



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

DILI DISTRICT COURT

SPECIAL PANEL for SERIOUS CRIMES

Case No. 14/2001

Date: 12/09/2002

Original: English

Before:

Judge Sylver Ntukamazina, Presiding

Judge Benfeito Mosso Ramos

Judge Maria Natercia Gusmao Pereira

Registrar: Joao Naro

Judgement of: 12 September 2002

THE PROSECUTOR

v.

FRANCISCO SOAERES

JUDGEMENT

The Office of the Public Prosecutor:

Ms. Brenda Sue, Mr. Stuart Alford, Mr. Eric Mac Donald

Ms. Molly Groom

Counsel of the accused:

Ms. Beatriz Sanchez, Ms. Marcia Sarmento

INTRODUCTION

- 1 The trial of Francisco Soares (aged 43, married and father of children, unemployed, born and living in Kamea Ailok Laran village, Sub-district of Dili, District of Dili, East Timor,) before the Special Panel for the Trial of Serious Crimes in the District Court of Dili (hereafter: the "Special Panel"), responsible for the handling of serious criminal offences, commenced on the 23rd March 2002 and concluded today, the 12 September 2002 with the rendering of the decision.
- 2 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

- 3 The Special Panels were established, within the District Court in Dili, pursuant to Section (hereafter "Sect.") 10 of UNTAET Regulation (hereafter "U.R.") n° 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. n° 2000/15. With regard to the serious criminal offences of murder and sexual offences, the Panels shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999, pursuant to Sect. 2.3 of U.R. n° 2000/30. In the present case, the offence of rape in the charge included in the indictment is alleged to have been committed on the 12 September 1999.

B. PROCEDURAL BACKGROUND

- 4 On 15 May 2001, the Public Prosecutor presented before the Dili District Court a written indictment (in English and Bahasa Indonesian versions) with a charge of rape against Francisco Soares. Attached to the indictment were copies of the following documents in English (typed or handwritten): the statement of the accused (19.04.2001), Affidavit of David John Senior (19.04.2001), the statements of the witnesses V. (16.04.2001), X. (10.10.2001), P. A. (12.04.2001), warrant of arrest and detention order.

Joint to the indictment was also a request (in English version) for the release of the accused with condition pending the trial.

- 5 The Court clerk provided notification of the receipt of the indictment to the accused and to his legal representative on the 16th May 2002, pursuant to Sect. 26.1 and 26.2 U.R. n° 2000/30.
- 6 On the 21st October 2001, the Public Prosecutor submitted to the Court the Bahasa Indonesian version of the following documents: Statement of Dave Senior, statement of Francisco Soares (19.04.2001), statements of X (10.04.2001 and 08.10.2001) and the statement of P. A. (12.04.2001).
- 7 Francisco Soares was arrested and detained on 23rd April 2001. His arrest was then confirmed and ordered by the Investigating Judge, who issued, on the 24th April 2001, an order for his detention from 24 April 2001 to 24 May 2001. On the 24th May 2001, on the request of the Public Prosecutor, the Defendant was granted conditional release, with some substitutes measures to an order of detention.
- 8 The preliminary hearing commenced and finished on the 13th November 2001.
- 9 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. n° 30/2000. The Defendant made a statement that he had read the indictment and understood the charges against him. The Court then accepted the list of evidence submitted by the Public Prosecutor. The Defence did not submit any list of evidence.
- 10 The Defendant did not enter a plea of guilt. He stated that he had sexual intercourse with the victim, because he was tempted and fell into temptation. He said further that he *would surrender everything to his Public Defender*. The Public Defender objected and requested to be given time to consult with the Defendant and then the Defendant made a statement and pleaded not guilty.
- 11 The ordinary trial was scheduled for the 22nd March 2002.
- 12 The trial was conducted over two sessions (22 March and 6 May 2002). On The 22nd March 2002, the Public Prosecutor read out the indictment in a closed hearing, the Defendant made a statement and was questioned by

the Court and the parties. The Court then examined the witness J. The hearing was postponed on the 6th May 2002 for the Court to hear other witnesses in the case.

- 13 On the 6th May 2002, the Court heard the following witnesses: Ms. A. and Ms. J. During the same hearing, the Public Prosecutor requested the Court, pursuant to Sect. 36.6 U.R. n° 2000/30, to admit as evidence the statement given before the investigator on the 12 April 2000 by the witness P. A., who died on April 2002. The Court granted the request. The defense expressed her intention to appeal the decision and applied for an adjournment of the proceedings until the decision of the appeal court on the interlocutory appeal. The Court noticed the intention of the Defense to appeal but rejected the motion in relation to the suspension of the proceedings.
- 14 The court closed the presentation and hearing of evidence and then postponed the hearing to the 17th July 2002 for the parties to prepare their final statements.
- 15 On the 17th July 2002, the Public Prosecutor and the Public Defender submitted their respective final statements in writing and read them out. Then the court gave an opportunity to the Defendant to make any additional statement. The Court then postponed the hearing on the 1st August 2002 to issue the final written decision.
- 16 On the 1st August 2002, due to the absence of one of the judges involved in the case, the hearing was postponed to 12 September 2002.
- 17 Interpreters into English, Portuguese, Bahasa Indonesia and Tetum languages assisted every act before the Court.

C. APPLICABLE LAW.

- 18 As specified in UNTAET Regulations n° 1/1999, n° 11/2000 and n° 15/2000, the Special Panel 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 U.R. n° 1/1999, the law applied in East Timor prior to 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.
- 19 U.R. n° 2000/15 provides in Sect. 9 relating to sexual offenses: *“For the purpose of the present regulation, the provision of the applicable penal code in East Timor shall, as appropriate, apply”*. On the 12 September 1999, which is the date the offence is alleged to have been committed, the applicable penal code in East Timor was the Penal Code of Indonesia (hereafter PCI).
- 20 Therefore, the Court will apply U.R. n° 2000/15, U.R. n° 2000/11, the PCI and U.R. n° 2000/30 on Transitional Rules of Criminal Procedure.

D. THE FACTS

Factual allegations of the case

- 21 The Prosecutor’s factual allegations may briefly be set out as follows:
- 22 The Public Prosecutor alleged that the accused Francisco Soares was a member of the Indonesian National Army (*“Tentara Nasional Indonesia”* hereafter TNI) in 1999. On or about 12 September 1999, the accused Francisco Soares approached X in order to take her to the Korem located in Dili. The accused Francisco Soares and X then left on his motorcycle in order to go to the Korem. Instead of going to the Korem, the accused Francisco Soares transported X to Usuleu Beach. After arriving to Usuleu Beach, the accused forced X, against her will to have sexual intercourse with him two times.
- 23 In his final statement, the Public Prosecutor submitted that many facts in this case are accepted. The only issue is whether Francisco Soares used force or the threat of force against X, so that she had sexual intercourse with him.
- 24 The Defence states that Francisco Soares did not go with the intention of looking for X to drive her with the motorbike. It was P. A. who made

suggestion that X should go together with him looking for transport. They went a long way before they arrived at *Areia Branca* area, Francisco Soares had already proposed to have sexual relationship and she kept quiet, did not have any effort to prevent Francisco. They then went near by "Cristo Rei" and the facts occurred, agreed on together. The defence concludes that X was not the victim of the crime of rape mentioned and punished in the article 285 of the PCI, because she was not forced, and the accused did not have such a need, since she accepted to have sexual intercourse with him. For the defence, "*there is no proof that the accused raped X, both had Sexual relationships, agreed by her, because she did not do anything to prevent this incident, and she had a lot of opportunities to do it*".

Factual findings.

- 25 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 and the link between his conduct and the rape of X.
- 26 It is undisputed that the accused Francisco Soares was a member of the TNI in 1999.
- 27 It is also undisputed that the accused Francisco Soares went on the morning of the 12 September 1999 to the 744 Battalion Base, took X from the Battalion Barracks on his motorcycle in order to take her to the Korem located in Dili. Instead of going to the Korem, the accused Francisco Soares took X to Useleo beach.
- 28 There is no issue that the accused Francisco Soares had sexual intercourse with X twice at Usuleo beach, after that Francisco Soares took X back to the Barracks on the same motorcycle.
- 29 It is also accepted by both parties that Francisco Soares and X were not married on the 12th September 1999 or at any time.
- 30 The only issue in this case is whether or not X was consenting to have sexual intercourse with Francisco Soares, or if Francisco Soares used a force or a threat of force against X in order to have sexual intercourse with him.
- 31 The defense underlined that X agreed to have sexual intercourse with Francisco Soares, otherwise she could have shouted or screamed. During

the preliminary hearing, the accused said: *"It was not forced because I did not bring any gun or any sword; if she did not want to, she should have shouted or screamed. She did not scream or shout; I did not force, actually I did not force"*.

- 32 It was also submitted by the defense that X was not forced and the accused did not have such need, based on the fact she accepted to have sexual relationship with him. Otherwise she would have tried to escape from him, rejected him and did not stay with him, because she had enough time, as she admitted by herself that they went out in the morning and they returned about 4 or 5 in the afternoon. *Then the question[from the defense] is that, how it was possible that she was almost all day with Francisco Soares, passed through various places, he was not armed and she had not any opportunity to try to escape or asked for emergency assistance, and knew what was going to happen since at that moment the accused proposed to maintain sexual relationship?"*.
- 33 That kind of argument from the defense cannot stand. First of all the law does not require, at any time, that the victim needs to voice objection, to shout or object. The accused has to establish that the victim consented, and before evidence of the victim's consent is admitted, the accused shall satisfy the Court that the evidence is relevant and credible (Sect. 34.3 U.R. n° 2000/30), what the Defense failed to do.
- 34 Secondly, it can be deducted, from both the statement of the accused and the testimony of X that the victim screamed when Francisco Soares was asking her for having sexual intercourse. The Court will compare the submissions of the accused and the victim on that issue. The accused told the Court that *"While on the motobike I asked X twice if she wanted to have sexual intercourse and she did not reply. The victim advanced the same allegations by saying: "When he asked me on the motobike I did not respond" but she added "I started crying. (...) He said you do not need to cry because on this planet everyone makes mistake, (...) I was crying, he kneeling, he said 'you do not need to cry everyone does something wrong at some stages. (...) I could only cry, I could not defend myself"*.
- 35 Responding to the questions of the prosecution, the accused admitted that when he asked for sex for the second time, *"she did not reply, she started crying. The accused was clear in admitting also that the victim has been crying after sex: "After sex the second time, she started crying". I gave her 200,000 Rupiah because I felt sorry for her, because she was crying.*

- 36 If the victim really wanted to have sex with the accused as underlined by the Defense why to cry, before, during or even after having sex? She should have been satisfied of having what she might have been looking for. That was not the case.
- 37 It is clear from the testimony of the accused himself that X did not want to have sex with him. During the preliminary hearing on the 13 November 2001, he told the Court: *"I was tempted I fell into temptation; I confess I committed this against the will of X"*. And during the trial hearing, on the 22nd March 2002, the accused declares that he thought the victim did not want to have sex with him: *"While on the motobike, I started to ask X if we could have sexual intercourse and she did not tell anything. She said, I would think about it first. We went past the Governor's office and I asked her again. She did not respond. I thought to myself that she does not want to"*.
- 38 During the same trial hearing, the accused told also the Court that while on the motorcycle he asked X twice if she wanted to have sexual intercourse and she did not reply. And at the hill on the main road he asked her again and she said: *"yeah let's go"*. *X removed her own skirt; I took off her underpants; there were many refugees and she knew that I wanted to do negative things. She would have screamed; she could not stand anymore so she agreed to have sex (...) when I asked her for sex she said she had a boyfriend.*
- 39 However, and when he was being questioned by the Public Prosecutor, the accused did not agree that X told him explicitly that she wanted to have sex: *"I told X why don't we have sex, most important do not tell parents, She said I will not tell anyone'. (...) Did you think from your questions that she wanted to have sex with you? I do not know about that.(...) did she at any time that day say that she wanted to have sex with you? I thought that because she was quiet. I thought she wanted to have sex.*
- 40 On one hand the accused affirms that the victim agreed to have sex, and on the other hand he stated that he could not stand anymore, and she agreed to have sex, or that he thought she wanted to have sex, because she was quiet. Sometime also he thought she did not want to have sex. It is also understandable how the accused could think that he was going to do negative thing, while there was a free agreement to have sex between two adult persons, as alleged by the defense. The Court is also of the opinion that if X wanted to have sexual intercourse with the accused, she would not need to tell him that he had already a boyfriend.

- 41 The absence of any consent for X to have sex with the accused person is also shown many times in the testimony of the victim. Instead of Francisco Soares whose statement is plenty of contradictions, X gave a consistent account of what happened in her testimony before the Court on the 22nd March 2002, during the trial hearing, when she stated the following: *I went with him on the motorcycle. He took me to the white sand beach; I wanted to jump off from the motorcycle but he held my leg; I continue to reject him; He said 'if we didn't, we will stay here the all night and go back tomorrow; he did what he wanted, he had his way; he removed my trousers; I got off bike, he said "if you refuse I will go home. (...)On the motobike, I started to cry. He said, you do not need to cry because on this planet everyone makes mistakes; (...) he said' if you continue to refuse, your family can stay and may be threatened.(...) When he asked me on the bike I did not respond but started crying. I was crying, he kneeling, he said "don't need to cry every person does some thing wrong at certain stage". I could only cry couldn't defend myself. I said "don't , please don't do that. (...) He removed my underpants. In same motion with my trousers;I did not say anything[while having sex], I was just crying during the sexual intercourse.(...) he removed my clothing with violence, pulled them in a rough manner"*.
- 42 Although it has been said by X that Francisco Soares physically held her on the motorbike as they rode out of Dili, the Court could not say that there was or not physical force to oblige X to have sexual intercourse with Francisco Soares. Anyway, the law does not require physical force.
- 43 Sect. 34.3 U.R. n° 2000/30 provides that in case of sexual assault, consent shall not be allowed as a defense if the victim (1) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (2) reasonably believed that if the victim did not submit, another person might be so subjected, threatened or put in fear.
- 44 As submitted by the Public Prosecutor, The Court is of the opinion that X was forced by the circumstances which Francisco Soares created and by the actions and threats he made into having sexual intercourse with him. The use of force or threat of force to oblige X to have sexual intercourse have to be considered within the circumstances prevailing in East Timor at that period.
- 45 It is very important to consider that on the 12 September 1999 in East Timor, many people had fled from their villages and only very few people, especially Aitarak militia, were around when Francisco Soares took X to Metinaro, as the victim told the Court: *" Between 744 Base and white*

sand beach, I did not see anyone. Everyone had fled. I only saw militia, they had weapons, red and white flags, black shirts with Aitarak written on them.(...) how could I escape he was holding my leg, there was a war going on. TNI was the only one there (...) While travelling to white sand beach, the only people anywhere were militia”.

- 46 In those circumstances, it could be understood how X could be afraid. Considering the tense situation and the fact that she was taken a long way from the safety of her family, in a deserted area. In addition to that, Francisco Soares told X she would leave her on the road if she did not go with him, and that her family may be at risk if she did not do what he wanted. He was able to affect whether or not X family stayed in the relative safety of the 744 barracks. The victim said :*“I was very afraid. It was on the new road that goes to Hera. (...) He said if you refuse your family are the one’s at risk. They would stay at the base and their lives were threatened there”.*
- 47 It has been shown, in the testimony of X and in the statement of P.A., and not contested by the defense, that Francisco Soares was a TNI soldier and the local militia (Aitarak) post commander. X told the Court:*“Francisco Soares was a commander of Aitarak. If I mentioned it was him I will be selling his name and lives of my family would be under threat; I knew TNI and militia were one and the same; TNI was in charge. Aitarak and militia were also in charge”.*
- 48 The family was afraid and helpless before such a person. That is why, when X came back with Francisco Soares in the afternoon, P. A. realized that something was wrong with his nephew but could not do anything. He said in his statement: *“Francisco Soares was the local militia post commander; there was nothing we could do because of the situation”.*
- 49 It is also necessary to consider, as submitted by the Public Prosecutor, the fact that Francisco Soares was already married and considerably older than X.
- 50 The Court found also clear, from the testimonies of the witnesses, that X was not happy with respect to what happened, when she returned to the barracks after having sexual intercourse. She appeared distressed.
- 51 It is true that, as underlined by the defense, the witnesses were not present at the time the facts occurred between X and Francisco Soares. However, it is undisputed that they saw both of them returning in the afternoon. Therefore, the Court will rely only of what they saw to check how was X

when she came back with Francisco Soares, after they had sexual intercourse. The three witnesses corroborated the facts of the victim after sexual intercourse between Francisco Soares and X.

- 52 The witness J., the widow of X's uncle, said before the Court in her testimony on the 6th May 2002 that she saw her in late afternoon and that she was dirty, tired and weak. The witness testified that she said that Francisco Soares raped her near Metinaro, or Hera at Manuleu, and that X was daydreaming and she would not eat.
- 53 The witness A. told the Court on the same day that X returned looking dirty and tired, and that the next day X was crying and she explained what happened, by saying that Francisco Soares took her for a ride and that he raped her. She said that X explained quickly, not even an hour;
- 54 The court decided also to rely upon the statement of P. A. which says: *"when X returned I saw that she was upset, she appeared unhappy and quiet; after we returned to the village X was very upset, very quiet and did not talk to anyone"*.
- 55 It is therefore clear, considering the grounds above mentioned, that Francisco Soares, on 12 September 1999, at Usuleo Beach in the District Court of Dili, forced X, by using threat of force to have sexual intercourse with him out of marriage and thereby committed Rape, a violation of Sect. 9 of U.R. n° 2000/15 and Article 285 of the PCI.

THE LAW

- 56 The Special Panel deems that the evidence on record proves beyond any reasonable doubt that all the essential elements of rape – as alleged in the charge made by the Public Prosecutor – are met.
- 57 Pursuant to Sect. 9 U.R. n° 15/2000 and Article 285 PCI, "Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall being guilty of rape be punished..."
- The evidence clearly show that the element of "the person" in this case is Francisco Soares
 - The evidence clearly shows also that Francisco Soares by using force

or threat of force forces X to have sexual intercourse with him.

- Finally, it has been proved that Francisco Soares and X were not married on 12th September 1999 or at any time.

58 Pursuant to the consideration of the aforementioned elements, it is found legitimately and in accordance with the law that the Defendant has committed on the 12th September 1999 the crime of rape, as specified in Sect. 9 U.R. n° 2000/15 and Article 285 of PCI.

F. VERDICT

59 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 Francisco Soares guilty of rape, as a violation of Sect. 9 U.R. n° 2000/15 and article 285 of PCI.

G. SENTENCING

- 60 Pursuant to these findings of guilt, the Special Panel will proceed to sentence Francisco Soares, in order to determine the appropriate penalty.
- 61 According to the applicable law, in particular Art. 285 of PCI, the penalties that the Special Panel could impose on a person convicted of rape is a maximum of 12 years of detention.
- 62 The Prosecutor did not recommend any sentence.
- 63 The defendant did not plead guilty and the trial had to be conducted.
- 64 The Public Defender underlined that the accused is innocent.
- 65 The Special Panel has taken into account the following:

Aggravating circumstances

- 66 The accused Francisco Soares took advantages of the circumstances prevailing in East Timor in September 1999, in order to rape a helpless woman, knowing that the victim already had a boyfriend.

Mitigating circumstances

- 67 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.
- 68 The accused has no previous convictions.

Sentencing policy

- 69 According to Sect. 10 U.R. n° 2000/15, for the crimes referred to in Sect. 9 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”.

- 70 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 the 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*).
- 71 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.
- 72 Taking into account the aggravating circumstances and the mitigating circumstances, the gravity of the crime and the abovementioned consideration, the Special Panel, deems appropriate the punishment of 4 (four) years imprisonment.

H. DISPOSITION

- 73 For the aforementioned reasons, having considered all the evidence (statement of the accused, testimonies and statement from the witnesses) and the arguments of the parties, the transitional rules of Criminal Procedure, with respect to the defendant Francisco Soares the Special Panel finds and imposes sentence as follows:
- (1) GUILTY for the charge of rape, in violation of Sect. 9 of U.R. n° 2000/15 and Article 285 of the PCI;
 - (2) In punishment of the crime, sentences Francisco Soares to an imprisonment of 4 years.
 - (3) Orders the defendant to pay the costs of the criminal procedure.

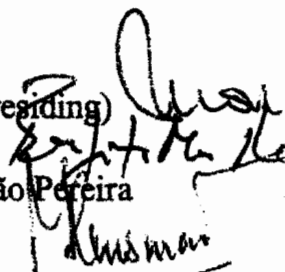
Credit for time served

- 74 According to Sect. 10.3 U.R. n° 15/2000, Sect. 42.5 U.R. n° 30/2000 and Article 33 of PCI, the Special Panel deducts the time spent in detention by Francisco Soares, due to an order of an East Timorese Court. The defendant Francisco Soares was arrested on 23 April 2001 and released on 24 May 2001. The defendant was detained for 1 month and 1 day, 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

- 75 Pursuant to Sections 42.1 and 42.5 of U.R. n° 2000/30, the convicted shall be immediately imprisoned and shall spend the duration of the penalty in East Timor.
- 76 The sentence shall be executed immediately.
- 77 This decision is provided in one copy to the Defendant and his legal representative, the Public Prosecutor and to the prison manager as a Warrant of Arrest.
- 78 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 U.R. n° 2000/30).
- 79 This Judgment was rendered and delivered on 12th September 2002 in the District Court of Dili by

Judge Sylver NTUKAMAZINA (presiding)
Judge Benfeito MOSSO RAMOS
Judge MARIA NATERCIA Gusmão Pereira



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



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRICTAL de DILI SECÇÃO CRIMES GRAVES

PARTLY DISSENTING OPINION OF JUDGE RAMOS

I agree with the finding the accused guilty for the charge of rape in violation of Section 9 of UNTAET Regulation n° 2000/15 and Article 285 of the Penal Code of Indonesia, but I have a reservation regarding to the compatibility of part of this article with the internationally recognized Human Rights standards as foreseen by the Section 3 of UNTEAT Regulation n°1/1999.

In particular, the article reads as follow:

“Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall being guilty of rape, be punished by a maximum of twelve years”

In effect, the prevision provides that the use of force or threat of force to constrain a woman to sexual intercourse is punished only if it occurs out of the marriage. This means that within marriage the Indonesian Law allows a husband to force his wife to engage in wife sexual intercourse (i.e. marital rape).

If the present Court applies indiscriminately the entire prevision of article 285 PCI it will create marital rape as an exception inside the crime of rape in East Timor: this position, according with my point of view, conflicts with internationally recognized Human Rights standards.

Marital rape, in fact, violates the *Convention on the Elimination of All Forms of Discrimination against Woman*, of the 17 December 1979. This Convention, ratified by Indonesian Government on the 13th of September 1984, condemning discrimination against women in all its forms, obliges the States Parties “*to embody the principle of the equality of man and women in their national constitutions or other appropriate legislation*” and “*to repeal all national penal provisions which constitute discrimination against women*”¹.

¹ The Convention at article 1 provides “*For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*”

The article 2 of the same Convention provide also “*States Parties condemn discrimination against women in all its forms... and, to this end, undertake:*

That the condemn action of marital rape is an internationally recognized Human Rights standard is also proved by the *Declaration on the Elimination of Violence* approved by the General Assembly of UN which states that in this matter there is no difference between public or private life and, further, expressly enumerates marital rape as a form of violence against women²

Furthermore, marital rape would violate also the East Timorese Constitution, which at article 17 provides for Gender equality as follow: "Women and men shall have the same rights and duties in all areas of political, economic, social, cultural and family life"³.

Since Indonesian Law shall be applied in East Timor only if it does not conflict with internationally recognized Human Rights standards⁴ and the East Timorese Constitution, I understand that the above mentioned article 285, to the extent that it allows marital rape, does not apply in East Timor⁵.

Furthermore, it would be advisable that in future legislative measures be taken in order to harmonize ordinary legislation with the letter and the spirit of the Constitution⁶ and internationally recognized Human Rights Standards.

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

² The Declaration, approved by the General Assembly with resolution 48/104 of 20 December 1993, at Article 1 say "For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. And at Article 2 it says "Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape..."

³ The official Portuguese version of article 17 on *Igualdade entre mulheres e homens* reads "A mulher e o homem têm os mesmos direitos e obrigações em todos os domínios da vida familiar, cultural, social, económica e política".

⁴ Section 3 of UNTAET Regulation n. 1999/1 states that "...the laws applied in East Timor prior to 25 of October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred in section 2 (internationally recognized human rights standards)"

⁵ According with article 120 - *Apreciação da inconstitucionalidade* - of the East Timorese Constitution "Os Tribunais não podem aplicar normas contrárias à Constituição ou aos princípios nela consagrados".

⁶ According with article 151 - *Inconstitucionalidade por omissão* - "O Presidente da República, o Procurador-Geral da República e o Provedor de Direitos Humanos e Justiça podem requerer junto do Supremo Tribunal de Justiça a verificação de inconstitucionalidade por omissão de medidas legislativas necessárias para concretizar as normas constitucionais".

Benfeto Mosso Ramos
/Benfeto Mosso Ramos/