
Judge Maria Natercia Gusmao Pereira

PROSECUTOR FOR SERIOUS CRIMES
V
JULIO FERNANDES A.K.A LIAN TIMOR

Dissenting decision and disagreement of
Judge Maria Natercia Gusmao Pereira
on the analysis of facts and applicable law.

PROSECUTOR FOR SERIOUS CRIMES:
BRENDA SUE THORNTON
ANTONINHO GONCALVES

TEAM OF PUBLIC DEFENDERS FROM THE PUBLIC DEFENDER OFFICE :
CANCIO XAVIER
SIPO MALUNGGA

Introduction

The decision announced today does not constitute a decision that was made with full consideration. Firstly I would like to indicate that I agree with part of the decision. Secondly I would like to indicate that in this instance I am the minority and I feel that my decision follows a different line of thinking but with the same purpose.

At this stage I would like to state my opinion in relation to the issue of the facts in the murder case of Julio Fenandes and the issue of the appropriate law that should be applied.

FACTS OF THE CASE:

After examining the facts presented in the indictment by the Prosecutor, in which Julio Fernandes is charged with committing a pre-meditated murder in accordance with UNTAET REG. 15/2000 section 8 and article 340 IPC.

After hearing the statement from the accused Julio Fernandes (hereafter: the accused) which in essence stated that on the 25th September 1999 or on some other date in

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September 1999 the accused returned from the mountains (place of refuge) with the intention of escorting refugees or pro-independence supporters back to the district of Ermera after hearing that the Indonesian Army (TNI) had withdrawn/left East Timor and returned to Indonesia.

When the accused arrived near the market the accused saw a group of people gathered around and the accused approached the crowd to find out what was going on, the accused saw a person seated on a chair with both hands tied behind his back, his ears had been cut off and his face was covered in blood and there were several wounds on his arm as he had been struck with a machete, the accused did not know the identity of the assailant.

The accused heard the crowd shouting “kill him, kill him, kill him”, then the accused asked the suspect Americo de Jesus Martins “are you a militia member?” The victim replied “yes” and the accused then asked “why did you wish to go to Atambua – West Timor?” and because the victim replied that he was a member of the Militia Group Darah Merah the accused also asked “why didn’t you go” and the victim replied that “there wasn’t any transport.” When the accused heard this response the accused was upset and at the same moment the accused heard the crowd still screaming “kill him, kill him” and at that moment the accused took out a knife measuring roughly 2 fingers wide and 20 cm long and stabbed the victim twice, first on the right side and secondly in the neck-bone.

As a result of the stabbing performed by the accused the victim fell to the ground and died instantly, after that the accused ordered the crowd to bury the body and the accused left the scene.

After examining the witnesses in the hearing, the witnesses Rita Pinto de Araujo, Mario Soers and Gabriel Ximenes, basically stated under oath:

That the witnesses are aware that: (as is stated in the record of the hearing)

After reading the Forensic Doctor’s autopsy report (attached to the indictment)

LEGAL ELEMENTS FROM SECTION 8 UNTAET REG. 15/2000 AND ARTICLE 340 IPC

In accordance with the aforementioned facts it must be first proven that all the elements specified in ARTICLE 340 IPC are met:

The elements are as follows :

(a). The person, (b). who with deliberate intent, (c). and with premeditation, (d). takes the life of another person .

Element: *The person*;

Considering that the element of *the person* in this article is intended to be a human as a legal subject who is to be made responsible for his/her actions. In this case the Prosecutor has charged the accused Julio Fernandes and in the hearing it was clearly

yes
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established that the accused is the same Julio Fernandes charged by the prosecutor in this case. Furthermore the accused is an adult and could answer coherently all answers directed towards him and therefore we can deduce that the accused can be made responsible for his actions, therefore the first element is sufficiently established.

Element: *who with deliberate intent;*

Considering that *with deliberate intent* in this article means with the desire or intention or realization, included in the intent of the perpetrator, in this matter it is the death of the victim;

Considering that in accordance with the facts obtained by the Judge in this case that on the 25th September at approximately 10.00 am in Ermera/Gleno or at some other time during September 1999 the accused returned from the mountains (place of refuge) with the intention of escorting refugees or pro-independence supporters back to the district of Ermera after hearing that the Indonesian Army (TNI) had withdrawn/left East Timor and returned to Indonesia.

The accused arrived, the accused saw a group of people gathered around and the accused approached the crowd to find out what was going on, the accused saw a person seated on a chair with both hands tied behind his back, his ears had been cut off and his face was covered in blood and there were several wounds on his arm as he had been struck with a machete, the accused did not know the identity of the assailant.

The accused heard the crowd shouting “kill him, kill him”, then the accused asked the suspect Americo de Jesus Martins “are you a militia member?” The victim replied “yes” and the accused then asked “why did you wish to go to Atambua – West Timor?” and because the victim replied that he was a member of the Militia Group Darah Merah the accused also asked “why didn’t you go” and the victim replied that “there wasn’t any transport.” When the accused heard this response the accused was upset and at the same moment the accused heard the crowd still screaming “kill him, kill him” and at that moment the accused took out a knife measuring roughly 2 fingers wide and 20 cm long and stabbed the victim twice, first on the right side and secondly in the neck-bone. As a result of the stabbing performed by the accused the victim fell to the ground and died instantly, after that the accused ordered the crowd to bury the body and the accused left the scene;

Considering that pursuant to the aforementioned deliberations (the judges feel that the element of *with deliberate intent* in this article, has been sufficiently established.

Element: *and with premeditation;*

Considering that *with premeditation* means that there is time between when the intent to murder arises and the intent is actually realized for the perpetrator/accused to calmly think about how the murder is to be committed. The time should not be too short,

however nor should it be too long, the important issue is if there is time for the perpetrator/accused to think calmly and organize the murder;

Considering that in the defense submitted by the public defender during the hearing, the accused was overcome with emotion and the screams of the huge crowd, the accused did not have sufficient time to contemplate, the accused was very emotional upon hearing the responses of the victim who stated that he intended to go to Atambua – West Timor because he was a member of the Darah Merah Militia Group, so that the murder of the victim was sudden, the accused could not extricate himself from this incident

Considering that in the hearing the Judge has determined that the actions of the accused in killing the victim Americo de Jesus Martins occurred spontaneously and without premeditation;

Considering that the element of *with premeditation* in this article has not been established;

Element: *takes the life of another person* .

Considering that the actions of the accused in accordance with the facts determined by the Judge in the hearing, the death of the victim Americo de Jesus Martins occurred in a spontaneous fashion, in accordance with the autopsy report from the Forensic Expert as attached to the indictment , the victim died as a result of wounds to his arm, a stab wound in his right side and a stab wound near the back of the neck-bone.

Considering that pursuant to the aforementioned deliberations the element of *takes the life of another person* has been established;

Considering that pursuant to the careful consideration of the elements contained in article 340 IPC, one of those elements, namely *with premeditation* has not been established. Therefore the accused must not be found guilty of this charge for the sake of law;

Considering that pursuant to the careful consideration of the aforementioned elements, the accused is legally and in accordance with the law found to have committed the crime specified in section 8 UNTAET REG. No. 15/2000 and/or article 338 IPC;

Considering that during the hearing the Judge did not find any excuse or reason to justify the actions of the accused therefore the Judge is certain that the accused is guilty and should be punished;

Considering that for all other matters relating to the decision made in this case there is no dissent towards the majority decision of the panel of judges of this court.

UNTAET
Dili, 7 February 2001
Micael Antonio Gusmão Pereira
DISTRICT COURT OF DILI