

COURT OF APPEAL

The judges of the Court of Appeal have agreed as follows:

I. With regard to case file No. 16/PID.C.G./2001/PD.DIL, from the Special Panel for Serious Crimes of the Dili District Court, the following entities have appealed to the Court of Appeal:

1st- The Public Prosecution Service, with a view to (a) convicting defendant Armando dos Santos of the crimes he was accused of, that is, a crime against humanity, involving premeditated murder, provided for and punishable under sections 5.1- a) and 14 of UNTAET Regulation 2000/15, in connection with Maukuru's murder committed in March 1999, in Gugleur, a crime against humanity, and other inhumane acts, provided for and punishable under sections 5.1-k and 14 of UNTAET Regulation No. 2000/15, in connection with the mistreatment inflicted on Maumeta Agostinho in March 1999, in Gugleur, a crime against humanity, involving premeditated murder, provided for and punishable under sections 5.1-a and 14 f UNTAET Regulation No. 2000/15, in connection the murder of an unidentified person, on 6 April 1999, in the church of Liquiçá, and a crime against humanity, involving premeditated murder, provided for and punishable under sections 5.1-a) and 14 of UNTAET Regulation 2000/15, in connection with the murder of an unidentified person, on 17 April 1999, in Manuel Carrascalão's house, in Dili; and (b) determining a single penalty close to the maximum limit provided for by law.

2nd- Defendant Armando dos Santos, with a view to: (a) being acquitted in connection with Maukuru and António's killings; and (b) getting a reduction, in either case, of the penalties imposed by the first instance court.

The Public Prosecution Service alleges that there was in the case file sufficient elements to convict the defendant of the crimes against humanity, stating, namely, that the court against which the appeal has been lodged was mistaken in considering that it could not be proved that the defendant was aware that his conduct was part of a widespread or systematic attack against civilian populations throughout East Timor.

The defendant alleges that he did not voluntarily participate in the militia's plans or in the killing of Maukuru and António, and that the rating of penalties for any of the crimes of which he was found guilty was disproportionate to the degree of his involvement.

II. It behoves us to review and decide.

A- The applicable law

In applying the law to this concrete case, the first function of the Court and judges is to know what law regulates the case at issue. And to respond to this question the judges have to know what the Constitution and the laws passed by the National Parliament and by the Government of the Democratic Republic of Timor-Leste say.

On the applicable law in the Democratic Republic of Timor-Leste, section 165 of the Constitution reads:

“Laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein.”

In order to abide by this constitutional norm, we need to know what were the “laws and regulations in force in Timor-Leste” when the country's Constitution entered into force on 20 May 2002.

And we notice that on 20 May 2002 UNTAET Regulation No. 1999/1, of 27 November, was in force, which, in its section 3.1, reads:

“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 the standards referred to in section 2, the fulfilment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.”

In the face of what this section 3.1 of Regulation 1999/1 says,

1st) The judges need to know if this concrete case that has been submitted to the Court is regulated by a law made by the National Parliament or by the Government. If any, that law shall be applied.

2nd) In the absence of a law emanated either from the National Parliament or the Government of Timor-Leste, the judges need to know whether this concrete case is regulated by any UNTAET regulation. If the case is regulated by a UNTAET regulation, such regulation shall be applicable.

3rd) In the absence of a law from the National Parliament or the Government of Timor-Leste or a UNTAET regulation, the Court shall apply the law that was in force in East Timor prior to 25 October 1999. And to that effect, the Court needs to know what were “the laws applied in East Timor prior to 25 October 1999”.

It takes to interpret the law to know what were “the laws in force in East Timor prior to 25 October 1999”. The point is here is about knowing what law the abstract lawmaker is referring to when he or she uses the expression “the laws applied in East Timor prior to 25 October 1999”. As such, this issue has to be settled by resorting to the rules of legal interpretation.

It has so far been understood that by using the expression “the laws applied in East Timor prior to 25 October 1999” in Regulation 1999/1 the lawmaker was referring to the Indonesian law.

But could this be the correct interpretation of that segment of Regulation 1999/1?

It seems unlikely. And in reality, to our knowledge, nobody has so far presented a valid legal argument legitimising that interpretation.

On the contrary, there are abundant legal arguments ruling out the interpretation that “the laws applied in East Timor prior to 25 October 1999” would be the Indonesian law.

East Timor was a Portuguese colony when it was invaded and occupied militarily by Indonesia in December 1975. As that invasion and occupation constituted a violation of the international law, the United Nations never recognised that military occupation,

and, over the whole period of occupation, kept on classifying East Timor as a non-autonomous territory of Portugal. The Timorese people did not accept the military occupation by Indonesia and fought for 24 years until they got rid of it and saw their independence recognised by the international community.

Therefore, from a legal viewpoint, the Indonesian administration, as well as the Indonesian law, has never been validly in force in the territory of East Timor.

After the recognition of the independence of the Democratic Republic of Timor-Leste by the international community, the National Parliament of Timor-Leste itself reiterated it in Law 1/2003, of 10 March (Law on the Juridical Regime of Real Estate Part 1 - Ownership over Real Estate) by affirming in the preamble of that law that “The occupation of Timor-Leste between 1975 and 1999 was an illegal act as recognised worldwide, namely by United Nations Security Council Resolutions 384 of 22 December 1975, and 389 of 22 April 1976. This is the reason why Indonesia was unable to succeed the Portuguese Administration in Timor-Leste”.

In issuing Regulation 1999/1, UNTAET could not ignore that the Indonesian administration, as well as the Indonesian law, has never been validly in force in the territory of East Timor, because the Indonesian occupation was in breach of the international law. For this reason, if UNTAET really wanted to apply the Indonesian law in East Timor, it would have said it explicitly; and if it did not do it was because UNTAET did not want to subject to the Indonesian law the territory and the people they had just liberated from the Indonesian yoke and were now under UN administration¹.

In a nutshell, “ the laws applied in East Timor prior to 25 October 1999” could not be the Indonesian law.

¹ At first sight one may think that section 3.2 of Regulation 1999/1, in stating that a set of specific laws- Law on Social Organizations, Law on National Security, Law on National Protection and Defence, Law on Mobilization and Demobilization, Law on Defence and Security, Law on Police- shall no longer be applied and that capital punishment is abolished in East Timor, allows one to conclude that the lawmaker was referring to the Indonesian law. But that would be a precipitous conclusion, to the extent that nothing allows one to conclude that the laws cited therein are a reference to Indonesian law; for if the lawmaker wanted to refer to Indonesian laws, they would have identified them in greater detail by indicating the number and date of such laws. The interpretation should not limit itself to the letter of the law, but rather reconstitute the legal thinking out of the texts, taking into account, above all, the unity of the legal system, the circumstances under which the law was drafted and the specific conditions of the period of time in which it was to be applied. However, the interpreter cannot entertain a legal thinking that cannot find in the letter of the law a minimum of verbal correspondence, even though expressed in an imperfect way. In establishing the meaning and scope of the law, the interpreter will assume that the lawmaker used the most appropriate solutions and was able to express their thinking in adequate terms.

The “laws applied in East Timor prior to 25 October 1999” could only be those which, in accordance with the principles of international law, were legitimately in force in that territory.

And, in accordance with the principles of international law, Portugal continued to be recognised by the international community, by the United Nations Security Council and by the Timorese People as the administering Power of East Timor during period between December 1975 and 25 October 1999. Over that period, Portugal itself, in turn, continued to assume clearly its responsibilities as the administering Power. In its article 293, the Portuguese Constitution itself kept on affirming that “Portugal remains bound by her responsibilities under international law to promote and guarantee the right to self-determination and the independence of East Timor” (paragraph 1) and that “the President of the Republic and the Government (of Portugal) have the power to take all necessary action for achieving the objectives set out in paragraph 1” (paragraph 2).

Having said this, “the laws applied in East Timor prior to 25 October 1999” could only be the Portuguese law.

And, therefore, to cases that are not regulated by legislation emanated from either the National Parliament or the Government of the Democratic Republic of Timor-Leste or by a UNTAET Regulation, the Portuguese law should be subsidiarily applicable in this country.

American judge Alan Kay from the Columbia District Court, United States of America, has come to a similar conclusion in a decision issued on 10 September 2001, in civil proceedings on a compensation request initiated by two Timorese citizens, Jane Doe and John Does (I-V), against the Indonesian Lieutenant General Johny Lumintang. In those proceedings the American judge applied the Portuguese law to issue a ruling ordering this Indonesian Lieutenant General to pay the plaintiffs compensation for the damage he had caused them in September 1999, based on the following:

“The law that currently applies in East Timor is Portuguese law. East Timor was a colony of Portugal in 1975, when it was invaded by Indonesia. Because the Indonesian invasion was a violation of international law, the United Nations has never recognized its military occupation, instead classifying East Timor as a non-self-governing territory of Portugal. *See* Clark Dec. at ¶4; *see*

also Pedroso et al. Aff. at 5-6. On August 30, 1999, the people of East Timor voted for independence; on October 25, 1999, the United Nations Transitional Administration in East Timor ("UNTAET") was established to act as the temporary governmental authority. "Section 3.1, Regulation No. 1999/1 of the UNTAET states that until replaced by UNTAET regulations or subsequent legislation or democratically established institutions of East Timor, the law applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with certain international legal norms." Id. at 5(a); *see also* Attachment A, UNTAET Regulation No. 1999/1, Section 3. 1. To date, UNTAET has not passed any regulations addressing the torts of assault, battery and intentional infliction of emotional distress. *See* Clark Dec. at 5(a). Therefore, the law of Portugal with respect to these torts continues to apply in East Timor. *See* Id. at 5(c)". – *Ruling published on the Website: <http://etan.org/news/2001a/10lumjudg.htm>*

Thus, by operation of section 165 of the Constitution of the Democratic Republic of Timor-Leste, which establishes that the "laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein", the Court and the judges should apply, subsidiarily, the Portuguese law to cases that are not regulated either by the laws emanated from the National Parliament or from the Government of Timor-Leste or by a UNTAET Regulation. The applicable Portuguese law shall be the one that was in force on 24 October 1999, taking into account the time limit established by section 3.1 of UNTAET Regulation No. 1999/1 (laws applied prior to 25 October 1999).

By operation of section 165 of the Constitution of the Democratic Republic of Timor-Leste and section 3.1 of UNTAET Regulation 1999/1, of 27 November, in ruling on each concrete case the court should apply

1st – The law made either by the National Parliament or by the Government of Timor-Leste that regulates the case;

2nd – UNTAET Regulation that regulates the case, in absence of a law made either by the National Parliament or by the Government of Timor-Leste;

3rd – The Portuguese law that regulates the case, in absence of a law made either by the National Parliament or by the Government of Timor-Leste, or of a UNTAET Regulation.

In order to clarify possible misunderstandings between the act of interpretation and application of the law to this concrete case, which falls within the jurisdiction of the Courts, and the act of making laws, which falls within the jurisdiction of the National Parliament and the Government, it is worth stating here that in the organisation of the Democratic Republic of Timor-Leste, which, as defined by its own Constitution, is a democratic State based on the rule of law (section 1, item 1, of the Constitution), the Courts are the pillars of the State (section 67)- the one whose function is to apply the law to a concrete case and ensure compliance with the laws and the Constitution, which is translated into the statement, contained in section 118, that the Courts are organs of sovereignty with competencies to administer justice in the name of the people.

The jurisdictional function is translated into the interpretation of, and application to, each concrete case of the law that the Democratic Republic of Timor-Leste either issues or accepts as its own.

By operation of the principle of the separation of powers enshrined in section 69 of the Constitution, the Courts and judges limit themselves to applying the Constitution and laws of the Democratic Republic of Timor-Leste. The Courts and judges do not make laws. Only the National Parliament and the Government of Timor-Leste have competencies to make laws that are applicable in the Democratic Republic of Timor-Leste.

In deciding, through a technical and legal interpretation, in favour of the subsidiary application of the Portuguese law to cases that are regulated neither by legislation emanated from the National Parliament nor from the Government of Timor-Leste or by a UNTAET Regulation, the Court limits itself to abiding by the Constitution of the Democratic Republic of Timor-Leste and to applying a law that the law-making body of this country decided, in the exercise of its competency and sovereignty typical of an independent State, to adopt, by a legislative act, as a law of this country.

B- The appeal lodged by the Public Prosecution Service

The Special Panel considered the following as being proved acts:

“General context

- 1.1 Widespread and systematic attacks against civilian populations have occurred throughout Timor-Leste in 1999. Those attacks took place over two successive periods of intense violence. The first period was the one following the announcement by the Indonesian Government, on 27 January 1999, that the people of East Timor would be allowed to choose between autonomy within Indonesia or independence. This period lasted until 4 September 1999, the date of announcement of the results of the popular consultation in which 78% of the voters voted against the proposal for a special autonomy within the Republic of Indonesia. The second period was the one that followed the announcement of the results of the popular consultation on 4 September and lasted until 25 October of the same year.
- 1.2 Those attacks were, to a great extent, directed against citizens of all ages, but particularly against supporters or presumed supporters of the independence option, and resulted in serious offences, including deaths caused by serious injuries, and injuries caused by gunfire.
- 1.3 Widespread and systematic attacks were also directed against property and livestock, including the mass arson of houses, looting of property and killing of livestock.
- 1.4 In 1999, there existed various militia groups whose objective was to support autonomy within Indonesia. These groups were organised on a common platform of the pro-integration forces (Pasukam Pejuang Integrasi, or PPI), which were allowed to act with impunity.
- 1.5 The Besih Merah Putih (BMP) militia group was created in Maubara, District of Liquiçá, in December 1998 and soon after their respective chiefs began to recruit members across the district, including Gugleur.
- 1.6 The Indonesian military forces used to work in close collaboration with armed groups, namely the BMP (Besih Merah Putih). This is what happened, for instance, on 6 April 1999, the date on which TNI military, POLRI officers (Policia Republik Indonesia), BRIMOP members (Mobile Brigade) and the BMP militiamen laid siege to the church of Liquiçá and killed civilians. These people had taken refuge on the

church premises some days earlier so as to escape the violence of which they were being victims.

- 1.7 From January to September 1999, the cooperation between TNI and the militiamen included joint operations and attacks in which militiamen would illegally arrest and detain civilians who were then taken to the TNI barracks where they were subjected to questioning.
- 1.8 The Besih Merah Putih (BMP) militia group launched widespread or systematic attacks in the District of Liquiçá over the period between January and September 1999.

The defendant's involvement

- 1.9 In February 1999, defendant ARMANDO DOS SANTOS, influenced by the local Chief of Suco, joined the Besih Merah Putih militia group by enlisting in the post of his area of residence, Palistela.
- 1.10 In all, 16 adult men enlisted in the BMP in the area of Palistela.
- 1.11 Upon joining the militia group, these enlisted men were told that they would be taken to other localities where they would have to kill people.

Attack against Citizen Maukuro

- 1.12 In March 1999, nearly one week after defendant Armando dos Santos and some other residents of Palistela, who had also joined the BMP militia group, were taken to a military post located in the vicinity of that village where they were told by commander Floriano Dato Neto, by a man known as Silvério, a TNI collaborator, and by the TNI commanders present, that they should go and attack a citizen by the name of Maukuro, a resident of the area of Gugleur.
- 1.13 Defendant Armando and his companions were told that they were to attack Maukuro because he was against the Indonesians.
- 1.14 Having understood this order, and with the aim of acting upon it, defendant Armando dos Santos and other companions, namely Martinho, Saturnino and José, accompanied by TNI military, set off to Maukuro's area of residence and arrived there by 9 am.
- 1.15 The militiamen were armed with several traditional weapons.

- 1.16 Defendant Armando dos Santos was armed with a knife, a bow and arrows.
- 1.17 On their way, and before they got to Maukuro's house, the group walked along the streets of that settlement.
- 1.18 Upon their arrival at MAUKURO's house, the group members received orders from the TNI commanders to surround the sought-after person.
- 1.19 And thus the group of militiamen, who, in the eyes of defendant Armando himself and witness Georgina, seemed to be a crowd, surrounded MAUKURO, who, unarmed, remained expectant, leaning against his wife.
- 1.20 Defendant Armando, who was still carrying his weapons, also helped surround MAUKURO.
- 1.21 After they had surrounded MAUKURO, he was beaten up by militiamen and by commander Floriano.
- 1.22 Thereafter, one of the group members and a TNI collaborator by the name of Silvério attacked him with a cutting/piercing traditional instrument known as machete, inflicting him a blow on the neck, which made him fall to the ground. While lying on the ground, Silvério inflicted him another blow with a sword.
- 1.23 Besides the blows inflicted by Silvério, MAUKURO was also hit by arrows hurled from the bows of other militiamen. These arrows pierced the victim's body.
- 1.24 The injuries caused by the machete blows and the piercing caused by the arrows determined MAUKURO's death, which occurred soon after the assault.
- 1.25 On the same occasion, two militiamen set out to punch and kick another person by the name of Agostinho, but their colleagues ordered them to stop the assault.

Attack on the Church of Liquiça

- 1.26 On 5 April, defendant Armando dos Santos was in Kaikassa, together with other BMP fellow militiamen from the area of Palistela, attending a ceremony at which they took undetermined quantities of a drink that was a concoction of animal blood and human blood and other unidentified products. This drink was contained in a bucket in which a flag of Indonesia was immersed.
- 1.27 The ceremony was attended by militia commanders Manuel Sousa and Floriano Tacometa.

- 1.28 After the ceremony, the group of which Armando dos Santos was a part was taken to the centre of Maubara. There they were informed that the BMP militiamen were already heading for Liquiçá. Then they also set off to Liquiçá accompanied by four or five TNI military.
- 1.29 Defendant Armando and their companions knew they were taking to Liquiçá to launch an attack.
- 1.30 Since the morning of that day, 5 April, an unspecified number of civilians, about some hundreds, including women and children, fleeing the actions that were being perpetrated by pro-Indonesia militia, took refuge in the interior of the church of Liquiçá, a place that, from at least 11 am, was already under siege from militia groups.
- 1.31 When the group of which defendant Armando was a member arrived in Liquiçá they were informed that the church would be attacked on the following day.
- 1.32 On 6 April, with the church still under siege, defendant Armando and his companions went over there with the intention to take part in actions against the population who had taken refuge therein, which were ongoing since the day before.
- 1.33 As their first attempt to enter the church premises failed, defendant Armando and some members of his group quit the place and headed toward the vicinity of the Liquiçá District Headquarters where they dispersed, with some seated on the ground and others roaming around.
- 1.34 Seeing them there, the District Administrator of Liquiçá, Leoneto Martins, ordered them to return to the church surroundings to attack the people who were there because they were “pro-independentists”
- 1.35 Having understood that order, and with the aim of acting upon it, defendant Armando dos Santos and their companions went back over to the church to take part in the operations along with other militias and TNI military who were already at the scene.
- 1.36 As time went by, the pressure exerted by the armed men who were laying siege to the church began mounting. And between 1 pm and 2 pm, while the intensity of machine gunfire was increasing, tear gas grenades were thrown into the interior of the church. At that time, the besieging forces managed to penetrate into the interior of the church, which caused the people who had taken refuge therein to run away, while others were trying to get shelter in the parish priest’s quarters.
- 1.37 While taking part in the operations there and upon seeing that one of the refugees, a medium-aged man, wearing a striped shirt, was coming out running in a bid to escape

the siege, and with the intention to take his life, defendant Armando backstabbed him, causing his immediate death.

Attack on Manuel Carrascalão's house

- 1.38 On 17 April 1999, Floriano Dato Meta and Manuel Sousa, militia commanders, ordered defendant ARMANDO DOS SANTOS, and other BMP militiamen in Palistela, to go to Maubara from where they would head for Dili in order to take part in a major meeting of the pro-integration militia that was scheduled to take place in that city.
- 1.39 Defendant Armando dos Santos understood the meaning of that order.
- 1.40 Upon their arrival in Dili, they joined thousands of other militiamen from all districts of East Timor.
- 1.41 Then they attended a meeting at which some militia leaders, namely Eurico Gueterres and João Tavares, took the floor.
- 1.42 While taking the floor to address the militiamen present, Eurico Guterres said, among other things, that they should go and search for independence supporters with the aim to arrest them and, should they resisted, kill them.
- 1.43 After the meeting, the militia groups left the meeting venue and started walking along the streets of Dili.
- 1.44 While doing that, they got to the house of a well-known leader of the cause of independence, Manuel Carrascalão, where hundreds of people, who had been harassed by the militias, were taking shelter. Commanders Eurico Guterres, Manuel de Sousa and Floriano Dato Meta ordered the militiamen present to storm the residence.
- 1.45 The militiamen stormed the residence, acting upon that order.
- 1.46 In the move, the militiamen were assisted by TNI military disguised as civilians, who fired their machine guns on the residence and the people inside.
- 1.47 Upon entering the house, the militiamen, using the weapons they were carrying, namely cutting/piercing instruments, beat to death several people that were inside the house.
- 1.48 Defendant Armando dos Santos was always present during that operation, equipped with a traditional cutting/piercing instrument known as machete, whose length was equivalent to two-thirds of an adult person's arm.

- 1.49 At a given moment of the operations, and while well inside the said residence, Floriano Dato Meta, who had by his side Armando dos Santos equipped with his machete, inflicted a blow on one of the refugees with a knife. After the refugee had fallen to the ground as a result of the blow received, defendant Armando dos Santos also inflicted a blow on the refugee with his machete. The victim died soon after as a result of the blows received.
- 1.50 Defendant Armando dos Santos is an illiterate farmer.
- 1.51 He can neither speak or understand Tetun, and the only language he speaks is tokodede, a dialect from the region where he was born and has always lived.”

The first instance court considered that:

“The following alleged acts in the indictment could not be proved:

- 2.1 That defendant Armando was aware that while he was committing the acts mentioned in the indictment, widespread or systematic attacks against civilian populations were also being carried out throughout East Timor and that his conduct was part of those widespread or systematic attacks against civilian populations.
- 2.2 That defendant Armando was the commander of the militia platoon in Palistela and that he had 16 men under his direct command.
- 2.3 That Armando dos Santos grabbed Maumeta Agostinho while the latter was being beaten up by other militiamen.
- 2.4 That during the night of 5 to 6 April 1999, Armando and his companions went to the village of Lauhata to prevent people from escaping from Liquiça”.

By appealing the Public Prosecution Service wants that the appealed decision be changed in order that the defendant may be convicted of the crimes he was accused of, that is, (a) a crime against humanity, involving premeditated murder, provided for and punishable under sections 5.1(a) and 14 of UNTAET Regulation No. 2000/15, in connection with Maukuru’s murder committed in March 1999, in Gugleur, (b) a crime against humanity, involving inhumane acts, provided for and punishable under sections 5.1(k) and 14 of UNTAET Regulation No. 2000/15, in connection with the mistreatment inflicted on Maumeta Agostinho in March 1999, in Gugleur, (c) a crime against humanity, involving premeditated murder, provided for and punishable under sections 5.1(a) and 14 of UNTAET Regulation No. 2000/15, in connection with the murder of an unidentified person committed on 6 April 1999, in the church of Liquiçá, and (d) a crime against humanity, involving premeditated

murder, provided for and punishable under sections 5.1(a) and 14 of UNTAET Regulation 2000/15, in connection with the murder of an unidentified person committed on 17 April 1999, at Manuel Carrascalão's house, in Dili.

Following the above-expounded reasoning in respect of determining the applicable law to this concrete case, we notice that there is no legislation emanated from the National Parliament or the Government of Timor-Leste, but there is UNTAET Regulation 2000/15, of 6 June, which qualifies the defendant's conduct as a crime against humanity in its section 5.1(a) and puts, in its section 10.1, the respective penalty at 25 years imprisonment.

Nevertheless, the Constitution of the Democratic Republic of Timor-Leste does not allow that the defendant be tried and convicted of the acts committed in 1999 based on UNTAET Regulation 2000/15, that did not enter into force until June 2000.

As a matter of fact, section 31 of the Constitution establishes, in its items 2, 3 and 5, that

“2. No one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed, nor endure security measures the provisions of which are not clearly established in previous law.

3. Penalties or security measures not clearly provided for by law at the moment the criminal offence was committed shall not be enforced

5. Criminal law shall not be enforced retroactively, except if the new law is in favour of the accused”.

Thus, contrary to the view held by the Public Prosecution Service and the Special Panel, even though the acts committed by the defendant in 1999 include the crime against humanity provided for under section 5.1(a) of UNTAET Regulation 2000/15, the defendant may not be tried and convicted based on this criminal law, which did not exist upon the date on which these acts were committed and, as such, may not be applied retroactively. Having entered into force after the occurrence of the acts, this law may only be applied retroactively if such law is more favourable to the accused, which is not the case here.

Looking further into the reasoning with respect to determining the applicable law, given the absence of a law from the National Parliament or the Government of Timor-Leste that qualifies the defendant's proven conduct as a crime and the inapplicability of a UNTAET regulation to the acts committed by the defendant in 1999, we have to move on to the Portuguese law, which is subsidiarily applicable to this case, and see whether the defendant's conduct is provided for and punishable under that law as a crime. The applicable Portuguese law shall be the one in force on 24 October 1999, taking into account the time limit stipulated by section 3.1 of UNTAET Regulation 1999/1, which states that the laws in force prior to 25 October 1999 shall apply.

The crimes committed

Resorting to the Portuguese law in force on 24 October, we realise that the defendant's conduct includes three crimes of murder provided for and punishable under article 131 of the Portuguese Penal Code, with the amendments introduced by Law 65/98, of 2 September (hereinafter referred to as CPPort/98), and a crime against humanity in the form of genocide, provided for and punishable under article 239.1(a) of the same Code.

Three crimes of murder

In the face of the proven acts, we realise that the defendant committed three crimes of murder provided for and punishable under article 131 of CPPort/98.

The defendant was the perpetrator of the murder of a citizen by the name of Maukuru in March 1999, when, armed with a knife, bow and arrows, and together with other militiamen also armed with various traditional weapons, took part in the assault on that citizen. The militiamen surrounded him during the assault and some of them beat him up. One of the militiamen inflicted him a machete blow on the neck and then another blow with a sword. Other militiamen hurled arrows at him, piercing his body. Maukuru died as a result of the injuries caused by the machete blows and the arrows that pierced his body.

He was the perpetrator of the murder of an unidentified person on 5 April 1999. When he and his colleagues joined other Besih Merah Putih militiamen who were laying siege to the church of Liquiçá, he backstabbed a medium-aged man, causing his immediate death, as was

the perpetrator's intention. The murder happened when he saw that the victim was walking out of the church premises in an attempt to escape the siege.

He was the perpetrator of the murder of one of the persons who were sheltered in Manuel Carascalão's house, in Dili, on 17 April 1999, when, taking part in the assault on that house, together with other Besih Merah Putih militiamen, he inflicted a blow on the victim with the machete he was carrying, after the victim had been stabbed with a knife by another militiaman. The victim died soon after as a result of the blows.

In all these cases the defendant was aware of, and willing to take part in, the execution of the act of taking a person's life. In the case of Maukuru's murder, he knew that he was participating in the murder of that person and wanted to get involved; in the two other murders he knew that he was taking the victims' lives and wanted to do it.

In this regard, it is worth noting that, contrary to the defendant's view as expressed in his written allegations, the proven acts include, as a matter of fact, three crimes of murder and not just one. He was not the material perpetrator of Maukuru's murder, but took part in its execution.

Under the terms of article 26 of CPPort/98, "a person who executes the act, on his or her own or through another person, or takes direct part in its execution, by agreement or together with another person(s), or, likewise, a person who, with malice aforethought, causes another person to commit the act, shall be punishable as the perpetrator, provided that the act is executed or begins to be executed".

Under the terms of article 30.1 of CPPort/98, "the number of crimes is determined by the number of types of crime that have been actually committed, or by the number of times the same type of crime is covered by the agent's conduct".

A crime against humanity/genocide

The defendant committed three crimes of murder in the context of a set of attacks directed against groups of people who were in favour of East Timor's independence. As a matter of fact, in February 1999, the defendant, while at the post in his area of residence, in the Besih

Merah Putih militia (BMP), whose objective was to support the autonomy within Indonesia and was carrying out attacks against supporters of East Timor's independence, was informed upon joining that militia group that the enlisted persons would be taken to other localities where they would have to kill people; he and other militiamen, who were operating with him, received orders to attack Maukuru because he was against the Indonesians; they received orders to attack the church of Liquiçá because the people who were sheltered there were "pro-independents"; they received orders to attack Manuel Carrascalão's house with the aim to arrest and kill independence supporters. And acting upon the orders they had received, they took part in the attacks in which they caused the death of three supporters of East Timor's independence.

The defendant was aware of the sieges and attacks in which the killings were aimed at destroying supporters of East Timor's independence and he adhered to that goal, taking part in the laying of sieges and in the execution of the attacks and killings described above, after he had been informed that the victims were independence supporters (as were the cases of the church of Liquiçá and of Manuel Carrascalão's house) or were against the Indonesians (as was the case of Maukuru's murder).

The first instance court considered that the defendant had committed none of the crimes against humanity imputed in the indictment, because it was not proved that "he was aware that while he was committing the acts mentioned in the indictment, widespread or systematic attacks against civilian populations were also being carried out throughout East Timor and that his conduct was part of those widespread or systematic attacks against civilian populations", and, for that reason, the subjective element ("mens rea") was missing for the crime against humanity provided for by section 5.1 of UNTAET Regulation 2000/15 imputed in the indictment to take place.

The judges of the Special Panel assumed that, in this type of crime, the agent's awareness had to cover the whole territory of East Timor, which is clearly not in either the letter or the spirit of section 5.1 of UNTAET Regulation 2000/15.

Nevertheless, the widespread nature of the attack has to refer to the defendant's conduct and to the geographic area where he was operating, which may be more or less extensive, but

does not necessarily have to cover the rest of the territory where there may exist civilian population against whom the attack was directed without his involvement.

In order to cover the legal type of crime provided for by section 5.1 of UNTAET Regulation 2000/15, what is needed, at the objective level, is that the agent's conduct falls within the scope of a widespread or systematic attack directed against a civilian population, resulting in the murder, extermination, enslavement, or other consequences provided for therein; and that, at the subjective level, the agent is aware that the attack in which he or she is taking part is being carried out in a widespread or systematic fashion and is willing to execute or take part in the attack.

The defendant's proven conduct occurred in Liquiçá, Maubara and Dili, where the Besih Merah Putih militia he had joined was operating. The attack was generally directed against supporters of East Timor's independence and not against isolated citizens. Both in the church of Liquiçá and at Manuel Carrascalão's house, in Dili, the attack was directed against hundreds of people who had sought refuge in each of these places to protect themselves from the acts that were being carried by the militias. Maukuru's murder fits into the attack against independence supporters and against those who "did not like Indonesia".

A systematic attack means an attack carried out according to a goal, according to a plan and directed against a certain kind of people.

The defendant's conduct falls under the goal of hitting independence supporters and those who are against the Indonesians. There is a plan according to which this action is carried out, ranging from the enlistment of Besih Merah Putih militiamen to instructions received from militia and TNI commanders. There is organised action on the part of the defendant and other fellow militiamen according to the directives received. Two of the attacks in which the defendant took part were directed against hundreds of independence supporters who had sought refuge in the church of Liquiça and at Carrascalão's house to protect themselves from the acts that were being carried out by the militias.

The context in which the defendant was acting, the instructions he was given, the goal to which his conduct was associated, and the circumstances surrounding it, leave no margin for doubt that the defendant was aware of the widespread or systematic nature of his conduct in

the geographic area in which he was acting, and that he wanted to take part in the widespread or systematic attacks against supporters of East Timor's independence as described above.

For this reason, one cannot accept the conclusion of the first instance court that the subjective element of the crime against humanity imputed in the indictment is not covered.

However, as mentioned earlier on, the defendant may not be tried and convicted based on section 5.1 of UNTAET Regulation 2000/15, according to the view held by the prosecution and the first instance court, as this criminal law came into force after the occurrence of the acts, and may not be applied retroactively because it is not more favourable to the defendant.

Getting into the Portuguese law in force on 24 October 1999, we find section 239 of CPPort that states:

“1- Where a person, with the intention to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, commits:

- (a) murder of members of the group;
 - (b) serious offence against the physical integrity of group members;
 - (c) subjection of the group to cruel, degrading or inhumane forms of existence or treatment, which are likely to cause its partial or total destruction;
 - (d) Transfer of children of the group to another group by violent means; or
 - (e) Impediment to procreation or births within the group;
- shall be punished with a penalty of 12 to 25 years imprisonment”.

As mentioned earlier on, the defendant committed three murders in three people who were part of the group of those who supported East Timor's independence. He was the perpetrator, in March 1999, of the murder of one unidentified person who was walking out of the church of Liquiçá in an attempt to escape the siege and attack that he and other Besih Merah Putih militiamen were conducting against the people who had took refuge in that church. On 17 April 1999, he was the perpetrator of the murder of another person during the assault on Manuel Carrascalão's house in Dili.

In the case of Maukuru's killing, he knew that he was taking part in his killing, and he wanted to get involved in it; in regard to the two other murders, he knew that he was taking the victims' lives, and he wanted to do it.

The purpose of these killings was to destroy supporters of East Timor's independence, a purpose that the defendant was aware of and adhered to, taking part in the laying of the sieges and in the execution of the attacks and killings described above, after he had been informed that the victims were supporters of East Timor's independence (as were the cases of the church of Liquiçá and of Manuel Carrascalão's house) or that the victims were against the Indonesians (as was the case of Maukuru's killing).

However, we do not accept the prosecution's legal construction that the defendant commits as many crimes against humanity as the number of people he murdered. According to article 30 of CPPort/98, the number of crimes is determined by the number of types of crime that have been actually committed, or by the number of times the same type of crime is covered by the agent's conduct.

The defendant's conduct includes only one crime against humanity in the form of genocide.

Cumulation of crimes

Under the terms of article 30.1 of CPPort/98, the number of crimes is determined by the number of types of crime that have been actually committed, or by the number of times the same type of crime is covered by the agent's conduct.

Although the murder element is common to the crimes of murder **in itself** and the crime against humanity in the form of genocide committed by the defendant, here we are facing two different types of crime in which the values protected by the criminal law are different, as mentioned above.

In this connection, the defendant has to be punished for three crimes of murder and for a crime against humanity in the form of genocide.

The penalty that corresponds to the crimes committed

Having done the criminal typification of the defendant's conduct, there is a need to determine the penalty that corresponds to each of the crimes committed, as well as the single penalty resulting from the cumulation of the individual penalties.

In determining the concrete penalty², we need to take into account that the value protected by the norm that has been breached is, in case of murder, human life, which is the most precious asset of any person; and, in case of crime against humanity in the form of genocide, is the preservation of distinct human groups in terms of nationality, ethnicity, race and religion, the protection of which is of direct interest to the international community. The degree of illegality of the crimes committed and the intensity of malice aforethought that accompanied their execution are very high. The defendant acted in the context of a troubled political period in which the supporters of the continuation of the occupation of East Timor by Indonesia sought, through the use of force and persecution against independence supporters, to neutralize the exercise of the right to political option by the people of East Timor. In committing these acts, he acted deliberately, wilfully and knowingly, but within a broader context of the Besih Merah Putih militia, which he had joined about one week earlier, and of TNI military, a set in which he was a simple executioner. He is illiterate.

² The criteria for establishing the penalty are stipulated in the following articles of the Portuguese Penal Code: Article 70 (Criterion for choosing a penalty)

If imprisonment sentence and punishment of a different nature are applicable, alternatively, the court gives preference to the latter whenever it accomplishes in an adequate and sufficient fashion the purposes of the punishment.

Article 71 (Determining the extent of a penalty)

1- The extent of a penalty shall be determined, within the limits of law, in accordance with the guilt of the agent and prevention requirements.

2- In determining a specific penalty, the court shall examine all the circumstances that, event though they are not part of the type of the crime, bear witness in favour or against the agent, considering, namely:

- a) The degree of illegality of the fact, the manner in which it was executed and the gravity of its consequences, as well as the degree of violation of the duties imposed on the agent;
- b) The intensity of malice aforethought or negligence;
- c) The sentiments expressed while the crime was being committed and the purposes or motives that prompted it;
- d) The personal situation of the agent and his or her economic status;
- e) The agent's conduct prior to and after the fact, especially where such conduct is intended to repair the consequences of the crime;
- f) The lack of preparation to keep a lawful conduct, manifested in the fact, where such lack of preparation should be reproached through the imposition of the penalty.

3- The arguments for the extent of the penalty shall be expressly set out in the sentence.

In relation to the crimes of murder, there is a need to make a sensible distinction between the defendant's forms of intervention in the execution of the crime: he himself is the executioner of two of the murders, and he only took direct part in Maukuru's killing.

Thus, taking into account the above-expounded considerations and also the corresponding criminal framework, the concrete penalty should be 10 years imprisonment for the crime of murder committed against Maukuru in March 1999, 12 years imprisonment for each of the crimes of murder committed on 5 April 1999 and on 17 April 1999, and 15 years imprisonment for the crime against humanity in the form of genocide.

Insofar as the other crimes committed are in a relationship of material cumulation, there is a need to determine a single penalty through a procedure of joint assessment of the acts and the defendant's personality. The determination of the penalty should be conducted within the criminal framework whose minimum limit is the most severe individual penalty and whose maximum limit is the sum of the individual penalties, though with the limitation that a single penalty may, in no case, exceed 25 years imprisonment.³

The most severe individual penalty, which can serve as the minimum limit, is, in this case, 15 years imprisonment; and the sum of the individual penalties is 49 years imprisonment.

In this connection, taking into account the assessment of the acts and the agent's personality that can be grasped from what was said above, the single penalty should be 22 years imprisonment.

³ The rules on cumulation of crimes are established under art. 77 of the Portuguese Penal Code: Article 77 (Rules on punishing cumulated crimes)

1- Where a person has committed various crimes before the conviction of any of such crimes is deemed final, he or she shall be convicted in a single penalty. The acts and the agent's personality shall be jointly considered in the extent of the penalty.

2- The maximum limit of the applicable penalty shall be the sum of the penalties concretely imposed on the various crimes and shall not exceed 25 years in case of an imprisonment sentence and 900 days in case of a fine; and the minimum limit shall be the most severe penalty concretely imposed on the various crimes.

3- Where the penalties imposed on cumulated crimes include both imprisonment sentences and fines, the distinct nature of these penalties shall be retained in a single penalty resulting from the application of the criteria established under the preceding items.

4- Accessory penalties and custody shall always be imposed on the agent, even though provided for by only one of the applicable laws.

Consequently, the appeal lodged by the Public Prosecution Service should be taken into consideration, but under the terms of, and in accordance with, the above-expounded arguments.

C- The appeal lodged by the defendant

The defendant alleges that his involvement in both the militia's plan and in Maukuru and António's killings was not voluntary, and that the rating of the penalties for each of the crimes of which he was convicted was disproportionate, taking into account his involvement.

However, contrary to the view held by the defendant in his written allegations, the proven acts include, indeed, three crimes of murder and not just one. He was not the material perpetrator of Maukuru's murder, but he took part in its execution.

Under the terms of article 26 of CPPort/98, " a person who executes the act, on his or her own or through another person, or takes direct part in its execution, by agreement or together with another person(s), or, likewise, a person who, with malice aforethought, causes another person to commit the act, shall be punishable as the perpetrator, provided that the act is executed or begins to be executed".

Furthermore, based on what was said above, there no reason for a reduction in the penalty as requested by the defendant.

Therefore, the appeal by the defendant is dismissed in full.

D – Appeal costs

Although the defendant did not succeed on the appeal, he is a farmer under detention and, to our knowledge, he has no sufficient possessions that would enable him to pay for the court costs.

In this connection, the defendant is not required to pay the costs of this appeal.

III. Conclusion

Having said that, the Court of Appeal decides:

- 1- To rule in favour of the appeal filed by the Public Prosecution Service, under the terms of, and in accordance with, the above-expounded arguments;**
- 2- To declare defendant Armando dos Santos guilty of three crimes of murder provided for and punishable by article 131 of the Portuguese Penal Code, applicable by operation of section 165 of the Constitution of the Democratic Republic of Timor-Leste and of section 3.1 of UNTAET Regulation 1999/1, of 27 November. One of these crimes was committed in March 1999 against Maukuru, the other was committed on 5 April 1999, and the third one was committed on 17 April 1999. He is also declared guilty of a crime against humanity in the form of genocide, provided for and punishable by section 239.1(a) of the same Code, applicable by the same provisions;**
- 3- To convict defendant Armando dos Santos of:**
 - (a) the crime of murder committed in March 1999 against Maukuru, which carries a 10 years imprisonment penalty,**
 - (b) the crime of murder committed on 5 April 1999, which carries a 12 years imprisonment penalty,**
 - (c) the crime of murder committed on 17 April 1999, which carries a 12 years imprisonment penalty;**
 - (d) the crime against humanity in the form of genocide, which carries a 15 years imprisonment penalty;**
 - (e) With regard to the cumulation of the individual penalties imposed, a single penalty of 22 years imprisonment;**
- 4- To rule against the appeal filed by defendant Armando dos Santos.**

Dili, 15 July 2003

The Judges of the Court of Appeal

[Signed]
Cláudio de Jesus Ximenes

[Signed]
José Maria Calvário Antunes

[Signed]
Jacinta Correia da Costa-Regarding to Dissenting Vote about the applicable law in this process, in my opinion in this case the applicable law is the Indonesian law.