



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRICTAL DE DILI

SECÇÃO CRIMES GRAVES

SPECIAL PANEL for SERIOUS CRIMES

Before:

Judge Maria Natercia Gusmao Perreira, Presiding

Judge Siegfried Blunk

Judge Sylver Ntukamazina

Case n° 18a/2001

The Public Prosecutor

Versus

Joao Sarmiento

Domingos Mendonca

Decision on the defense (Domingos Mendonca) motion for the Court to order the Public Prosecutor to amend the indictment.

For the Prosecutor:

Shyamala Alagenda

For the Defense:

Beatrix Sanchez for Domingos Mendonca

Jet Clayton Abad for Joao Sarmiento

A. Procedural background

1) The defense of Domingos Mendonca made a request for the Court to order the Prosecutor to amend the indictment in order to follow the decision of the Court of Appeal in the case of Armando dos Santos, based on the following grounds:

- The binding nature of the decision of the Court of Appeal to the Special Panel
- To base the new indictment on the applicable law decided in the Armando dos Santos case

B. With respect to the alleged binding nature of the Armando dos Santos case for the Special Panel

2) The Court of Appeal issued on 15 July 2003 a decision in the case PP v. Armando dos Santos in which the judges ruled as follows:

- *The subsidiary law applied in Timor Leste according to Section 165 of the Constitution is the Law of Portugal and not the Law of the Republic of Indonesia*
- *Section 31 of the Constitution of the Democratic Republic of Timor Leste does not allow a defendant to be tried and convicted for acts committed in 1999 on the basis of UNTAET Regulation 2000/15, which did not enter into force until June 2000. The relevant provisions of Regulation 2000/15 (Sections 5 and 10) infringe the constitution.*
- *The respondent could be only properly convicted under Portuguese law with the offense of the crimes against humanity in the form of Genocide.*

3) Section 2. 1, 2& 3 UNTAET Regulation 2000/11 as amended by UR 2001/25 states that: “ 2.1 Judges shall perform their duties independently and impartially, and in accordance with applicable laws in East Timor and the oath or solemn, declaration given by them to the transitional administrator pursuant to UNTAET Regulation 1999/3. 2.2 Judges shall decide matters before them without prejudice and in accordance with their impartial assessment of the facts and their understanding of the law, without improper influence direct or indirect, from any source. 2.3 Notwithstanding their rank or grade

within the hierarchy of the court have to respect all decision made by the CA. Such decisions are binding and the independency of the individual judge is not affected”.

- 4) Section 4 of the Statute of Judicial Magistrates provides that:
“Judicial magistrates shall adjudicate in accordance with the Constitution, the law and their conscience and they shall not be subject to orders, instructions or directions, except for the duty of lower courts to obey to decisions awarded by higher courts on cases appealed against”.
- 5) However the provision of Section 2.3 of UNTAET Regulation 2000/11 as amended by Reg. 2001/25 and Sec.4 Statute of Judicial Magistrates, which ask judges to follow the decision of higher courts, would violate the independence of the Court stipulated in Section 119 Constitution if they were interpreted literally and without exception.
- 6) The decision of the Court of Appeal in the Armando dos Santos case claims that the applicable law in East Timor is the Portuguese law as subsidiary to the law of the parliament and East Timor Government, UNTAET Regulations, and international human rights standards, while in four other decisions the same Court of Appeal based the decisions on Indonesian law instead of Portuguese law, and applied UNTAET Regulation 2000/15.
- 7) It is therefore clear that there are more than 2 conflicting decisions issued by the same Court with respect to the applicable law. It would be difficult for the Special Panel to know which decision to follow.
- 8) In addition to that this court is of the opinion that the new jurisprudence of the Appeal Court as set down in the new decision cannot be followed because that decision is violating the East Timorese Constitution and violating international human rights standards.
- 9) Therefore, and according to Section 2.1&2 Reg. 2011 as amended by Reg. 2001/25 this panel is unable to follow that decision, because it would not be following its understanding of the applicable law in East Timor and the oath “to faithfully apply the Constitution of the Republic and other laws in force”. Also, if this were the case, the

Special Panel judges would no be adjudicating in accordance with their conscience.

- 10) This Court will show how the decision of the Court of Appeal is violating the Constitution, the applicable law in East Timor, international human rights standards and the rights of the accused, by the Appeal Court saying that the law applied in Timor Leste according to Section 165 of the Constitution is the Law of Portugal and not the Laws of the Republic of Indonesia, and that Section 31 of the Constitution of the Democratic Republic of Timor Leste does not allow a defendant to be tried and convicted for acts committed in 1999 on the basis of UNTAET Regulation 2000/15.

With respect to the principle of nullum crimen sine lege

- 11) The Constitution of Timor Leste in Section 165 states that *“laws and regulations in force in East Timor shall continue to be applicable on all matters except to the extent that they are inconsistent with the Constitution or principles contained therein”*.
- 12) The Court of Appeal decided that Section 31 of the Constitution of East Timor does not allow a defendant to be tried and convicted for acts committed in 1999 on the basis of UNTAET Regulation 2000/15, because it claims, Section 5 and 10 violate the constitution.
- 13) Section 31 of the Constitution provides as follows:

“(2) No one shall be tried and convicted for an act that does not qualify in law as a criminal offence at the moment it was committed, nor endure security measures the provisions of which are not clearly established in the previous law”
- 14) The constitution hereby recalls a principle, which is a recognized principle of international human rights law, namely that a person shall not be convicted of an act that was not a crime at the time the act was committed. Article 15(1)&(2) of International Covenant on Civil and Political Rights (ICCPR) for example stipulates that:

“no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed

“Nothing in Article 15 shall prejudice the trial and punishment of any person for an act or omission which at the time when it was committed, was criminal according to general principles of law recognized by the community of nations.”

- 15) Section 9.1 of the Constitution provides as follows: *“The legal system of East Timor shall adopt the general or customary principles of international law”*
- 16) Section 9.2 provides as follows: *“Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective organs and after publication in the official gazette”*.
- 17) The provision of Section 9 Constitution like Article 15(2) ICCPR contains principles of international customary law, which are non-derogable, as supported by Article 53 of the United Nations Convention on the Law of Treaties, which says: *“...norms of customary international law are non-derogable and can be modified only by a subsequent norm of general international law having the same character.”*
- 18) The Court is of the opinion that Section 9.1 and Section 31 of the Constitution lead to the interpretation that a person may be convicted and punished for an act or omission *which at the time when it was committed, “was criminal according to general principles of law recognized by the community of nations.”*
- 19) This interpretation is harmonizes the constitutional provisions of East Timor with what is provided in Section 12.1 Regulation 2000/15.
- 20) As decided by ICTY in the Celebici case, under customary international law crimes against humanity are criminal under general

principles of law recognized by the community of nations, and thus constitute an exception to the principle of retroactivity. In the Celebici case (para 313) the ICTY held that acts such as murder, torture, rape and inhumane treatment are criminal according to general principles of law recognized by every legal system and those who commit these acts cannot escape prosecution before an international tribunal by hiding behind the principle of retroactivity¹.

- 21) The principle *nullum crimen sine lege* is clarified in Section 12 of UNTAET Regulation No. 2000/15, which reads as follows:

12.1 A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.

12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.

12.3 The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.

- 22) The Special Panel for Serious Crimes in the case the Prosecutor versus Jhoni Franca² and Sabino Gouveia³ Leite clarified that, in order to satisfy the principle of *nullum crimen sine lege*, the act must have been a crime under international law giving rise to individual criminal responsibility at the time the conduct occurred.⁴ With respect to the application of *nullum crimen sine lege* to crimes within the jurisdiction of the Special Panels, the Court has to examine the application of the principle of *nullum crimen sine lege*

¹ ICTY, case No.IT-96-21-T, Prosecutor V. Delalic and others 16 November 1998, para 313.

² *The Prosecutor Versus Jhoni Franca*, Judgment of the 5th December 2002 Paragraph 66 and 84.

³ *The Prosecutor Versus Sabino Gouveia Leite*, Judgment of the 7th December 2002 Paragraph 66 and 84.

⁴ *This requirement, of course, is limited to acts occurring before the Regulation 2000/15 entered into force.*

to the jurisdiction of the Special Panels under UNTAET Regulation No. 2000/15. In particular, this part investigates whether the “serious criminal offences” enumerated in Section 1.3 of UNTAET Regulation 2000/15 were already crimes under international law either as customary international law binding on all states;^{5[1]} or, in the absence of customary law and at least to the extent defendants were Indonesian citizens,^{6[2]} as treaty law binding on Indonesia.

- 23) It was the International Military Tribunal at Nuremberg that established the precedent of international criminal prosecution notwithstanding retroactivity. By doing it for the first time, the Nuremberg Tribunal set precedents for future criminal prosecution of individuals before an international tribunal applying international criminal law.
- 24) The General Assembly of the United Nations endorsed the Charter of Nuremberg and its judgments in Resolution 95(1) on 11 August 1946. The same principles were subsequently formulated by the International Law Commission (ILC) and accepted by the UN General Assembly on 12 December 1950.
- 25) One of those principles is stated as follows:

^{5[1]} See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc, S/25704, 3 May 1993 [hereinafter Report of the Secretary-General regarding the ICTY Statute], accompanying the proposed statute for the International Criminal Tribunal for the Former Yugoslavia. Paragraph 34 of this report addresses the principle of *nullum crimen sine lege* and reads, in relevant part:

34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

^{6[2]} There may be a question about to what extent East Timor fell within the scope of Indonesia’s treaty obligations. This question arises from uncertainty as to whether East Timor was legally part of Indonesia.

“The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law”

- 26) The ICTY clarified that its statute does not create substantive law, but simply provides a forum and framework for the enforcement of existing international humanitarian law. In Celebici case⁷, and with respect to the issue of legality, it was decided that: *“While the criminalization process in a national criminal justice system depends upon legislation which prescribes the time when conduct is prohibited and the content of such prohibition, the international criminal justice system achieves this objective through treaties or conventions, or after customary practice of the unilateral enforcement of a prohibition by states. The latter aims at maintaining a balance between the preservation of justice and fairness towards the accused and taking into consideration the preservation of world order, with due regard to, inter alia, the nature of international law; the absence of international legislative policies and standards; the ad hoc nature of technical drafting of norms; and the basic assumption that international criminal law norms will be embodied in the national criminal law of the various states”*.
- 27) It is therefore clear that Regulation 2000/15 like the ICTY and ICTR Statutes did not create substantive law, but simply provides a framework for the trial of crimes against humanity already existing under international humanitarian law before 1999.
- 28) Sec. 160 Constitution of Timor Leste further supports this argument:
- “Acts committed between 25 April 1974 and 31 December 1999 that can be considered to be crimes against humanity or genocide or of war shall be liable to be criminal proceedings in national and international courts”*.
- 29) Therefore a person can be tried and convicted of violations of international humanitarian law committed between 25 April 1974

⁷ ICTY, case No.IT-96-21-T, Prosecutor V. Delalic and others 16 November 1988, Para 402-405

and 31 December 1999, although there was no legislation in East Timor specifically criminalizing crimes against humanity, genocide or war crimes. This is, because these crimes already existed under customary international law.

- 30) It is clear that crimes against humanity apply in every jurisdiction because they are recognized principles of customary international law, which are non-derogable. Section 160 of the Constitution confirms this in the case of Timor Leste.
- 31) The situation in East Timor under Regulation 2000/15 is similar to that of the Nuremberg Charter establishing the Courts in Nuremberg, the ICTY Statute, the ICTR Statute and the Statute of the Special Court of Sierra Leone. None of these statutes existed before the crimes punished were committed. That is why, the ICTY elucidated the issue of legality by saying that its Statute does not violate the principles of *nullum crimen sine lege*, because it is beyond dispute that crimes against humanity are international crimes, and prosecutable and punishable as such.
- 32) The Court of Appeal decision in the Armando dos Santos case implies that all decisions issued by the Special Panel until now were applying inappropriate law and that convictions or the innocence decided were unlawful. It implies also that the decisions issued previously by the same Appeal Court have no basis in law.
- 33) The Court of Appeal decision in the Armando dos Santos Case therefore violates Sec. 160 of the Constitution, which adopted all general or customary principles of international law, and came into force on 20 May 2002.
- 34) For these reasons, this Court cannot follow the decision of the Court of Appeal in the Armando do Santos case. It considers that sections 5 and 10 of Regulation 2000/15 do not violate the provisions of section 31 of the Constitution of Timor Leste on the ground of *nullum crimen sine lege* or retroactivity. Regulation 2000/15 is therefore applicable in this case.

With respect to the applicability of Indonesian law

35) Section 165 of the Constitution states that "*Laws and regulations in force in East Timor shall continue to be applicable to all matters.*"

36) Section 3.1 of UNTAET Regulation 1999/1 states as follows:

Until replaced by UNTAET Regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with standards referred to in Section 2, the fulfillment of the mandate given to UNTAET under United Nations Security Council Resolution 1272, or the present or any other Regulation and Directive issued by the Transitional Administrator.

37) The issue here is to determine which law that was applied in East Timor before 25 October 1999.

38) The fact that the Transitional Administrator did not mention the nation of Indonesia in the legislation does not necessarily mean that he was not referring to Indonesian law. There is enough evidence to show that the law that "was applied in East Timor prior to 25 October 1999" is Indonesian law:

- The Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor signed on 5th May 1999 in the presence of the Secretary- General of the United Nations provides, in Article 11 as follows: "*Indonesian laws in force upon the date of entry into force of this agreement that fall within the competence of the Central Government, as defined in this Chapter, shall remain in force in SARET*"(Special Autonomous Region of East Timor). As it was agreed between Indonesia, Portugal and the UN that Indonesian law was the law in force in East Timor in 1999, (which agreement was signed by the Secretary General), it therefore follows from that, that when the Special Representative of the Secretary General chose the law that was "applied in East

Timor prior to 25 October 1999”, he was referring to Indonesian law.

- The Transitional Administrator in Section 3(2) UNTAET Regulation 1999/1 referred to a number of laws from the Indonesian legal system and declared them inapplicable:
 - Pencabutan Undang-undang Nomor II/PNPS/Tahun 1963 Tentang Pemberantasan Kegiatan Subversi (Law on Anti-Subversion)
 - Undang-Undang 8/1985 Tentang Organisasi Kemasyarakatan (Law on Social Organizations)
 - Undang-Undang 20/1982 Ketentuan-ketentuan Pokok Pertahanan Keamanan Negara Republik (Indonesia Law on Defence and National Security)
 - Undang-undang 27/1997 Tentang Mobilisasi dan Demobilisasi (Law on Mobilisation and Demobilisation)
 - Undang-Undang 29/1954 Pertahanan Negara Republik (Indonesia Law on National Defence)
- In Section 3 of Regulation 1999/1, the Transitional Administrator abolished the death penalty. Section 340 of the Penal Code of Indonesia allows the death penalty. Since Portugal did not have the death penalty in 1999, the Transitional Administrator could not have been referring to Portuguese law.
- Sec. 53.2 Reg. 2000/30 states: *“The present regulation takes precedence over Indonesian laws on criminal procedure; provided, however, that any point of criminal procedure which is not specified in the present regulation shall be governed by applicable law as provided in Section 3 of Regulation 1999/1”*
- Section 10 of the *Portuguese version of Regulation 2000/15* refers to Indonesian Penal Code while the English version

refers to the applicable Penal Code. The competent authority – Transitional administrator- officially signed both documents.

- The Transitional Administrator on 7 September 2000 promulgated Executive Order No.2000/2, which states as follows: *Effective immediately, the conduct defined in Chapter XVI (Defamation) of the Indonesian Penal Code, comprising articles 310 through 321, is of non-criminal nature in East Timor. Under no circumstances may said articles be the basis for criminal charges by the Public Prosecutor. Persons allegedly defamed shall be limited to civil actions and only to the extent that such remedies may be provided in a future UNTAET regulation.*
- Executive Order 2001/6 decriminalizing adultery, which provides as follows: *Effective immediately, the conduct defined in Chapter XIV, Article 284 (Adultery), of the Indonesian Penal Code, which pursuant to Section 3 of UNTAET Regulation 1999/1 is the applicable law in East Timor, is no longer of a criminal nature in East Timor.*
- The fact that prior to the decision of the Court of Appeal, all the Courts in East Timor (including the same Court of Appeal) applied Indonesian law as the subsidiary law of East Timor. Many accused persons have been convicted and some others acquitted under that law.
- The 5th of May Agreement allowed the Indonesian currency (the Rupiah) to continue to be the legal tender in East Timor (Section C Article 5 of the Agreement), before the transitional administrator promulgated Regulation 2000/7 relating to the new legal tender.

40) The argument that the UN called the Indonesia occupation illegal is invalid in this context because the UN has also branded the continued Portuguese occupation as illegal. The fact that the Timorese parliament on 10th March 2003 passed the Law (No.1/2003) on the Juridical Regime of Real Estate, the preamble of which calls the Indonesian occupation an illegal

act, is inconclusive because this occupation being the most recent one is likely to have been foremost in the mind. At any rate the Constitution in its Preamble refers side by side to “ *Colonization and illegal occupation of the Maubere Motherland by foreign powers*”

- 41) The Court of Appeal cited the decision *Doe v. Lumintang* issued by the Columbia District Court on 10 September 2001 in support of its position. However, that decision was issued not in a criminal but in a civil case in which the plaintiffs had asked compensation for the torts of “assault, battery and intentional infliction of emotional distress”, and it only ruled “the law of Portugal with respect to these torts continues to apply in East Timor.”
- 42) This Court does not understand how a decision issued by an American District Court in a civil case should take precedence over the Timorese Constitution, which in its Sec. 9.1 stipulates: “The legal system of East Timor shall adopt the general and customary principles of international law.” It is according to the principle of customary international law that Crimes against Humanity are offences, even before being incorporated in National criminal law itself. It is therefore a question of enforcing criminal law that has existed already in International law. If the reasoning of the Court of Appeal was correct, the ICTY and the ICTR would be illegal, because they were established after the commission of the crimes under their respective jurisdictions.
- 39) This Court would like to underline that the Special Panel as well as the Court of Appeal is obliged to apply the law. Both courts cannot create the law but must follow and apply the law already in existence. The current decision has been a departure from the precedent set by the court in the past, a departure that is wrong in law, as the Court of Appeal is not the legislature. It does not have the power to promulgate laws at will.
- 40) This Court is therefore unable to follow the Court of Appeal decision and considers that Indonesian law is still the subsidiary applicable law in Timor Leste.

C. This Court cannot follow a decision of the Court of Appeal which violates the Constitution, the rights of the accused and international human rights standards.

- 41) The Court of Appeal convicted Armando dos Santos amounted to the crime against humanity in the form of genocide. In the indictment he was charged with murder as a crime against humanity under Section 5 (a) of UNTAET Regulation 2000/15. The Court of Appeal reached a decision of conviction for genocide under Section 239 of the Portuguese Penal Code. It is clear that genocide is different offence from crimes against humanity. Also, a crime against humanity is not a lesser-included offence of genocide, neither is the reverse possible. That means he was convicted of an offence that was not contained in the indictment, contrary to Section 32.4 Reg. 2000/30.
- 42) According to Regulation 2000/30, “All persons shall be equal before the Courts of Law. In the determination of a criminal charge against a person or of rights and obligations of a person in a suit of law, *that person shall be entitled to a fair and public hearing...*”
- 43) Article 34.3 of the Constitution states that:
- Every individual is guaranteed the inviolable right of hearing and defence in criminal proceedings.*
- 44) Among the rights to a fair hearing is the right to defend oneself or through legal representative. This right can only be exercised if the accused person knows the charge, which he/she is facing. In the case of Armando dos Santos, by reading the judgment of the Appeal Court and following the submissions of the defense counsel in the present case, who was also the defense counsel of Armando dos Santos before the Court of Appeal and who is the author the present motion, Armando do Santos was never charged with genocide nor was he ever informed that he faced the risk of being convicted of genocide. This means that he never had the chance to defend himself concerning the charge of genocide, generally considered the most horrendous of all crimes.

- 45) This principle of fair trial is a fundamental principle of Human Rights law and the rules of procedural fairness. In East Timor, in order to safeguard the rights of accused persons to defend themselves, Section 32.4 provides as follows:

The accused shall not be convicted of a crime that was not included in the indictment, as it may have been amended, or of which the accused was not informed by the judge. For the purposes of the present subsection, a crime which shall be deemed to be included in the indictment is a lesser included offense of an offense which is stated in the indictment.

- 46) Under Section 358 Portuguese Code of Criminal Procedure, the Presiding Judge, if the Court considers altering the legal qualification described in the indictment, must communicate the alteration to the accused. According to Section 379, violation of this even leads to the nullity of the sentence.
- 47) Genocide is not a lesser-included offence of crimes against humanity. Notwithstanding the fundamental differences between the two crimes, genocide is regarded as a more serious offence than crimes against humanity. Thus, a court cannot convict a person of genocide who had been charged only with crimes against humanity on the basis of Section 32.4.
- 48) In summary, this Court if it followed the Court of Appeal decision, would be disregarding Sec.32 Reg.2000/30, would acknowledge the violation of the East Timorese Constitution and Human Rights, and would sanction a sentence, which even under Portuguese law is a nullity.
- 49) Therefore there are no grounds from the defense to have the indictment amended.

For all those reasons, the Court:

- a. Rejects the request from the defense of Domingos Mendonca to order the Prosecutor to amend the indictment in order to follow

the decision of the Court of Appeal in the case the PP v. Armando dos Santos

- b. Says that it cannot follow a decision of the Court of Appeal which violates the Constitution, the laws of East Timor, the rights of the accused and international human rights standards

Dili, 24 July 2003

Judge Maria Natercia Gusmao Pereira, Presiding
Judge Siegfried Blunk
Judge Sylver Ntukamazina